No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY JEFFERSON CROMARTIE,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Where multiple judges of a court of appeals consider an application for a certificate of appealability in a habeas corpus action, must the court grant the application where at least one judge votes in its favor, as the Third, Fourth, Sixth, Seventh, and Ninth Circuits prescribe, or may a divided court of appeals deny such an application, as the Eleventh Circuit did here and as is also permitted in the Second, Fifth, and Eighth Circuits?

2. Whether the rule of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), contains a requirement that criminal defendants exercise reasonable diligence in attempting to obtain material, exculpatory information being withheld by the prosecution?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ray Cromartie respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Eleventh Circuit's denial of Mr. Cromartie's application for a certificate of appealability (COA) and motion to reconsider that denial. In the alternative, Mr. Cromartie respectfully requests that the Court grant certiorari, vacate the Eleventh Circuit's judgment, and remand the case with instructions to issue a COA, as required by 28 U.S.C. § 2253(c) and this Court's cases.

OPINIONS BELOW

The panel order of the divided court of appeals denying reconsideration of Petitioner's motion for a COA (App. 1–32) is unreported. The initial single-judge summary order of the court of appeals denying Petitioner's application for a COA (App. 34) is available at 2018 WL 3000483. The order of the district court denying the petition for writ of habeas corpus (App. 36–121) is available at 2017 WL 1234139. The order of the district court deeming Petitioner's claim of ineffective assistance of counsel at the penalty phase time-barred (App. 122–39) is unreported.

JURISDICTION

The court of appeals issued its order denying reconsideration of Petitioner's application for a COA on March 26, 2018. On June 15, 2018, Justice Thomas granted Petitioner's application to extend the time to file a petition for a writ of certiorari to August 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2253 provides, in pertinent part:

> (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
>
> * * *
>
> (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.

Federal Rule of Civil Procedure 15 provides, in pertinent part:

> (c) Relation Back of Amendments.
>
> (1) *When an Amendment Relates Back*. An amendment to a pleading relates back to the date of the original pleading when:
>
> * * *
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . .

STATEMENT OF THE CASE

Under 28 U.S.C. § 2253(c)(1), appeals in habeas corpus actions may not be taken "[u]nless a circuit justice or judge issues a certificate of appealability." To obtain a COA, habeas petitioners must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which is demonstrated where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). If a procedural ruling is involved, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

In the Eleventh Circuit, COA applications addressed to the court of appeals may be considered and denied by a single circuit judge. 11th Cir. R. 22-1(c). The denial of a certificate of appealability "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." *Id.* Reconsideration motions are considered by a three-judge panel. *See Hodges v. Att'y Gen., State of Florida*, 506 F.3d 1337, 1339 (11th Cir. 2007).

In this case, the district court denied a COA, App. 120–21, and the court of appeals initially denied a COA by single-judge order, pursuant to the Eleventh

Circuit rules. App. 34. Mr. Cromartie sought reconsideration of that denial, which a panel of the Eleventh Circuit denied in a two-to-one decision. App. 1–32. In dissent, Judge Martin asserted that Mr. Cromartie's claim of ineffective assistance of counsel at the penalty phase was debatable among jurists of reason. App. 20–24. Judge Martin further found debatable the district court's procedural ruling that the claim was untimely because it was raised in an amended petition filed beyond the statute of limitations and did not relate back to the timely initial petition. App. 24–30.

Three members of this Court have indicated that a disagreement among judges as to the debatability of a habeas claim "alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution" of the claim. *Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari) (emphasis in original).

This petition raises an important question that this Court has yet to resolve and to which the courts of appeals apply differing standards: whether a COA on a claim may properly be denied as not debatable among jurists of reason over the dissent of a federal appellate judge. In the Second, Fifth, Eighth, and Eleventh Circuit Courts of Appeals, the answer is yes—COA would be denied. In the Third, Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeals, the answer is no—COA would be granted. Mr. Cromartie asks that the Court grant certiorari to address this important, recurring issue and resolve the circuit split.

A. Trial

On the evening of April 7, 1994, Dan Wilson, the clerk of the Madison Street Deli in Thomasville, Georgia, was shot in the face during a robbery. *See Cromartie v. State*, 514 S.E.2d 205, 209 (Ga. 1999). Mr. Wilson suffered serious injuries but survived. *Id.* In the early-morning hours of April 10, 1994, Richard Slysz, the clerk of the Junior Food Store in Thomasville, was shot and killed, also during a robbery. *Id.* The same gun—a .25-caliber pistol belonging to Gary Young—was used in both shootings. *Id.* at 210. Mr. Cromartie was charged with both shootings, which were tried jointly. *Id.* at 209 n.1, 210. On September 26, 1997, the jury convicted Mr. Cromartie of malice murder, armed robbery, aggravated battery, aggravated assault, and four counts of possession of a firearm during the commission of a crime. *Id.* at 209 n.1.

The trial then proceeded to the penalty phase. The prosecution put on no additional evidence. The defense presented the testimony of five family members. The entire penalty phase—including opening and closing statements and the court's charge—lasted three hours. *See* ECF No. 18-19 at 80[1] (penalty phase begins at 9:05 a.m.); *id.* at 189 (jury retires to deliberate at 12:05 p.m.); *see also* App. 22 (Martin, J., dissenting in part from the denial of COA reconsideration) ("[T]he jury got just a glimpse of Mr. Cromartie's childhood trauma from the scattered testimony of five of his family members . . . .").

[1] Citations to "ECF No." refer to the specified ECF docket entry in the district court, followed by the applicable page number. Page references are to ECF-generated page numbering.

The jury debated Mr. Cromartie's fate over the next three days. On October 1, 1997, the jury sentenced Mr. Cromartie to death. A press report indicated that the jurors were initially deadlocked six-to-six over whether to sentence Mr. Cromartie to death or life without parole, and that multiple jurors wept after the death penalty verdict was read. ECF No. 18-24 at 105.

B. State Habeas Proceedings

After his conviction was affirmed on direct appeal, Mr. Cromartie, represented by new counsel, filed a state petition for writ of habeas corpus, which he subsequently amended. ECF Nos. 19-14 & 20-22. In 2008, the state habeas court held a three-day evidentiary hearing. The hearing centered on a *Brady*[2] claim that the prosecution suppressed evidence that Mr. Young, not Mr. Cromartie, was the perpetrator of the Madison Street Deli shooting.

Although the amended state habeas petition included a series of allegations regarding trial counsel's ineffectiveness, state habeas counsel did not present any testimony at the evidentiary hearing in support of a claim that trial counsel performed ineffectively at the penalty phase for failing to present mitigating evidence,[3] nor did they include such a claim in their initial post-hearing brief. ECF No. 23-32. Indeed, state habeas counsel did not include any claim of trial counsel

[2] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[3] The only testimony at the state habeas hearing that could be considered relevant to counsel's penalty-phase ineffectiveness was trial counsel's testimony regarding his penalty-phase investigation and presentation, which was elicited by counsel for the Warden. ECF No. 21-14 at 101–04.

ineffectiveness in their initial post-hearing brief, nor did they cite *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id.*

On February 8, 2012, the state habeas court denied relief in an opinion copied nearly verbatim from the Warden's proposed findings of fact and conclusions of law. *Compare* ECF No. 23-36 *with* App. 141–227. As to the *Brady* claim, the state habeas court denied it as both procedurally defaulted and meritless. App. 158–94. With respect to the various allegations of trial counsel ineffectiveness, the court stated: "As Petitioner has failed to brief this claim or otherwise present evidence in support thereof, and as he carries the burden of proof, this claim is **DENIED**." App. 225 (emphasis in original). The state habeas court also ruled that "[t]o the extent Petitioner failed to brief his claims for relief, the Court deems those claims abandoned." App. 145. Mr. Cromartie filed an application for a certificate of probable cause to appeal (CPC) the trial court's order. ECF No. 24-11. On September 9, 2013, the Georgia Supreme Court denied the application for CPC in a two-sentence order that contained no legal analysis. App. 140.

C. Federal District Court Proceedings

Still represented by his state habeas counsel, Mr. Cromartie filed a petition for writ of habeas corpus in federal district court on March 20, 2014. ECF No. 1. The initial habeas petition included several claims raised in an abbreviated fashion, with little factual development. *Id.* Among the claims raised was a claim that trial counsel were ineffective for their "[f]ailure to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that

would exculpate Petitioner or mitigate punishment." *Id.* at 17. This claim was included just after a paragraph that more generally claimed that trial counsel were ineffective, citing several decisions of this Court regarding claims of ineffective assistance of counsel for failing to investigate and present life-history and mental-health mitigating evidence at the penalty phase of a capital trial. *Id.* at 16.[4]

After replacing initial federal habeas counsel, current counsel for Mr. Cromartie sought and was granted the opportunity to file an amended habeas petition. ECF No. 44 at 1–2. In preparing the amended petition, counsel reviewed and investigated all claims that had been raised in the initial petition. In subsequently seeking an extension of time to file the amended petition, counsel noted that they were conducting this additional investigation and further noted that the default of any claims not litigated in state habeas proceedings could potentially be overcome pursuant to *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 417 (2013), which allow federal habeas petitioners to overcome procedural defaults in certain circumstances in which their state post-conviction attorneys provided ineffective assistance. *See* ECF No. 48 at 2–4. The district court granted the extension, finding good cause for undersigned counsel to perform this investigation. ECF No. 49 at 3.

[4] Less than two weeks later, the Warden filed a motion to dismiss the habeas petition in its entirety as untimely under the Antiterrorism and Effective Death Penalty Act's (AEDPA's) statute of limitations. ECF No. 9. Mr. Cromartie's attorneys, concerned that the initial habeas might have been untimely and that their own effectiveness might be in issue, moved to withdraw. ECF Nos. 11, 31. Initial federal habeas counsel was replaced by undersigned counsel, who litigated the statutory tolling question. ECF Nos. 37, 41. The district court denied the Warden's motion to dismiss, ruling that Mr. Cromartie's petition was timely. ECF No. 42 at 2, 16.

Mr. Cromartie filed the amended federal petition on June 22, 2015, along with an extensive proffer of supporting materials. ECF Nos. 62, 62-1, 62-2. Included in the amended petition was a fully developed claim that Mr. Cromartie's trial attorneys were ineffective for failing to investigate and present mitigating life-history and mental-health evidence at the penalty phase. ECF No. 62 at 55–71. The supporting materials included declarations from numerous lay witnesses, expert reports, and records. ECF Nos. 62-1, 62-2.

The amended petition alleged that Mr. Cromartie's life has been plagued by trauma, abuse, and neglect, starting from before he was born, when his mother drank alcohol throughout her pregnancy. *See* ECF No. 62-1 at 7 (Estelle Barrau Decl.); ECF No. 62-2 at 87 (Julian Davies, M.D., Report). The trauma continued from there, as Mr. Cromartie's life was "marked by an essentially unrelenting stream of harmful influences," including "family violence; verbal, emotional, and physical abuse; severe parental neglect and abandonment; poverty; witnessing extreme violence; frequent changes in living arrangements; and a family and personal history of substance abuse." ECF No. 62-1 at 88 (Bhushan Agharkar, M.D., Decl.).

The amended petition further alleged that Mr. Cromartie's history of trauma has had severe and life-long consequences. He suffers from Alcohol-Related Neurodevelopmental Disorder as a result of prenatal exposure to alcohol; multiple neuropsychological impairments, including impaired executive functioning; the effects of complex trauma; and symptoms of depression, anxiety, and posttraumatic

stress disorder. ECF No. 62-2 at 97–100 (Julian Davies, M.D., Report); ECF No. 62-2 at 76–77 (Daniel Martell, Ph.D., Report); ECF No. 62-1 at 87–90 (Bhushan Agharkar, M.D., Decl.). These factors combined to negatively impact Mr. Cromartie's ability to make rational decisions and respond appropriately to stressors, and placed him at much greater risk of negative life outcomes, including trouble with the law. *Id.*

The amended petition also alleged that, although this mitigating evidence was available at the time of trial, very little of it was presented during the penalty phase. *See* ECF No. 62 at 55–71. Trial counsel offered only a brief presentation involving five lay witnesses, and failed to adequately investigate or present expert testimony that could explain Mr. Cromartie's life history from a mitigating and mental-health perspective. ECF No. 18-19 at 88–154.

Finally, the amended petition alleged that Mr. Cromartie was prejudiced by counsel's failure to effectively present mitigating evidence. ECF No. 62 at 63–71. The amended petition alleged that, given the prosecution's pretrial offer of life with the possibility of parole after seven years, *see* ECF No. 21-14 at 57, and the jury's lengthy penalty-phase deliberations, there is a reasonable probability that, had counsel performed effectively, at least one juror would have voted to spare his life. ECF No. 62 at 71.

The Warden filed an answer to the amended petition on July 22, 2015. ECF No. 64. In his answer, the Warden argued that Mr. Cromartie's claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence at

trial was unexhausted and procedurally defaulted because it was not raised in the state courts. *Id.* at 13. The Warden did not allege that this claim was untimely.

Mr. Cromartie subsequently filed a memorandum of law in support of his amended habeas petition. ECF No. 69. In light of the affirmative defense of procedural default raised in the Warden's answer, Mr. Cromartie argued that any default could be overcome by state habeas counsel's ineffectiveness under *Martinez* and *Trevino*. Specifically, Mr. Cromartie alleged that state habeas counsel "did not litigate a claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence at the penalty phase. As [state habeas counsel] each acknowledge, they failed to do so not for any strategic reason, but due primarily to inattention that resulted from focusing on competing obligations in other cases." ECF No. 69 at 132. Mr. Cromartie presented a detailed argument regarding why he meets the *Martinez*/*Trevino* standard, along with an additional proffer of supporting materials. *Id.* at 131–50; ECF No. 69-1. Mr. Cromartie further requested a hearing on the claim. ECF No. 69 at 151–53.

On March 21, 2016, the Warden filed a response to Mr. Cromartie's memorandum of law. ECF No. 75. While the Warden raised various procedural defenses to the penalty-phase ineffectiveness claim, the Warden also "request[ed] discovery and an evidentiary hearing to fully litigate this claim" in the event the court denied those arguments. *Id.* at 227.

Simultaneously with his response, the Warden filed a motion to amend his answer. ECF No. 74. The Warden sought to amend his answer solely to argue that

Mr. Cromartie's penalty-phase ineffectiveness claim was time-barred. *Id.* at 2. In support, the Warden argued that the penalty-phase ineffectiveness claim raised in the amended petition did not relate back to any claim in the original petition and was not otherwise timely. *Id.* at 3–4, 9–11, 24–28. The Warden's counsel explained their failure to raise the time-bar defense in their initial answer as being "based upon counsel's misunderstanding of the law regarding claims brought in amended petitions." *Id.* at 5.

On June 6, 2016, Mr. Cromartie filed a reply memorandum of law and consolidated response to the Warden's motion to amend. ECF No. 78. Mr. Cromartie argued that the penalty-phase ineffectiveness claim in his amended petition was timely because it related back to the penalty-phase ineffectiveness claim in his initial petition. *Id.* at 12–20. Specifically, Mr. Cromartie argued that the heading and two paragraphs from Claim Two of his initial petition, which, like the vast majority of the initial petition, were raised in an abbreviated fashion, sufficed to preserve his claim of penalty-phase ineffectiveness for further review.

The relevant passages from the initial petition read as follows:

> **Claim Two: Petitioner Was Deprived Of His Right To The Effective Assistance Of Counsel At Trial And On Appeal, In Violation Of His Rights Under The Fifth, Sixth, Eighth, and Fourteenth Amendments To The United States Constitution, *Strickland v. Washington*, 466 U.S. 668 (1984), *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 545 U.S. 374 (2005), and Related Precedent.**
>
> * * *
>
> 37. Petitioner was denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution . . . . *See*

> *also Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 130 S. Ct. 3259 (2010).
>
> 38. Trial counsel's ineffectiveness includes, but is not limited to the following:
>
> * * *
>
> b. Failure to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that would exculpate Petitioner or mitigate punishment . . . .

ECF No. 1 at 16–17.

Mr. Cromartie argued that three separate statements within the claim, individually and in combination, establish that Mr. Cromartie raised—or at least attempted to raise—the penalty-phase ineffectiveness claim in his initial petition: 1) the heading, which alleged ineffective assistance of counsel at trial in combination with citation to three cases addressing claims of ineffectiveness at a capital trial for failing to develop and/or present mitigating evidence at the penalty phase; 2) paragraph 37, which made a similar allegation alongside an even longer list of relevant precedent; and 3) paragraph 38(b), which alleged ineffectiveness for failing "to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that would exculpate Petitioner or mitigate punishment." ECF No. 78 at 14–16; ECF No. 1 at 16–17; *see also* Fed. R. Civ. P. 15(c)(1)(B) (an amendment relates back to the date of the original pleading where it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading").

The district court granted the Warden's motion to amend his answer. App. 139. The district court ruled that the penalty-phase ineffectiveness claim in the amended petition did not relate back to any claim in the initial petition. App. 125–33. As such, the district court determined that amendment of the Warden's answer would not be futile. App. 133.

The district court subsequently denied Mr. Cromartie's habeas petition without granting an evidentiary hearing. App. 120. As to the *Brady* claim, the district court ruled that the state court's factual findings and application of the law were reasonable; therefore, there was no basis for federal habeas relief. App. 68. And having previously determined that the penalty-phase ineffectiveness claim was untimely, the district court denied it without additional analysis. App. 105–07. The district court declined to grant a COA as to any claim. App. 120–21.

D. Eleventh Circuit Proceedings

Mr. Cromartie next sought a COA from the Eleventh Circuit on the penalty-phase ineffectiveness and *Brady* claims. On January 3, 2018, Chief Judge Ed Carnes denied the COA application as to both claims in a one-sentence, single-judge order. App. 34.

Mr. Cromartie then sought panel reconsideration of Chief Judge Carnes's COA denial. The panel unanimously denied reconsideration of the COA denial with respect to the *Brady* claim, but denied reconsideration as to the ineffectiveness claim over the lengthy dissent of Judge Martin. App. 1–32. The panel majority determined that Mr. Cromartie "asks too much of the relation back doctrine." App.

7. It construed paragraph 38(b) of the initial petition as narrowly alleging that counsel was ineffective for failing to investigate and present evidence about the underlying crime in mitigation at the penalty phase. App. 11. And it deemed the allegations that Mr. Cromartie was denied the effective assistance of counsel, paired with a list of citations to cases involving penalty-phase ineffectiveness for failing to present life-history and mental-health evidence, as too general to warrant relation back. App. 12–13. The panel majority's factual and legal analysis arriving at the conclusion that the district court's procedural ruling was not debatable among jurists of reason spanned eight pages.[5] App. 5–13.

In dissent, Judge Martin asserted that "[a] reasonable judge could understand Mr. Cromartie's original and amended *Strickland* claims to be 'tied to a common core of operative facts.'" App. 20 (quoting *Mayle v. Felix*, 545 U.S. 644, 664 (2005)). As such, the amended claim is "'not entirely new,' but rather 'serves to expand facts or cure deficiencies in the original claim[].'" *Id.* (alteration in original) (quoting *Dean v. United States*, 278 F.3d 1218, 1223 (11th Cir. 2002) (per curiam)). Judge Martin's factual and legal analysis of the debatability of the district court's procedural ruling spanned seven pages. App. 24–30.

As to the underlying ineffectiveness issue, Judge Martin asserted that the record developed in federal court "could certainly cause reasonable judges to debate the merits of Mr. Cromartie's claim of a violation of his Sixth Amendment right to effective assistance of counsel." App. 23. The dissent thus would have granted a

[5] The majority did not discuss the debatability of the underlying merits of Mr. Cromartie's penalty-phase ineffectiveness claim.

COA in order to give Mr. Cromartie "a chance to thoroughly brief and argue the timeliness of his *Strickland* claim." App. 20.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Resolve A Split Among The Circuits Regarding How Disagreement Among Judges Reviewing A COA Application Impacts Whether COA Should Issue And To Correct The Eleventh Circuit's Misapplication Of The COA Standard.

A prisoner seeking a COA must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make such a showing, a petitioner need only demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted); *see also Miller-El*, 537 U.S. at 327. When a petitioner seeks a COA on a district court's procedural ruling, the reviewing court must determine whether reasonable jurists would debate both the procedural ruling and the underlying constitutional claim. *Slack*, 529 U.S. at 484–85.

Recently, this Court reiterated in *Buck v. Davis* that the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." 137 S. Ct. 759, 773 (2017). Courts undertaking a COA inquiry should "ask only if the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 348) (internal quotation marks omitted). The bar is a low one: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not

prevail." *Id.* (alteration in original) (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted). "[M]eritorious appeals are a subset of those in which a certificate should issue, . . . not the full universe of such cases." *Jordan*, 135 S. Ct. at 2651 (Sotomayor, J., dissenting from the denial of certiorari) (alteration in original) (quoting *Thomas v. United States*, 328 F.3d 305, 308 (7th Cir. 2003)) (internal quotation marks omitted). The threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El*, 537 U.S. at 337.

Because the COA standard entails merely a threshold inquiry, it "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336. When an appellate court "sidesteps this process by first determining the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 336–37.

The Eleventh Circuit employs a procedure by which a single circuit judge may initially consider a COA application in cases in which the district court has denied a COA. 11th Cir. R. 22-1(c). Should that judge deny a COA, habeas petitioners are permitted to seek panel review upon a motion for reconsideration. *Id.* Such a procedure created the result here: by a two-to-one vote, the Eleventh Circuit determined in a lengthy opinion that reconsideration was not warranted

because jurists of reason would not find Mr. Cromartie's ineffective-assistance-of-counsel claim "debatable." *Slack*, 529 U.S. at 478.

Three members of this Court have indicated that the mere fact of disagreement among judges, standing alone, may indicate that the COA standard has been met. *Jordan*, 135 S. Ct. at 2651 (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari). While the Third, Fourth, Sixth, Seventh, and Ninth Circuits explicitly or implicitly follow COA practices consistent with that reality (and would grant COA to a petitioner like Mr. Cromartie), the Second, Fifth, Eighth, and Eleventh do not (and would not grant COA).

In this case, reasonable jurists could debate—and indeed have debated—the procedural ruling that the district court made and the underlying merits of Mr. Cromartie's claim. The vigorous debate between the majority and the dissent below is exactly the type of debate that is meant to be resolved after full briefing on the merits, rather than under the limited process provided at the COA application stage. Thus, this case serves as a perfect vehicle for this Court to grant certiorari and clarify the effect that a split decision has on whether a COA should issue. At a minimum, in light of the Eleventh Circuit's evasion of the COA standard, the Court should grant certiorari, vacate the Eleventh Circuit's judgment, and remand with instructions to issue a COA. Otherwise, "Mr. Cromartie's claim will never be fully evaluated before the State of Georgia takes his life." App. 18 (Martin, J., dissenting in part from the denial of COA reconsideration).

A. The Court Should Grant Certiorari To Resolve A Split Among The Circuits Regarding How Disagreement Among Judges Reviewing A COA Application Should Impact Whether The COA Should Issue.

The very fact that Mr. Cromartie's claim generated a dissent from one of the three judges on the reviewing panel is powerful evidence in itself that reasonable jurists could debate the correctness of the district court's ruling. Indeed, to find otherwise would necessarily imply that dissenting federal appellate judges—who have been appointed by the President of the United States and confirmed by the United States Senate—are not "jurists of reason." And such a finding would be inconsistent with the plain text of AEDPA, which permits "*a* circuit justice or judge" to issue a COA. 28 U.S.C. § 2253(c)(1) (emphasis added); *accord* Fed. R. App. P. 22(b)(1) (in a habeas corpus proceeding, "the applicant cannot take an appeal unless *a* circuit justice or *a* circuit or district judge issues a certificate of appealability under 18 U.S.C. § 2253(c)." (emphasis added)). Yet lower courts are split on the impact of a contrary opinion on the outcome of a COA application. In some circuits, a lack of unanimity on whether a COA should issue automatically results in issuance of a COA. In others, COAs may be denied by split panels.

1. The Third, Fourth, Sixth, Seventh, And Ninth Circuits: COA Is Granted If Circuit Judges Disagree.

A majority of the federal courts of appeals to have offered guidance on the issue—either by local rule or in reported decisions—permit a single circuit judge to issue a COA, even where the application is being considered by a panel. In the Third Circuit, COA applications are referred to a panel of three judges, and "if any judge on the panel is of the opinion that the applicant has made the showing

required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. L.A.R. 22.3; *see also Harper v. Vaughn*, 272 F. Supp. 2d 527, 529 n.4 (E.D. Pa. 2003). Likewise, in the Fourth Circuit, an application for COA "shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue." 4th Cir. R. 22(a)(3); *see also Johnson v. Moore*, 164 F.3d 624, 1998 WL 708691, at *1 (4th Cir. 1998) (unpublished). In the Ninth Circuit, an application for COA is "presented to 2 judges rather than the full panel if only 2 are participating. Any judge participating may vote to grant relief and so order." 9th Cir. General Order 6.3(g)(1).

The Sixth and Seventh Circuits have not codified their COA procedures in local rules or general orders, but follow the same one-judge-suffices standard through their decisional law. *See Shields v. United States*, 698 F. App'x 807, 813 (6th Cir. 2017) (noting that court had granted COA on motion to vacate under 28 U.S.C. § 2255, where circuit judge on panel that heard direct appeal had dissented from opinion affirming conviction); *Shields v. United States*, No. 15-5609 at 2 (6th Cir. Nov. 4, 2015) (Order) (stating that "[b]ased on the dissenting opinion in the direct appeal, it appears that reasonable jurists could debate" the substantive claim, and granting COA); *Thomas*, 328 F.3d at 307–09 (summarizing Seventh Circuit procedure whereby COA application is assigned to two-judge panel and then, if both vote to deny COA, the applicant may seek reconsideration by a three-judge panel, in which case COA will issue "if one of the judges to whom the application was referred under Operating Procedure 1(a)(1) concludes, on reconsideration, that the statutory

criteria for a certificate have been met"); *cf. Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.").

2. The Second, Fifth, Eighth, And Eleventh Circuits: COA Can Be Denied Despite Disagreement Among Circuit Judges.

Conversely, the Second, Fifth, Eighth, and Eleventh Circuits permit a COA to be denied over a single judge's dissent, notwithstanding the debatable-among-jurists-of-reason standard. In the Second Circuit, "[t]he clerk initially refers a request for a certificate of appealability to a single judge of the panel assigned to a death penalty case, who has authority to issue the certificate. If the single judge denies the certificate, the clerk refers the application to the full panel for disposition by majority vote." 2d Cir. Internal Op. Proc. 47.1(c).[6] The Fifth, Eighth, and Eleventh Circuits do not have rules delineating that COA determinations are made by majority vote; instead, their decisional law reflects that these courts regularly deny COA by a vote of two-to-one. *See, e.g.*, *Cromartie v. GDCP Warden*, No. 17-12627 (11th Cir. Mar. 26, 2018) (denying COA by vote of two-to-one); *Vang v. Hammer*, 673 F. App'x 596, 598 (8th Cir. 2016) (same); *Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014), *cert. denied sub nom. Jordan v. Fisher*, 135 S. Ct. 2647 (same).

[6] The Second Circuit procedure allowing for non-unanimous COA denials applies at a minimum in capital cases. It is not clear from the Second Circuit's rules whether a similar procedure applies in non-capital cases.

In this case, the Eleventh Circuit denied Mr. Cromartie the opportunity to raise his penalty-phase ineffectiveness claim on appeal over the dissent of Judge Martin. In so doing, the court of appeals failed to acknowledge the impact of Judge Martin's dissent in assessing whether reasonable jurists could debate the correctness of the district court's ruling. Judge Martin engaged in a lengthy COA analysis of Mr. Cromartie's procedural argument and came to the opposite conclusion the majority did. App 24–30. Furthermore, to arrive at its conclusion, the panel majority engaged in a lengthy legal analysis of its own. If, as this Court has held, the touchstone of the COA inquiry is whether reasonable jurists might differ, then it is clear that a COA should have issued in this case.

The split among the circuits on whether a COA may be denied over the dissent of a panel judge leads to arbitrary results. Were Mr. Cromartie litigating his claim in the Third, Fourth, Sixth, Seventh, or Ninth Circuits, a COA would automatically have issued. This Court should grant certiorari to resolve the circuit split and provide much-needed guidance to the lower courts on the import of dissenting opinions in the COA analysis.

B. This Court Should Grant Certiorari To Correct The Eleventh Circuit's Misapplication Of The COA Standard.

In spite of this Court's clear directive, the panel majority bypassed the threshold COA inquiry and instead denied relief based on its view of the timeliness of Mr. Cromartie's claim. Rather than making a threshold inquiry into whether reasonable jurists might debate the district court's decision, the court delved into a lengthy evaluation of the merits of the procedural issue, engaging in detailed

interpretation of this Court's and its own precedent, and ultimately concluding that the circumstances of Mr. Cromartie's case did not compare favorably with the circumstances of the relevant precedents. App. 5–13. The court then capped off its merits analysis by conclusorily stating that reasonable jurists could not debate whether the district court was correct in its procedural ruling. App. 13. In doing so, the appellate court "phrased its determination in proper terms . . . but it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 137 S. Ct. at 773. In other words, the court "pa[id] lipservice to the principles guiding the issuance of a COA," while instead holding Mr. Cromartie to a much higher standard. *Tennard v. Dretke*, 542 U.S. 274, 283 (2004).

Here, as in *Buck*, the appellate court "invert[ed] the statutory order of operations and first decid[ed] the merits of [Mr. Cromartie's] appeal, . . . then justif[ied] its denial of a COA based on its adjudication of the actual merits." *Buck*, 137 S. Ct. at 774 (quoting *Miller-El*, 537 U.S. at 336–37) (internal quotation marks omitted). The court thus denied Mr. Cromartie's appeal without jurisdiction and without allowing him an opportunity to brief and argue the issue on the merits. *See Miller-El*, 537 U.S. at 336–37. This Court should grant certiorari to correct the Eleventh Circuit's misapplication of the COA standard.

C. The District Court's Procedural Ruling And Mr. Cromartie's Underlying Ineffective-Assistance-Of-Counsel Claim Are Debatable Among Jurists Of Reason.

Certiorari is warranted in this case not only because of the circuit split described above and the Eleventh Circuit's improper merits determination at the

threshold COA stage, but also because the panel majority's conclusion that jurists of reason could not debate the district court's substantive and procedural rulings was incorrect.

1. The District Court's Procedural Ruling That Mr. Cromartie's Penalty-Phase Ineffectiveness Claim Is Untimely Because His Amended Petition Does Not Relate Back To His Initial Petition Is Debatable Among Jurists Of Reason.

Mr. Cromartie's penalty-phase ineffectiveness claim has thus far risen and fallen in federal court based upon the lower courts' application of the relation-back doctrine to determine whether the claim was timely filed. As Judge Martin explained below, the resolution of this procedural question is debatable. App. 24. And it has had a substantial impact on the resolution of Mr. Cromartie's case. App. 31–32 (noting that "Mr. Cromartie merely asks for a chance to brief and argue the timeliness of his amended *Strickland* claim," but that "without a COA, Mr. Cromartie will face his sentence without the benefit of this process. This is important, because in my view a thorough assessment of Mr. Cromartie's background may well have caused his jury, which already appeared to struggle with whether he should die for his crime, to spare his life.").

The debate between the majority and the dissent showed that, for the majority, it was the merits of the relation-back question that were under consideration. Had the panel majority instead conducted the threshold inquiry contemplated by *Miller-El*, it likely would have concluded that the relation-back question was debatable. But instead, the panel majority engaged in extensive analysis to arrive at its conclusion to deny COA—akin to the type of merits analysis

prohibited by this Court in *Buck*, 137 S. Ct. at 773 ("Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." (citation omitted)). After summarizing the nature of Mr. Cromartie's claim and its procedural history, the panel majority explicated at length on *Mayle*, 545 U.S. at 648–50, 659, 664; *Dean*, 278 F.3d at 1221–23; *Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000); and Federal Rule of Civil Procedure 15(c). App. 7–10. The panel majority delved into Congress's intent in enacting Rule 15(c), App. 7, and addressed Rule 15(c)'s relationship to Rule 12 of the Rules Governing Section 2254 and 2255 cases, App. 7 n.3 (citing *Farris v. United States*, 333 F.3d 1211, 1215 (11th Cir. 2003)).

The panel majority found that the amended claim did not "share a common core of operative facts with any of the claims in his original petition." App. 10 (quoting *Mayle*, 545 U.S. at 659 (internal quotation marks omitted)). The panel majority further found that the initial petition's claim of ineffectiveness for failing to "mitigate punishment" did not encompass counsel's failure "to investigate and present evidence of Cromartie's background in mitigation at sentencing." App. 11. The panel majority found that "mitigate punishment" referred solely to the circumstances of the Junior Food Store shooting and that because the initial claim was "tied to a specific factual event" involving counsel's ineffectiveness "at the guilt and penalty phases," the subsequent, purely penalty-phase claim did not relate back to it under *Mayle*. *Id.* The panel majority also found unpersuasive that the initial claim had cited "some Supreme Court decisions (without any pincites to specific

pages of them)." App. 12 (characterizing *Williams*, 529 U.S. 362, *Rompilla*, 545 U.S. 374, *Porter*, 558 U.S. 30, and *Sears*, 561 U.S. 945, as "some ineffective assistance of counsel decisions").

The dissenting circuit judge disagreed sharply with the panel majority. Starting with the last point, she noted: "These [cases] are not, as the majority says, just 'some Supreme Court decisions.' They are the seminal cases outlining trial counsel's constitutional duty to investigate mitigating evidence about the troubled background of a capital defendant and present it to a penalty phase jury." App. 26 (internal citation omitted). Indeed, *Rompilla*, *Sears*, *Porter*, and *Williams* exclusively present claims involving ineffectiveness of counsel at the penalty phase.[7]

As to the *Mayle* "common core of operative fact" test, Judge Martin opined that "a reasonable jurist could hold that Claim X (in the amended petition) relates back to Claim Two (in the original petition), because Claim X just added specifics to Claim Two." App. 25; *see also Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001); *Cowan v. Stovall*, 645 F.3d 815, 819 (6th Cir. 2011); *Dean*, 278 F.3d at 1222; *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000); 6 Charles A.

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[7] *Sears*, 561 U.S. at 946 ("[B]ecause—in the words of the state trial court—his counsel conducted a penalty phase investigation that was 'on its face . . . constitutionally inadequate,' evidence relating to Sears' cognitive impairments and childhood difficulties was not brought to light at the time he was sentenced to death." (internal citation omitted)); *Porter*, 558 U.S. at 30–31 (claim before Court was based on mitigating evidence that counsel "failed to discover or present during the penalty phase of [Porter's] trial in 1988"); *Rompilla*, 545 U.S. at 391 (undiscovered evidence "would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts. With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case."); *Williams*, 529 U.S. at 390 ("In this case, Williams contends that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury.").

Wright et al., *Federal Practice and Procedure* § 1474 (3d ed. 2018). In addition to a lengthy discussion of *Williams*, *Rompilla*, *Porter*, and *Sears* (and why these cases are shorthand for trial counsel's failure to investigate and present mitigation evidence at the penalty phase), Judge Martin reasoned that "Claim Two asserted that trial counsel was unconstitutionally ineffective for failing to appropriately investigate and convey Mr. Cromartie's troubled background to the penalty-phase jury." App. 27.[8] Judge Martin compared the initial and amended claims in Mr. Cromartie's case favorably to those that the Eleventh Circuit found to relate back in *Dean*, 278 F.3d at 1223. App. 28.[9]

As Judge Martin concluded,

> [t]he consequences of the majority's error of judgment are not academic. Indeed, the majority's denial of a COA to Mr. Cromartie on his *Strickland* claim renders it a virtual certainty that no court or jury will ever consider his troubled past. This means, of course, that no court or jury will ever thoroughly weigh whether, or how, Mr. Cromartie's 'troubled history' affected his 'moral culpability' for the crime for which he will be executed.

App. 31 (quoting *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)).

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[8] Judge Martin also advanced a common-sense argument: that "the evidence referred to in Mr. Cromartie's original petition, then elaborated on in his amended petition, is precisely the type of capital penalty-phase mitigation evidence that Georgia expects to see presented in most every one of its death cases." App. 27.

[9] The dissent also took issue with the panel majority's treatment of *Dean*, 278 F.3d 1218, noting that "the majority cites, describes, but does not appear to rely on" it. App. 28. Likewise, the dissent noted the difference between this amended claim—which should relate back—and that in *Mayle*, which did not: whereas the claims in *Mayle* targeted different episodes and involved different constitutional provisions, the claims here arose "from the same constitutional provision and target the same episode." App. 30.

2. Mr. Cromartie's Penalty-Phase Ineffectiveness Claim Is Debatable Among Jurists Of Reason.

The panel majority did not dispute the merits of Mr. Cromartie's underlying claim of ineffective assistance of counsel at the penalty phase. The majority did not address the underlying claim at all, except to twice reference Mr. "Cromartie's mental health and life history of trauma, abuse and neglect." App. 11, 12.

Judge Martin, on the other hand, asserted that the merits of Mr. Cromartie's underlying ineffectiveness claim are at least debatable. Judge Martin explained that:

> [Mr. Cromartie's] jury did not hear that his mother would binge drink for days on end while she was pregnant with him. His jury did not hear that, as a result, Mr. Cromartie suffers from Alcohol-Related Neurodevelopmental Disorder, which made it more likely that he would experience disruptions in his schooling; get into trouble with the law; and abuse drugs and/or alcohol. His jury never heard that Mr. Cromartie had a history of post-traumatic stress disorder and depression. . . . [T]he jury heard . . . Mr. Cromartie's defense case without expert testimony that would have conveyed the ways in which Mr. Cromartie's complex trauma made it more likely for him to act impulsively and react extremely to minor stimuli.

App. 22–23.

Judge Martin also provided several reasons why, but for counsel's ineffectiveness, there was a reasonable probability of a different result. She noted that, "[b]efore Mr. Cromartie's murder trial began, Georgia offered to allow him to plead guilty, with a sentence of life with the possibility of parole after seven years. This does not indicate to me that Georgia saw Mr. Cromartie as an extremely culpable offender deserving of execution." App. 21. During the penalty-phase jury deliberations, the panel sent a question to the presiding judge three hours into its

deliberations asking "what would happen if they did not reach a unanimous vote about whether Mr. Cromartie should be executed." *Id.* Finally, even in the absence of the mitigating evidence that trial counsel could have presented but did not, "the jury took three days to reach a unanimous decision on Mr. Cromartie's fate." App. 23.

Finally, Respondent's concession below that an evidentiary hearing is appropriate on Mr. Cromartie's penalty-phase ineffectiveness claim if it is reached on the merits, ECF No. 75 at 230, is a tacit acknowledgement that Mr. Cromartie has pleaded a prima facie case for relief. Mr. Cromartie's underlying substantive claim is at least debatable among jurists of reason.

This is not a case where a dissenting circuit judge merely indicated that she "would have" granted COA in a summary disposition. Here, a dissenting circuit judge has propounded a lengthy, reasoned opinion explaining why the panel majority that denied COA was in error on its procedural rulings and the underlying merits. It is, in short, a debate among jurists of reason. That is precisely why this Court should grant certiorari.

II. The Court Should Grant Certiorari To Resolve The Split Among The Circuits On Whether Suppressed Evidence Falls Within The *Brady* Rule If It Would Have Been Available To Counsel In The Exercise Of Diligence.

Mr. Cromartie alleged in his state habeas proceedings that prosecutors violated their *Brady* obligations by suppressing statements to police by Terrell Cochran and Keith Reddick that they had seen Gary Young—not Mr. Cromartie—running from the scene of the Madison Street Deli shooting. The evidence

supporting Mr. Cromartie's guilt of the Madison Street Deli shooting consisted primarily of inculpatory statements allegedly made by Mr. Cromartie to Mr. Young and to Carnell Cooksey. *Cromartie*, 514 S.E.2d at 209. Mr. Cooksey also testified that he observed Mr. Young hand the pistol used in the shooting to Mr. Cromartie on the night of the incident. ECF No. 18-12 at 107–08. Although portions of the Madison Street Deli shooting were captured by the store's security camera, the footage did not show the shooter's face clearly. *Cromartie*, 514 S.E.2d at 209. Mr. Young was initially charged in the Madison Street Deli shooting, but those charges were later dropped. ECF No. 18-22 at 93–98.

Mr. Cochran and Mr. Reddick each testified during state habeas proceedings that he saw Mr. Young running from the deli on the night of the shooting. *See* ECF No. 21-15 at 9–10 (Cochran); ECF No. 21-14 at 147 (Reddick). Mr. Cochran and Mr. Reddick each also testified that he told Thomasville police that he had seen Mr. Young running from the deli. *See* ECF No. 21-15 at 10–11 (Cochran); ECF No. 21-14 at 150 (Reddick). No statements from Mr. Cochran or Mr. Reddick had been disclosed to the defense.[10]

The state habeas court rejected the claim, finding, inter alia, that Mr. Cromartie failed to prove that the evidence "was not available to trial counsel by reasonable diligence," and also that Reddick and Cochran were not credible. App.

[10] Other evidence introduced during the state habeas hearing also called Mr. Cromartie's conviction of the Madison Street Deli shooting into question. Mr. Cooksey, who testified at trial that he saw Mr. Young hand Mr. Cromartie his gun on the night of the Madison Street Deli shooting, admitted during state habeas proceedings that his trial testimony was false. *See* ECF No. 21-14 at 130. Mr. Cooksey disavowed direct knowledge of the deli shooting and explained that the basis of his trial testimony had been hearsay statements from Mr. Young. *Id.*

193.[11] The federal district court denied the claim on the same grounds. App. 63, 67 ("There is no *Brady* violation if the defendant could have obtained the evidence with reasonable diligence.").

The Eleventh Circuit denied Mr. Cromartie's COA application as to his *Brady* claim, in part, because "counsel could have obtained the same information from the allegedly suppressed 'statements' by exercising reasonable diligence," but did not. App. 16.[12] The Eleventh Circuit cited its settled law that, to establish a *Brady* violation, a defendant must establish that he "did not possess the evidence *and could not have obtained it with reasonable diligence*." App. 16–17 (emphasis added) (quoting *LeCroy v. Sec'y*, 421 F.3d 1237, 1268 (11th Cir. 2005), and citing *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983)).

The courts of appeals are split on whether this Court's *Brady* jurisprudence includes a diligence requirement. Unlike the Eleventh Circuit, the Third, Tenth, and District of Columbia Circuits have held that it does not: the *Brady* rule focuses on disclosure by the prosecutor, not diligence by the defense.[13] *See*, *e.g.*, *Dennis v.*

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[11] The state habeas court's order was a nearly verbatim adoption of an eighty-nine-page proposed order written by the state. *See* ECF No. 23-36 (proposed order). As the dissenting Judge from the denial of COA pointed out, "the state habeas court adopted the State of Georgia's proposed findings of fact nearly verbatim. For that reason, I am reluctant to defer to that court's factual findings." App. 19 n.2. This Court, too, should view the supposed credibility findings with suspicion. *See, e.g.*, *Jefferson v. Upton*, 560 U.S. 284, 293–94 (2010); *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985).

[12] The Eleventh Circuit also found that Mr. Cromartie had failed to prove the existence of the favorable evidence that was suppressed, based on the prior state court findings that Mr. Cochran and Mr. Reddick were not credible. App. 15.

[13] The Second Circuit has also stated that this Court "has never required a defendant to exercise due diligence to obtain *Brady* material." *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015). On the other hand, the Second Circuit has held that "evidence is not 'suppressed [for *Brady* purposes] if the defendant either knew, or should have known, of the essential facts permitting him

Sec'y, 834 F.3d 263, 289–93 (3d Cir. 2016) (en banc); *In re Sealed Case*, 185 F.3d 887, 896–97 (D.C. Cir. 1999); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). Those circuits have relied heavily on *Banks v. Dretke*, 540 U.S. 668 (2004), among other decisions, to come to that conclusion. *See Banks*, 540 U.S. at 696 ("[A] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). The *Brady* obligation does not depend on defense counsel's actions. *See United States v. Agurs*, 427 U.S. 97, 107 (1976) (construing duty on government to produce *Brady* material that clearly supports innocence, even absent a defense request for it).

The First, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, however, join the Eleventh Circuit in concluding that some sort of reasonable diligence requirement applies to *Brady* claims. *See Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007); *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006); *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001); *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001); *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998); *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990).

In this capital case, the state withheld evidence from Mr. Cromartie that would have been material both to guilt and to punishment. As a result of the state's non-disclosure and Mr. Cromartie's counsel's ineffectiveness, *see also supra* Section I, the jury never heard this evidence. Whether or not the *Brady* rule contains a

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to take advantage of any exculpatory evidence." *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006). Accordingly, it falls somewhere in the middle of the circuit split.

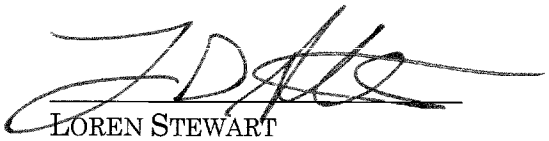
reasonable diligence requirement is critical to whether Mr. Cromartie can obtain the relief he seeks: each of the courts below—state and federal—based its denial of this claim in large part on the finding that Mr. Cromartie's counsel was not diligent.

Mr. Cromartie respectfully requests that this Court grant certiorari to resolve the split among the circuits on whether the *Brady* rule applies to suppressed evidence that might otherwise have been available to the defense in the exercise of reasonable diligence.

CONCLUSION

For the foregoing reasons, Petitioner Ray Cromartie respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. In the alternative, he requests that the Court grant certiorari, vacate the Eleventh Circuit's judgment, and remand with instructions for the Eleventh Circuit to issue a COA.

Respectfully submitted,



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