No. 18-5796

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court of appeals panel may deny a certificate of appealability over a dissent.

2. Whether the court of appeals correctly denied a COA on petitioner's claim of ineffective assistance because it was time-barred.

3. Whether the court of appeals correctly denied a COA on petitioner's *Brady* claim because petitioner failed to prove that the State possessed exculpatory evidence.

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The decision of the Georgia Supreme Court in the criminal direct appeal is published at 270 Ga. 780, 781-82 (1999).

The decision of the state habeas court denying relief is not published, but is included in Petitioner's Appendix F.

The decision of the Georgia Supreme Court denying the application for a certificate of probable cause to appeal is not published, but is included in Petitioner's Appendix E.

The decision of the district court determining Petitioner's new sentencing phase ineffective-assistance claim pled in his amended petition was time-barred is unpublished, but is included in Petitioner's Appendix D.

The decision of the district court denying federal habeas relief is not published, but is included in Petitioner's Appendix C.

The single-judge decision of the Eleventh Circuit Court of Appeals denying Petitioner's motion for a certificate of appealability is not published, but is included in Petitioner's Appendix B.

The decision of the Eleventh Circuit Court of Appeals denying Petitioner's motion reconsideration of his request for a certificate of appealability is not published, but is included in Petitioner's Appendix A.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on March 26, 2018. On June 15, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 23, 2018, and the petition was timely filed. On September 10, 2018, Justice Thomas extended the time within which to file the brief in opposition to and

including October 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

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

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law … .

28 U.S.C. § 2253(c) provides in relevant part:

> (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(c) provides in relevant part:

> (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… .

INTRODUCTION

The court of appeals denied petitioner Ray Jefferson Cromartie a certificate of appealability (COA) on a time-barred ineffective assistance of trial counsel claim and a claim arising under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). A single judge denied Cromartie's COA, and a three-judge panel reconsidered that decision and again denied the COA. All three panel members agreed that a COA should not issue on Cromartie's *Brady* claim, but one judge dissented as to the denial of Cromartie's time-barred ineffective-assistance claim.

Cromartie argues that differences in the local internal procedures of the circuit courts of appeals in determining the weight given to a dissenting judge's opinion on a motion for COA represents a split over which this Court should exercise certiorari review. It is true that several circuits require the grant of a COA if a single judge on a multiple-judge panel determines it should issue, while other circuits, and in this case the Eleventh Circuit court of appeals, do not allow a single judge on a multiple-judge panel to control the decision. But this is not a conflict among the circuit courts of appeals on an issue of federal law that warrants certiorari review. This Court held long ago that differing local procedures for determining whether to grant a COA by the circuit courts either by "panel …one of its judges, or in some other way" was "not reviewable" when kept "within the bounds of judicial discretion." *In re in re Burwell*, 350 U.S. 521, 522, 76 S. Ct. 539, 540 (1956). As neither the applicable statute, 28 U.S.C. § 2253(c), nor this Court's precedent, speaks to or instructs on the weight a single judge's opinion is to be given on a multiple-judge panel, this is clearly an issue "within the bounds of judicial discretion" of the courts of appeals. In any event, Cromartie points to no

federal law suggesting that a three-judge panel *must* defer to a single dissenting judge when they disagree about how the COA standard applies to any given claim.

Regarding the time-barred ineffective-assistance claim, Cromartie argues the court of appeals improperly considered the merits of the claim, contrary to this Court's precedent. While this Court has instructed that a full merits determination is inappropriate in deciding a request for COA, this Court has stated that an "overview of the claims" and "a general assessment of the[] merits" is necessary. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003). This is precisely the review conducted by the court of appeals. It succinctly stated the claim and the applicable law and determined in a concise opinion that reasonable jurists could not debate the district court's determination that Cromartie's new untimely-filed ineffective-assistance claim did not relate back to his claims in his initial timely-filed petition and was therefore time-barred. Moreover, the court was correct: a plain reading of the untimely-pled ineffective-assistance claim showed it did not relate back to the ineffective-assistance claims in the timely-filed petition, because the claims were not of the same "time and type" and did not share the same "core facts." *Mayle v. Felix*, 545 U.S. 644, 650, 657,125 S. Ct. 2562, 2566, 2571 (2005). Thus, the court of appeals' decision was in accord with this Court's precedent and certiorari review should be denied.

Cromartie also argues the circuit courts of appeals are in conflict regarding whether diligence of the petitioner in obtaining the allegedly suppressed exculpatory evidence is a proper consideration in a *Brady* analysis. It is true that only some circuits include an express diligence component in analyzing *Brady* claims, but Cromartie's *Brady* claim does not

present an appropriate vehicle for resolving any question on this issue, because Cromartie's failure to show diligence was only an alternative basis for the state habeas court's decision. The state habeas court first concluded that Cromartie failed to prove with any credible evidence that the State possessed exculpatory evidence, and because Cromartie failed to prove that the state court's determination was not supported by the record, the court of appeals correctly determined that reasonable jurists could not disagree with the district court's denial of the *Brady* claim. Although there was an alternative determination regarding diligence, this was independent of the finding that the State did not possess exculpatory evidence. Consequently, the split Cromartie relies upon has no bearing on the controlling reason the court of appeals denied his COA request for his *Brady* claim. Thus, this claim also does not warrant this Court's review.

STATEMENT OF THE CASE

A. Facts of the Crimes

The Georgia Supreme Court accurately summarized the essential facts of Petitioner Ray Jefferson Cromartie's crimes in deciding the evidence was sufficient to authorize the jury's determination of guilt:

> The evidence adduced at trial shows that Cromartie borrowed a .25 caliber pistol from his cousin Gary Young on April 7, 1994. At about 10:15 p.m. on April 7, Cromartie entered the Madison Street Deli in Thomasville and shot the clerk, Dan Wilson, in the face. Cromartie left after unsuccessfully trying to open the cash register. The tape from the store video camera, while too indistinct to conclusively identify Cromartie, captured a man fitting Cromartie's general description enter the store and walk behind the counter toward the area where the clerk was washing pans. There is the sound of a shot and the man leaves after trying to open the cash register. Wilson survived despite a severed carotid artery. The

> following day, Cromartie asked Gary Young and Carnell Cooksey if they saw the news. He told Young that he shot the clerk at the Madison Street Deli while he was in the back washing dishes. Cromartie also asked Cooksey if he was "down with the 187," which Cooksey testified meant robbery. Cromartie stated that there was a Junior Food Store with "one clerk in the store and they didn't have no camera."
>
> In the early morning hours of April 10, 1994, Cromartie and Corey Clark asked Thaddeus Lucas if he would drive them to the store so they could steal beer. As they were driving, Cromartie directed Lucas to bypass the closest open store and drive to the Junior Food Store. He told Lucas to park on a nearby street and wait. When Cromartie and Clark entered the store, Cromartie shot clerk Richard Slysz twice in the head. The first shot which entered below Slysz's right eye would not have caused Slysz to immediately lose consciousness before he was hit by Cromartie's second shot directed at Slysz's left temple. Although Slysz died shortly thereafter, neither wound caused an immediate death. Cromartie and Clark then tried to open the cash register but were unsuccessful. Cromartie instead grabbed two 12-packs of Budweiser beer and the men fled. A convenience store clerk across the street heard the shots and observed two men fitting the general description of Cromartie and Clark run from the store; Cromartie was carrying the beer. While the men were fleeing one of the 12-packs broke open and spilled beer cans onto the ground. A passing motorist saw the two men run from the store and appear to drop something.
>
> Cooksey testified that when Cromartie and his accomplices returned to the Cherokee Apartments they had a muddy case of Budweiser beer and Cromartie boasted about shooting the clerk twice. Plaster casts of shoe prints in the muddy field next to the spilled cans of beer were similar to the shoes Cromartie was wearing when he was arrested three days later. Cromartie's left thumb print was found on a torn piece of Budweiser 12-pack carton near the shoe prints. The police recovered the .25 caliber pistol that Cromartie had borrowed from Gary Young, and a firearms expert determined that this gun fired the bullets that wounded Wilson and killed Slysz. Cromartie's accomplices, Lucas and Clark, testified for the State at Cromartie's trial.

Cromartie v. State, 270 Ga. 780, 781-82 (1999).

B. Proceedings Below

1. Trial

Cromartie was indicted by the Thomas County Grand Jury on October 20, 1994, for one count of malice murder, one count of armed robbery, one count of aggravated assault, one count of aggravated battery and four counts of possession of a firearm during the commission of a crime. ECF No. 17-1 at 29-34.[1]

Cromartie was represented by Michael Mears and Mears' team during trial. During his career, Mears was involved in approximately 100-120 death penalty cases. ECF No. 21-14 at 39. Mears served as lead counsel in at least 60 death penalty cases and had tried about 27-29 death penalty cases to a jury. *Id.* Additionally, Mears was a national educator on defending death penalty cases. *Id.* at 41-42.

On September 26, 1997, following a jury trial, Cromartie was convicted as charged in the indictment. ECF No. 17-8 at 63. Following the sentencing phase of trial, the jury found three statutory aggravating circumstances: 1) that the offense of murder was committed during an armed robbery; 2) that the offense of murder was committed for the purpose of receiving money or any other thing of monetary value; and 3) that the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved depravity of mind, or aggravated battery to the victim prior to the death of the victim. ECF No. 17-8 at 74-75. The jury recommended a sentence of death on October 1, 1997. *Id.* at 74.

[1] Respondent has adopted Cromartie's method of citation to the record. "ECF No." refers to the federal docket entry in the district court, followed by the applicable ECF page number.

The trial court sentenced Cromartie to death for malice murder, consecutive sentences of life imprisonment for armed robbery, twenty years for aggravated battery, and five years for each count of possession of a firearm during the commission of a crime. *Id.* at 77-82.

2. Direct Appeal

The Georgia Supreme Court affirmed Cromartie's convictions and death sentence on March 8, 1999. *Cromartie v. State*, 270 Ga. 780. Cromartie raised a claim under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), on direct appeal regarding certain State files, but he did not raise a claim concerning the suppression of pre-trial statements of alleged witnesses near the Madison Street Deli at the time of the crimes. *Id.* at 785-86. Thereafter, Cromartie filed a petition for writ of certiorari in this Court, which was denied on November 1, 1999. *Cromartie v. Georgia*, 528 U.S. 974, 120 S. Ct. 419 (1999), *r'hrg. denied*, 528 U.S. 1108, 120 S. Ct. 855 (2000).

3. State Habeas

Cromartie filed a petition for writ of habeas corpus on May 9, 2000 in the Superior Court of Butts County. ECF No. 19-14. An amended petition for writ of habeas corpus was filed on December 9, 2005. ECF No. 20-22. Petitioner was represented by a team of attorneys from the Georgia Resource Center and pro bono counsel Martin McClain. Both *specialized* in representing death row inmates in collateral appeals.

During his state habeas proceeding, Cromartie raised a claim that his rights were violated under *Brady* due to the State's alleged suppression of statements by two witnesses—Terrell Cochran and Keith Reddick—that they

saw Gary Young[2] running from the Madison Street Deli, one of the crime scenes, on the night of the crime. The team of attorneys representing Cromartie, who had specialized in death penalty litigation for nearly a decade, did not raise a claim that his trial counsel was ineffective for failing to investigate and present evidence regarding his life and mental health for mitigation purposes.

After eight years of discovery, the habeas court held an evidentiary hearing on August 12-14, 2008. ECF Nos. 21-14 – 23-20. Both parties submitted post-hearing briefs and proposed orders. ECF Nos. 23-32, 23-33, 23-34, 23-35, 23-36. Nearly two years after the submission of the proposed orders, on February 9, 2012, the state habeas court entered an order denying relief. ECF No. 23-37 at 18. The court dismissed Cromartie's *Brady* claim as procedurally defaulted, and alternatively concluded the claim was without merit. ECF No. 23-37 at 18. Cromartie filed a motion for reconsideration based upon new testimony from trial witness Gary Young and, after further discovery and briefing, the state habeas court denied the motion on October 9, 2012. ECF No. 24-9. The Georgia Supreme Court denied Cromartie's application for a certificate of probable cause to appeal (CPC) on September 9, 2013. ECF No. 24-14.

Cromartie filed a petition for writ of certiorari in this Court seeking review of the state court's determination of his *Brady* claim, which this Court

[2] Young was the owner of the handgun used by Cromartie during the crimes, and the individual Cromartie alleged committed the crimes.

denied on April 21, 2014.[3] *Cromartie v. Chatman*, __ U.S. __, 134 S. Ct. 1879 (2014).

4. Federal Habeas

Cromartie filed his federal habeas petition on March 20, 2014.[4] ECF No. 1. In this initial petition, Cromartie alleged in Claim II, 15 instances of ineffective assistance of trial counsel, none of which mentioned or alluded to a failure by trial counsel to investigate and present evidence of Cromartie's life history and mental health.[5] The relevant portions of the petition alleged:

> Claim II
>
> 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 and Article I, §1, ¶¶ 1, 2, 11, 12, 14, and 17 of the Constitution of the State of Georgia. *See also Strickland v. Washington*, 466 U.S. 688 (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:
>
> a. Failure to adequately investigate the Madison Street Deli shooting incident and present evidence at both phases of the trial that would exculpate Petitioner or mitigate punishment;

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[3] Notably, in that petition, Cromartie argued the same alleged split among the courts regarding *Brady* he argues in his current petition.

[4] Respondent filed a motion to dismiss the initial petition as untimely. ECF No. 9. The district court denied the motion. ECF No. 42.

[5] Cromartie was initially represented by the Georgia Resource Center and Martin McClain in his federal habeas proceeding. However, counsel was replaced in order to litigate certain portions of the timeliness challenge to the original petition.

> 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;
>
> * * * *
>
> j. Failure to adequately defend Petitioner against the death penalty during the sentencing phase of trial by not adequately presenting evidence of residual doubt;

ECF No. 1 at 16-17, 18.

On January 6, 2015, Petitioner filed a request to amend his petition and the district court granted that request on the same day. ECF Nos. 43, 44. Subsequently, Petitioner amended his petition on June 22, 2014, and included a new claim, Claim X, that trial counsel were ineffective during the sentencing phase of trial regarding the investigation and presentation of Cromartie's life and mental health:

> Claim X
>
> 1. Mr. Cromartie's life has been plagued by trauma, abuse, and neglect. These damaging influences began prior to Mr. Cromartie's birth, when his mother attempted to abort him and drank alcohol throughout the course of her pregnancy. (App. at 4 (Barrau Dec. at 4); App. at 231 (Davies Report at 4)). The trauma continued from there, as Mr. Cromartie's life was marked by "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." (App. 85 at (Agharkar Dec. at 9)).
>
> * * * *
>
> 4. Mr. Cromartie was prejudiced by his counsel's failure to effectively present his case in mitigation. *Id.* Given the non-aggravated nature of the case—as demonstrated by the prosecution's willingness before trial to agree to a sentence of life with the possibility of parole after seven years as adequate punishment for the crimes—there is a reasonable probability that had counsel effectively presented the mitigation evidence described in this petition, Mr. Cromartie would not have been sentenced to death.

ECF No. 62, at 55-57. The amended petition goes on for an additional fifteen pages alleging the facts in support of Petitioner's new ineffective assistance of trial counsel claim. *Id.* at 57-71.

Respondent filed his answer to the amended petition on July 22, 2015, and asserted that the new claim was unexhausted and procedurally defaulted because it was not raised in his state habeas proceeding. ECF No. 64 at 13. However, after further research and consideration, Respondent requested permission on March 21, 2016, from the district court to amend his answer to assert a time-bar to Petitioner's new ineffective-assistance claim pursuant to § 28 U.S.C. 2244(d)(1). ECF No. 74. Cromartie objected to the amendment. ECF No. 75. The district court granted the request to amend on August 22, 2016, and determined Respondent's request to amend was not futile because Cromartie's new ineffective-assistance claim did not, pursuant to Federal Rule of Civil Procedure 15(c), relate back to a claim in his initial petition. ECF No. 80 at 4-12. After full briefing of all claims, the district court denied Cromartie's request for federal habeas relief and declined to issue a COA as to any of Cromartie's claims. ECF No. 81.

Cromartie timely filed a motion for a COA with the Eleventh Circuit Court of Appeals on August 24, 2017. In a single-judge order, Cromartie's motion was denied. App. 34. Cromartie then requested reconsideration of the denial of his motion for COA. His motion was then reviewed by a three-judge panel and was denied on March 26, 2018. App. 1-33. The majority and the dissent agreed that Cromartie was not entitled to a COA on his *Brady* claim. Regarding the time-bar, the majority held that the ineffective-assistance claim in his initial petition was too general to place Respondent on notice of Cromartie's new ineffective-assistance claim and did "not share a

'common core of operative facts'" with his newly pled Claim X. App. 10-12 (quoting *Mayle v. Felix*, 545 U.S. 644, 664,125 S. Ct. 2562, 2574 (2005)). A member of the panel dissented, beginning and ending the dissent by echoing Cromartie's complaint that his new ineffective-assistance claim had never been considered. *See, e.g.,* App. 18 ("No judge has thoroughly considered the merits of Mr. Cromartie's claim that his death sentence resulted from a violation of his fundamental right to effective representation.")).

REASONS FOR DENYING THE PETITION

I. The court of appeals' denial of Cromartie's motion for a certificate of appealability of his time-barred ineffective-assistance claim was in accord with this Court's precedent.

The court of appeals correctly denied a COA on the question whether Cromartie's new ineffective-assistance claim was time-barred. Three hundred and twenty-nine days *after* his one-year federal statute of limitations had run, Cromartie amended his federal petition to include a new ineffective-assistance claim.[6] Under federal law, if a claim is filed after the one-year AEDPA statute of limitations, unless the claim relates back to the timely filed petition pursuant to Federal Rule of Civil Procedure 15 (c)(1)(B),

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[6] This Court denied Cromartie's request for certiorari review of his direct appeal on November 1, 1999, which started the clock on the one-year limitation as set forth in § 28 U.S.C. 2244(d)(1). *Cromartie v. Georgia*, 528 U.S. 974. One hundred and ninety-one days later, Cromartie filed his state habeas petition on May 9, 2000, tolling his one year timeline. ECF No. 19-14. Following the denial by the Georgia Supreme Court of Cromartie's CPC application, and the filing of the remittitur in the superior court, Cromartie had 174 days to file his federal habeas petition. ECF No. 33-1; ECF No. 42. Petitioner filed his original petition within this time-frame on March 20, 2014. ECF No. 1. Cromartie then filed his amended petition on June 22, 2015. ECF No. 62.

it is time-barred under § 2244(d). The district court determined Cromartie's new ineffective-assistance claim as alleged in his amended petition had no relation to any of the ineffective-assistance claims raised in the initial petition. App. 125-133. The court of appeals determined that Cromartie failed to "show 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" App. 13 (quoting *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1601 (2000)).

Cromartie offers two reasons why this Court should review the court of appeals' factbound denial of his COA on this issue. First, he argues there is a current split among the circuit courts of appeals regarding internal procedures for determining whether to grant a COA. Second, he argues the court of appeals considered the merits of the procedural time-bar determination of the district court in contravention of this Court's precedent. Both arguments fail. Cromartie has not identified a split concerning an issue of federal law worthy of this Court's certiorari review. Nor has Cromartie shown the court of appeals incorrectly applied this Court's precedent in determining he was not entitled to a COA on his time-barred claim. Accordingly, certiorari review should be denied.

A. Cromartie has failed to identify a conflict of authority that warrants this Court's review.

To obtain a COA under 28 U.S.C. § 2253(c), a habeas prisoner must make a "substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Under the controlling standard, a petitioner must "show [] that 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.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

This Court has explained that "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Where a claim has been dismissed on procedural grounds, then a petitioner must make two showings—"one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Id.* at 485. As *Slack* pointed out , each "component of the § 2253(c) showing is part of a threshold inquiry," which promotes deciding *first* the component that provides "an answer … more apparent from the record"—typically "procedural issues." *Id.*

Cromartie argues that the circuit courts of appeals are divided on whether a COA should issue if a single judge on a multiple-judge panel determines a motion for COA should be granted. In support, Cromartie contends that the Third, Fourth, Sixth, Seventh, and Ninth Circuits have either promulgated a local rule or issued "decisional law" "permit[ting] a single circuit judge to issue a COA, even where the application is being considered by a panel." Pet. at 19. Cromartie states the Second, Fifth, Eighth, and Eleventh Circuits "permit a COA to be denied over a single judge's dissent." Pet. at 21.

Cromartie's alleged split does not warrant this Court's review. To begin with, differences in the courts of appeals' internal procedures for COAs do not represent a conflict of federal law which concerns this Court's review. Neither § 2253(c) nor this Court's precedent restricts how the courts of

appeals may implement local rules regarding the number of judges required to grant a COA or how a panel is to proceed if they are not in agreement. Indeed, this Court specifically declined to do so many decades ago:

> It is for the Court of Appeals to determine whether such an application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers. [] It is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U. S. C. § 2253, should be exercised. [] As long as that court keeps within the bounds of judicial discretion, its action is not reviewable.

In re in re Burwell, 350 U.S. 521, 522, 76 S. Ct. 539, 540 (1956). Cromartie has failed to identify any decision of this Court since indicating a change in course. Moreover, *Burwell* specifically allows differing procedures for courts of appeals to implement for determining whether a COA should issue. In short, Cromartie fails to identify any federal law that requires courts of appeals to adopt, or not adopt, local rules like those of the Third, Fourth, and Ninth Circuits or those of the Second Circuit, so he has not presented a conflict in federal law which this Court reviews.

Nor does the "decisional law" Cromartie cites reflect a circuit conflict that warrants review. Instead, these cases generally reflect case-specific applications of the settled COA standard. For example, in *Shields v. United States*, 698 F. App'x 807, 813 (6th Cir. 2017) the Sixth Circuit granted a COA from a motion to vacate his sentence "on the sole issue of whether trial counsel was ineffective in failing to argue that the *Miranda* waiver was not knowing and intelligent" based, in part, on the fact that a dissenting judge in the direct appeal had concluded that the waiver was not knowing and intelligent. *Shields* does not show that the Sixth Circuit will necessarily

always grant a COA if the panel finds a judge—whether on the panel or, as in *Shields*, not—who believes the claim has merit; that case just shows that in that case, the court of appeals was satisfied that the dissenting opinion indicated that reasonable jurists could debate whether the claim at issue had merit.

Taking Cromartie's argument to its logical conclusion would mean that a dissenting opinion now carries more weight than a majority opinion. Contrary to Cromartie's argument, the question before a court of appeals on a motion for COA is whether "reasonable jurists" could find a district court's decision "debatable"—not whether the individual judges on the panel are "reasonable jurists." Two judges holding no "reasonable jurist" could debate the correctness of the lower court's opinion is not the same as stating their colleague is an unreasonable jurist. Courts often disagree with the reasonableness of their fellow jurists' opinions without it amounting to a declaration of unfitness.

Accordingly, Cromartie has failed to identify a conflict among courts of appeals or with this Court's decisions on any issue of federal law that warrants review by this Court.

B. Cromartie has failed to show that the court of appeals' denial improperly considered the merits of his time-barred claim.

Cromartie also argues that the court of appeals improperly "bypassed" the "threshold inquiry into whether reasonable jurists might debate the district court's decision" and instead determined "the merits of the procedural issue." Pet. at 22. To support this argument, Cromartie alleges the majority opinion is "lengthy" and engages in "vigorous debate" with the dissent. *Id.* at

18, 22. Neither is accurate. Instead, the court of appeals properly identified the applicable law and performed a limited review of the merits to determine whether reasonable jurists could debate the correctness of the district court's decision that his ineffective-assistance claim was time-barred.

"The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and *a general assessment of their merits*." *Miller-El*, 537 U.S. at 336 (emphasis added). This is precisely the review completed by the court of appeals in assessing Cromartie's motion for a COA. The court correctly stated the COA standard of review, summarized the law applicable to Cromartie's time-barred claim, summarized the necessary portions of the record, and succinctly explained that reasonable jurists could not debate the district court's decision. The court of appeals' decision is comparable in length and format to this Court's decision in *Slack*.[7] Before the Court in *Slack* was "whether jurists of reason could conclude that the District Court's dismissal on procedural grounds was debatable or incorrect." *Slack*, 529 U.S. at 485. The *Slack* Court set out the relevant facts, the law, and discussed the parties' arguments. *Id.* at 485-90. The court of appeals did not improperly assess the merits of Cromartie's claim in denying the COA.

Cromartie states several times that the court of appeals' decision was "lengthy." *See*, *e.g.* Pet. at 17, 22. The portion of the majority opinion deciding whether Cromartie was entitled to a COA on his time-barred claim encompasses only eight pages, double-spaced in Times New Roman, 14 point font. App. 5-13. At least three of the pages merely recite the appropriate law

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[7] Respondent is not suggesting this Court's holding is comparable to the court of appeals' holding in Cromartie's case as the issue which *Slack* asserted deserved a COA is not the same as Cromartie's claim.

and applicable portions of the record. App. 5-9. Indeed, the parties' briefs to the district on the issue of whether Cromartie's new ineffective-assistance claim was time-barred totaled well-over 100 pages. ECF Nos. 74, 78, 80. In contrast, the court of appeals' opinion on this issue is abridged and only discusses the points necessary to determine whether Cromartie met the COA threshold inquiry.

Likewise, Cromartie's allegation that the majority and the dissent engaged in "vigorous debate" is incorrect. Pet. at 18. Taking Cromartie's "vigorous debate" at face value implies a heated exchange between the majority and dissent. While the dissent does address specific determinations made by the majority, the majority does not mention or specifically acknowledge the dissent's opinion. App. 1-32. Simply because the dissent disagrees with the majority does not mean a "vigorous debate" ensued. What is more, it is unclear from this Court's precedent that even if a "vigorous debate" had occurred this would mean the majority had improperly "bypassed" the § 2253 threshold inquiry and launched into a merits analysis. Cromartie's attack on the court of appeals' decision is unfounded and certiorari review should be denied.

C. The court of appeals' determination that reasonable jurists could not debate that Cromartie's new ineffective-assistance claim did not relate back to a claim in his timely-filed petition is in accord with this Court's precedent.

Cromartie generally pled in Claim II of his initial timely-filed petition that trial counsel were ineffective in their investigation and presentation of evidence in the sentencing phase as it related to his specific crimes. ECF No. 1 at 16-17. However, in his amended petition, filed 329 days after his one-year statute of limitations had run, he added a new claim, Claim X, that trial

counsel were ineffective for failing to investigate and present mitigating evidence during the sentencing phase that related to his life history and mental health. ECF No. 62 at 55-71. The district court examined the issue and held the law did not support Cromartie's argument that his new ineffective-assistance claim related back to any ineffective-assistance claim pled in his initial petition. App. 125-33. The court of appeals held that reasonable jurists could not debate the district court's determination because Cromartie's new claim did not concern the same "core facts" as the claims pled in this initial petition and the claims in the initial petition did not place Respondent on notice of his new claim. App. 10, 11.

Federal Rule of Civil Procedure 15(c)(1)(B) states that "[a]n 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;

In *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct. 2562 (2005), this Court found claims within an amended 28 U.S.C. § 2254 petition filed after the timely filing of an original § 2254 petition were time-barred. As correctly summarized by the Eleventh Circuit, in *Mayle*, the Ninth Circuit held that a claim pled in an untimely amended petition alleging "that the police's coercive tactics to obtain pretrial statements from him violated his Fifth Amendment right against self-incrimination" "related back" to a claim in the timely-filed initial petition "that the prosecution improperly showed the jury a witness's videotaped statements" which "violated the petitioner's Sixth Amendment right to confront the witness." (A9). This Court disagreed with the Ninth Circuit and explained that alleging a claim was from the same

"transaction" or "occurrence" merely because it is also from the same trial would read the meanings from Rule 15(c) at "too high a level of generality." 545 U.S. at 661 (quoting *United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000)). Instead, this Court stated that the claims must have a "common 'core of operative facts' uniting the original and newly asserted claims." *Mayle,* 545 U.S. at 659 (quoting *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259, n. 29 (9th Cir. 1982)). In sum, this Court held an "amended habeas petition… does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650.

The court of appeals also looked to its own precedent, *Dean v. United States*, 278 F.3d 1218 (11th Cir. 2002), in which the Court had determined that three newly pled claims related back to the initial timely-filed petition. (A8). The *Dean* decision, which pre-dated, but largely mirrored this Court's instructions and holdings in *Mayle*, explained that the newly pled claims arose from specific conduct or occurrences that the respondent was put on notice of in claims pled in the original petition. *Dean*, 278 F.3d at 1222-23. And the newly pled claims "serve[d] to expand facts or cure deficiencies in the original claims." *Id.* at 1223.

The court of appeals then examined Cromartie's newly pled ineffective-assistance claim under the holdings of *Mayle* and *Dean*.[8] As stated by the

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[8] Cromartie, relying upon the dissent, implies that the court of appeals did not properly apply *Mayle* or *Dean*. Pet. at 27 n. 9. Specifically, the dissent took issue with the applicability of *Mayle* and *Dean* because they were factually dissimilar to Cromartie's case. (A28, 29-30). But the majority's reliance on *Mayle* and *Dean* was focused on the general holdings of each

court of appeals, Cromartie alleged that his newly pled Claim X related back to: Claim II of his initial petition, paragraph 38, that counsel was ineffective for failing to investigate each of the convenience store incidents, *i.e.* the crimes, and present evidence that would either "exculpate" or "mitigate punishment." App. 10-11; ECF No. 1 at 16-17. However, as correctly determined by the court of appeals, Claim II from the initial petition did "not allege that trial counsel were ineffective for failing to investigate and present evidence of Cromartie's background in mitigation at sentencing" but instead alleged that counsel was ineffective for failing to investigate and "present evidence" regarding Cromartie's "particular crime[s]." App. 11. Consequently, the court held the original claims and new claim did "not share a 'common core of operative facts'" and the new claim was "'supported by facts that differ[ed] in both time and type from those the original pleading set forth.'" App. 11-12 (quoting *Mayle* 545 U.S. at 650).

Cromartie disagrees with the majority opinion and cites to the dissent in support. Specifically, Cromartie relies upon the dissent's determination that: his new claim just "added specifics to" the original claim; and that the new claim "asserted that trial counsel was unconstitutionally ineffective for failing to appropriately investigate and convey Mr. Cromartie's troubled background to the penalty-phase jury.'" Pet. at 26-27 (quoting App. 25, 27). Neither of the determinations by the dissent relied upon by Cromartie are reasonable. As shown in the clear text of Cromartie's initial Claim II, nothing was pled that either specifically stated or suggested that trial counsel was ineffective for failing to investigate Cromartie's *life history or*

court regarding the relation back doctrine—not a fact-specific comparison between Cromartie's case and *Mayle* and *Dean*.

mental health. Instead, Claim II plainly only concerned investigation and presentation of evidence regarding the *crimes*. Cromartie's recitation of the dissent does not show that reasonable jurists could disagree with the district court's decision.

Cromartie also disagrees with the majority's opinion that a general ineffective-assistance claim followed by a string citation to this Court's opinions in his initial petition was not enough to preserve his new claim. Cromartie argues that because this Court's opinions in the string cite concerned similar ineffective-assistance claims as that of his new Claim X, that was enough to generally assert a claim of ineffective assistance for failing to investigate and present evidence of his life history and mental health. However, as correctly found by the court of appeals, neither the general claim nor the string citation was "enough." (App. 12). Otherwise, all a petitioner would have to plead was a "generalized allegation" of ineffective assistance and "cite some ineffective assistance of counsel decisions and withhold disclosure of his specific ineffective assistance claims and allegations until long after the limitations period ran." (App. 12). As aptly stated by the court, "[t]his type of pleading would circumvent one of AEDPA's main goals — 'to advance the finality of criminal convictions'" and make the statute of limitations "pretty much pointless." *Id.* at 12-13 (quoting *Mayle*, 545 U.S. at 662). Reasonable jurists could not disagree on this point, as this is pleading a claim at too "high a level of generality" for purposes of relation back under Rule 15. *Mayle*, 545 U.S. at 661.

Reasonable jurists could not debate that Cromartie's ineffective-assistance Claim II and Claim X differ in "time and type." *Mayle*, 545 U.S. at 650. He did not allege trial counsel were ineffective for failing to investigate

and present evidence of his *background* in mitigation and then amend to include specific evidence in support. Instead, Cromartie alleged in his initial petition that trial counsel were ineffective in their investigation of his *crimes* and failed to present evidence from the investigation of his crimes to "mitigate his punishment," which he argued he amended with specific allegations of traumatic childhood and resulting mental health deficiencies. These are two very different investigations as is the mitigation evidence that each would produce and are not based upon the same set of "core facts."

The court of appeals, applying this Court's precedent, correctly determined that reasonable jurists could not disagree with the district court's determination that his new Claim X did not relate back to his original Claim II and was thus time-barred.[9] Certiorari review of this issue is not warranted.

II. The court of appeals' denial of Cromartie's motion for a certificate of appealability of his *Brady* claim is in accord with this Court's precedent.

Cromartie alleged that the State suppressed material, exculpatory evidence regarding the identity of the perpetrator of the Madison Street Deli incident in violation of his rights under *Brady v. Maryland*. The state court properly concluded that this claim was procedurally defaulted. ECF No. 23-37 at 14-15, 18-54; ECF No. 24-3. The state habeas court, in the alternative,

[9] As the court of appeals correctly stated, as reasonable jurists could not debate the correctness of the district court's procedural ruling, the court "need not consider his argument that reasonable jurists could debate whether he stated a valid ineffective assistance of counsel claim." App. 13; *see Slack*, 529 U.S. at 484.

also found it was without merit. ECF No. 23-37 at 49-54. The district court "concluded that the record supported both determinations." App. 13; ECF No. 81 at 25-33. The entire panel agreed that reasonable jurists could not debate the correctness of the district court's decision on this issue. (App. 13-17, 19 n.2). Contrary to Cromartie's argument, he has failed to prove his case is an appropriate vehicle to address a split among the circuit courts of appeals regarding the proper standard of review for a *Brady* claim. Thus, as the court of appeals properly applied this Court's precedent in denying Cromartie's COA on this claim, certiorari review should be denied.

A. Cromartie fails to show his *Brady* claim is the appropriate vehicle for his alleged conflict of authority.

As the court of appeals correctly stated, to establish a *Brady* claim, Cromartie had to show that: (1) "the State possessed evidence favorable to the defendant"; (2) "the petitioner does not possess the evidence" and "could not obtain it with any reasonable diligence"; (3) "the State suppressed the favorable evidence"; and (4) "had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." (App. 13) (citing *United States v. Vallejo*, 297 F.3d 1154, 1164 (11th Cir. 2002); *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989)). As the court of appeals also correctly stated, this Court has held that *Brady* claims can be procedurally defaulted. *Id; see Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936 (1999) (holding that *Brady* claims can be procedurally defaulted).

In determining that Cromartie failed to show reasonable jurists could debate the correctness of the district court's decision, the court of appeals first held that Cromartie could not show cause and prejudice to overcome the

default "because there was no credible evidence for the State to suppress." App. 15. Alternatively, the court held that if it did "assume" that the evidence existed, "there was no suppression because Cromartie's trial counsel could have obtained the information." App. 16. Ignoring the court's initial holding that the alleged exculpatory evidence did not exist, Cromartie argues there is a split between the courts regarding the diligence component of the second prong of the *Brady* standard. Specifically, Cromartie argues the District of Columbia, Third, and Tenth Circuits do not require a petitioner to show the evidence could not have been obtained with reasonable diligence, while the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits do. Pet. at 32. Cromartie's petition for writ of certiorari from the Georgia Supreme Court following the denial of state habeas relief raised this same claim. This Court denied that petition. *Cromartie,* 134 S. Ct. 1879.

Respondent does not dispute that the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits include a diligence component for *Brady* claims. However, the D.C. Circuit and Tenth Circuit cases Cromartie cites do not no show a circuit split. In the D.C. Circuit case, *In Re Sealed Case*, 185 F. 3d 887 (D.C. Cir. 1999), the State had information regarding a defense witness's prior agreements with the State that were solely in the possession of the State. The real controversies in the case were whether information about other State deals was exculpatory and whether information from other law enforcement agencies was imputed to the State. The court did not hold that the petitioner did not have to show the evidence could not have been obtained with reasonable diligence; instead, the court rejected the government's arguments that trial counsel could have gotten the information because they talked to the informant, since the informant had

stated he had lied to defense counsel and the government was the only source for the information requested.

Likewise, Cromartie's reliance on the Tenth Circuit case *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), does not support his argument. In *Banks*, the court found the defendant "neither knew nor should have known about the withheld evidence." *Banks*, 54 F.3d at 1518. Moreover, the court stated, "Whether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation. Obviously, if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." *Id.* at 1517. The court did not hold that the diligence of the defendant should have no bearing on whether there was a *Brady* violation.

Cromartie also relies upon a recent Third Circuit opinion, *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263 (3d Cir. 2016), which was not included in Cromartie's 2014 petition for certiorari, as it had not issued. Respondent cannot state that *Dennis* does not part ways with the other circuit courts as it holds: "the concept of 'due diligence' plays no role in the *Brady* analysis." *Dennis*, 834 F.3d at 291. However, it is fair to state that Dennis involved several pieces of evidence allegedly suppressed by the State, and only one piece of evidence concerned, in part, the diligence of the defendant.

In any event, Cromartie's case is not an appropriate vehicle to resolve any split as the Eleventh Circuit's decision does not rely only on the diligence component. The court of appeals initially rejected Cromartie's *Brady* claim because he had failed to show the alleged exculpatory evidence in fact

existed. App. 15. Resolving any questions about the diligence component here would have no bearing on the outcome of this case.

B. Cromartie fails to show that reasonable jurists could debate the correctness of the district court's decision that he failed to prove exculpatory evidence was in the possession of the State.

Cromartie alleged during his state habeas proceeding that the State suppressed statements from Terrell Cochran and Keith Reddick that they saw Gary Young[10] running from the scene of the crime at the Madison Street Deli, the first convenience store armed robbery and attempted murder committed by Cromartie. As the district court correctly concluded, the state habeas court found that Cromartie had failed to show prejudice, or suppression, because he failed to show the first prong of *Brady*. That is because there was no credible evidence that Cochran and Reddick informed law enforcement that they saw Young running from the Madison Street Deli. App. 15. The court of appeals held that reasonable jurists could not debate this determination. App. 15.

As recounted above in the statement of the facts, Cromartie committed two separate convenience store armed robberies. On April 7, 1994, Cromartie shot the Madison Street Deli clerk Dan Wilson in the face and "left after unsuccessfully trying to open the cash register." *Cromartie*, 270 Ga. at 781. A video of this crime showed the perpetrator acted alone.[11] *See Cromartie*,

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[10] Young was the individual that Cromartie attempted to implicate both at trial and in his collateral proceedings as the perpetrator of the crimes for which he was convicted.

[11] Cromartie could not be positively identified in the video but the person in the video fit Petitioner's "general description." *Cromartie*, 270 Ga. at 781.

270 Ga. at 781. Mr. Wilson survived the attack. Three days later, on April 10, 1994, in the early morning hours, Cromartie and co-defendant Corey Clark entered the Junior Food Store and Cromartie fatally "shot clerk Richard Slysz twice in the head." *Id.* Cromartie and his co-defendant Clark unsuccessfully attempted to open the cash register and Cromartie then "grabbed two 12-packs of Budweiser beer and the men fled." *Id.* at 782.

As the court of appeals correctly noted, "There is no evidence at all that Cochran and Reddick told the police — or anyone, for that matter — that they saw Young running from the Madison Street Deli except for their testimony at the state habeas evidentiary hearing that they did." (App. 15). The court's decision was based upon the state habeas court's determination "that Reddick and Cochran were not credible witnesses." *Id.* As in the court of appeals, Cromartie fails to point to any "evidence, much less clear and convincing evidence, to rebut the state court's credibility determinations." *Id.*

The record supports the state court's findings. Although Cromartie alleged that Cochran and Reddick informed law enforcement that they saw Young running from the Madison Street Deli, no State files contained this information. The district court determined the state habeas court had reasonably found that the State file relied upon by Cromartie to support his allegation only showed that law enforcement had spoken with Cochran and Reddick about the Madison Street Deli incident—but it did not contain any evidence that Cochran and Reddick had informed law enforcement that they saw Young running from the Madison Street Deli. ECF No. 81 at 28; *see also* ECF No. 23-37 at 22-23. In further support of the reasonableness of the state court's determination, the district court pointed out the state court's finding that, despite having the burden of proof, when Cromartie deposed the

applicable law enforcement personnel in his state habeas proceedings, counsel for Cromartie never asked any of the detectives whether Cochran or Reddick stated they had seen Young running from the Madison Street Deli. ECF No. 81 at 28, 31; *see also* ECF No. 23-37 at 33-34. Thus, Cromartie did not present any testimony from law enforcement that Cochran and Reddick informed them they allegedly saw Young running from the Madison Street Deli.

Additionally, as the court of appeals pointed out, the state court gave a "number of reasons" for determining Reddick and Cochran were not credible. App. 15. Most notably, both Reddick and Cochran had lengthy criminal records (ECF No. 23-37 at 40-41), and both Reddick and Cochran were biased for various reasons (ECF Nos. 21-14 at 149-50, 164; 21-15 at 17; 23-37 at 42, 44, 51). Given that Cromartie's *Brady* claim rose and ultimately fell on the reliability of Reddick's and Cochran's state habeas testimony, failure to show there was no support for the state court's credibility determinations meant there was no proof the State had exculpatory evidence.

Cromartie has not provided any argument or evidence, much less clear and convincing, which rebuts the state court's credibility determination. Cromartie has therefore failed to show that reasonable jurists could debate the district court's refusal to dismiss the state court's credibility determination. In turn, he has failed to show that reasonable jurists could debate the finding of no cause and prejudice to overcome the default of his claim.

Certiorari review of this claim should be denied.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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I hereby certify that on October 26, 2018, I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email and post-prepaid and properly addressed upon:

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