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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November 9, 2018

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Petitioner Ray Jefferson Cromartie files this Reply in support of his Petition for a Writ of Certiorari in this capital case.[1] This Court should grant the writ to resolve the important questions presented, or in the alternative, should grant certiorari, vacate the judgment below, and remand to the Eleventh Circuit for issuance of a certificate of appealability (COA).

ARGUMENT

I. The Warden Acknowledges That The Circuits Are Split In Their Application Of The COA Standard And Offers No Compelling Reason To Deny Certiorari.

Mr. Cromartie has asked this Court to resolve a circuit split regarding whether disagreement among circuit judges reviewing a COA application requires issuance of a COA. In response, the Warden concedes that the circuits are indeed divided:

> 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.

BIO 3.

The Warden nonetheless contends that this split does not "represent a conflict of federal law which concerns this Court's review." BIO 15. That contention is incorrect. The circuit courts' inconsistent standards are plainly the result of conflicting interpretations of this Court's precedents establishing the "debatable amongst jurists of reason" COA standard, *e.g., Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), and of the text of 28 U.S.C. § 2253(c). This capital case squarely

[1] The relevant opinions below were included in the Appendix filed with Mr. Cromartie's Petition for Writ of Certiorari and are cited herein as "App." followed by the page number.

presents this recurring issue and does so where meaningful appellate review is most crucial.

The Warden relies primarily on *In re Burwell*, 350 U.S. 521 (1956), to argue that this Court has authorized "differing procedures for courts of appeals to implement for determining whether a COA should issue." BIO 16. The Warden misapprehends the question Mr. Cromartie presents for review.

In *Burwell*, the Ninth Circuit had certified the question whether "all the judges, as judges, or some individual judge, or the court as a court shall consider the petition for a certificate of probable cause." *Burwell*, 350 U.S. at 522. This Court declined to answer in a short, per curiam opinion, ruling that "[i]t is for the Court of Appeals to determine" the procedure by which it reviews petitions for a certificate of probable cause. *Id.*

Burwell instructs that the *procedure* by which appellate courts review COA applications—by "all the judges," "some individual judge," or otherwise—is left to the discretion of the circuits themselves. But the *standard* by which those courts judge COA applications is a clear question of federal law that falls squarely within this Court's reviewing authority, about which this Court has repeatedly spoken since *Burwell*. *See Miller-El*, 537 U.S. at 336 ("A COA will issue only if the requirements of § 2253 have been satisfied."); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("Except for substituting the word 'constitutional' for the word 'federal,' § 2253 is a codification of the [certificate of probable cause] standard announced in *Barefoot v. Estelle*, 463 U.S. [880,] 894 [(1983)]."); *see also Hohn v. United States*,

524 U.S. 236, 245 (1998) ("Decisions regarding applications for certificates of appealability . . . are judicial in nature," rather than administrative, and are thus reviewable by this Court.).

Mr. Cromartie does not challenge the Eleventh Circuit's procedure for review of applications for COA, nor does he seek this Court's prescription of a particular procedure. Rather, he asks this Court to determine whether, when an appellate court has prescribed review by multiple circuit judges, the COA debatability *standard* is met when at least one of those judges opines that the COA should issue. Petition at i. In other words, does a differing opinion by at least one circuit judge indicate that reasonable jurists could differ? This question is not resolved by *Burwell*, nor by any other precedent of this Court.[2]

The Warden also argues that the Eleventh Circuit correctly denied COA because reasonable jurists would not debate that the ineffective-assistance-of-counsel claim pled in Mr. Cromartie's amended habeas petition did not relate back to his initial petition. BIO 19–24 .[3] The amended claim related back in part because its general initial factual allegations were paired with citations to several landmark decisions of this Court addressing claims of ineffective assistance of counsel for failing to present life-history and mental-health mitigating evidence at the penalty phase of a capital trial. Petition 26. The Warden argues that these

[2] The plain text of 28 U.S.C. § 2253(c) strongly supports Mr. Cromartie's argument that a COA should issue where at least one circuit judge so finds. *See* Petition 19. The Warden does not rebut, or even acknowledge, Mr. Cromartie's textual argument.

[3] Of course, the judges below *did* debate the question at length. *Compare* App. 5–13 *with* App. 19–32 (Martin, J., dissenting in part).

citations did nothing to preserve the claim because, 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.'" BIO 23 (quoting App. 12).

The Warden's concerns for abuse and end-runs around the statute are overblown. Importantly, the ineffectiveness cases cited in the initial petition involved the exact same type of claim raised in Mr. Cromartie's amendment. Because of the specific nature of the ineffectiveness claims addressed in the cited cases—*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*, 561 U.S. 945 (2010)—the Warden was well aware of the nature of the ineffectiveness claim that was "set out—or attempted to be set out" in the initial petition. Fed. R. Civ. P. 15(c)(1)(B). Mr. Cromartie agrees that merely citing a general ineffective-assistance-of-counsel case, or an ineffectiveness case addressing some other type of error by counsel, would not be sufficient. But here, the specific nature of Mr. Cromartie's ineffectiveness claim was evident; at a minimum, the Eleventh Circuit judges' debate on this question should not have been resolved without actual appellate review. *See* App. 20 ("A reasonable judge could understand Mr. Cromartie's original and amended *Strickland* claims to be tied to a common core of operative facts." (Martin, J., dissenting in part) (internal quotations omitted)).

Finally, the Warden does not now and has never disputed that Mr. Cromartie pled a prima facie claim of penalty-phase ineffectiveness. The Warden acknowledged below that the merits of the claim could not be resolved without an evidentiary hearing. ECF No. 75 at 227.[4] Because the relation-back question and the merits of Mr. Cromartie's penalty-phase ineffectiveness claim are indeed debatable among jurists of reason, a writ of certiorari should issue.

II. The Circuits Are Divided As To Whether *Brady* Requires A Showing That The Defendant Did Not Know Of And Could Not Reasonably Have Obtained The Withheld Evidence.

The federal courts of appeals are likewise split as to whether a defendant must satisfy a "diligence" requirement to show a violation of the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Petition 29–33. The First, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, like the Eleventh Circuit below,[5] include a diligence requirement to establish a *Brady* violation, whereas the Third, Tenth, and District of Columbia Circuits do not. *See* Petition 31–32 (citing cases).

The Warden appears both to dispute and to concede the circuit split. First, the Warden disputes the split by arguing that the Tenth and District of Columbia Circuits have not clearly rejected a *Brady* diligence requirement. BIO 26–27. On the other hand, the Warden concedes that the Third Circuit has "part[ed] ways with the other circuit courts." BIO 27 (discussing *Dennis v. Sec'y, Dep't of Corr.*, 834

[4] 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.

[5] In its order denying COA below, the Eleventh Circuit concluded that, "[b]ecause trial counsel could have obtained the same information from the allegedly suppressed 'statements' by exercising reasonable diligence, binding precedent precludes relief under *Brady*." App. 16. (citations omitted).

F.3d 263 (3d Cir. 2016) (en banc)). Whatever its precise contours, the split is worthy of this Court's review.

The Warden specifically contends that *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), did not reject a diligence requirement to establish a *Brady* violation. BIO 27. But the Tenth Circuit plainly ruled that "the fact that defense counsel knew or should have known about the [*Brady*] information . . . is irrelevant to whether the prosecution had an obligation to disclose the information." *Banks*, 54 F.3d at 1517 (internal quotations omitted); *accord Scott v. Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence."); *United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) ("[W]hether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information.").

The Warden likewise contends that the District of Columbia Circuit's *Brady* jurisprudence is not at odds with a diligence requirement. BIO 26–27. The Warden posits that the "real controversies" in *In re Sealed Case No. 99-3096*, 185 F.3d 887 (D.C. Cir. 1999), related to whether the information was exculpatory and whether the prosecutor was responsible for potential *Brady* evidence possessed by other law enforcement agencies. BIO 26. While these issues were undoubtedly present in *In re Sealed Case*, the government also argued there that the *Brady* claim should be denied because the defendant did not seek the exculpatory information himself. The court specifically rejected that argument. *In re Sealed Case No. 99-3096*, 185

F.3d at 896–97; *see also Dennis*, 834 F.3d at 291 n.19 (citing *In re Sealed Case No. 99-3096* for proposition that "defense counsel's knowledge is not at issue in *Brady*").

Finally, the Warden's attempt to downplay the Third Circuit's en banc rejection of a *Brady* diligence requirement in *Dennis* fails. *See* BIO 27 ("[I]t 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."). The en banc court engaged in a searching analysis of its own and this Court's jurisprudence before concluding that "the concept of 'due diligence' plays no role in the *Brady* analysis." *Dennis*, 834 F.3d at 291.

Contrary to the Warden's arguments, the split amongst the circuits is clear.

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 and review the questions presented. 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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Dated: November 9, 2018