NO:

IN THE
SUPREME COURT OF THE UNITED STATES

LOUIS RUGGIERO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The district court denied, without an evidentiary hearing, petitioner's *pro se* 28 U.S.C. § 2255 claim of ineffective assistance of his defense counsel who had failed to convey a favorable plea offer that petitioner would have accepted to resolve state court charges. In the absence of a plea, the case was turned over to federal prosecutors who then obtained petitioner's plea to a significantly longer sentence than contemplated by the unconveyed state court offer. Although counsel's ineffective performance, petitioner's willingness to accept the unconveyed plea offer, and the timeline of the federalization of the case were uncontested, the district court ruled that petitioner had not established *in his § 2255 filings* that by entering the state court plea, he would have avoided the federal charges. The question presented is:

> Should the court of appeals have granted a certificate of appealability on whether a district court may deny a 28 U.S.C. § 2255 evidentiary hearing on the issue of prejudice resulting from counsel's deficient plea representation, where the district court placed on petitioner a burden at the pleading stage to allege facts that would prove—rather than merely support, without contradiction in the record—a claim of prejudice?

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Louis Ruggiero respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-11350, in an unpublished decision rendered by that court on November 19, 2019, denying a motion for certificate of appealability to review the decision of the United States District Court for the Middle District of Florida denying relief under 28 U.S.C. § 2255.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1). A copy of that court's order denying the motion for reconsideration is attached in the Appendix (App. 2).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 19, 2019, and reconsideration was denied on February 25, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

> against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253(c)(2)

> (2) A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2255(b)

> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. ... .

STATEMENT OF THE CASE

Petitioner was indicted in the Middle District of Florida on charges of internet enticement of a person under 18 years of age and sexual activity with a person under 18 years of age, in violation of 18 U.S.C. § 2422(b) and 18 U.S.C. § 2251(a), respectively. The criminal conduct underlying both charges was investigated by local law

enforcement authorities in Orlando, Florida and was originally pursued by two different state prosecutors there. But when petitioner failed to accept a plea offer from the state prosecutor in the enticement case, the state prosecutions were abated in favor of federal prosecution of both matters. Petitioner pleaded guilty to the same offenses in federal court and received a 20-year sentence. App. 12–15.

The prosecution and plea sequence was as follows: First, Florida state court charges were filed as to the enticement conduct. The state prosecutor soon sent petitioner's defense counsel a letter offering a five-year imprisonment term in exchange for a guilty plea. App. 13. Defense counsel failed to convey to petitioner the offer or any related plea discussions. After a month passed with no acceptance of the offer, the state prosecutor sent petitioner's defense counsel a new offer, with more adverse terms that indicated the failure to quickly resolve the case was hurting petitioner's interests. *Id*. The new offer was for 10 years imprisonment, doubling the initial offer of 5 years. Defense counsel again failed to convey the state prosecutor's offer to petitioner. Some two months after the state's first plea offer, and with no response by defense counsel and no conveying of the plea offers, the case was turned over to the federal government for prosecution. *Id*. Regarding the separate state prosecution for sexual activity with a minor, the record showed that a total sentence of 15 years for all of petitioner's criminal conduct was sufficient to warrant dismissal of that state prosecution. App. 14.

Following his direct appeal of his underlying federal conviction, petitioner learned of the plea offers and that the failure to accept them had led to the federal

takeover of his case and his receiving a higher sentence than contemplated in the forfeited offers. He timely sought relief *pro se* under 28 U.S.C. § 2255. Petitioner asserted that the dealings with the state showed that the federal prosecution would likely not have occurred but for defense counsel's failure to convey favorable state court plea offers that petitioner would have accepted. Because petitioner's 20-year federal sentence was at least 5 years longer than any sentence sought by the state, counsel's plea representation ineffectiveness was highly prejudicial.

The district court denied petitioner's *pro se* § 2255 motion without granting an evidentiary hearing despite petitioner's proffer of the testimony of defense counsel as to the plea offer history of the case and how counsel's failure to convey the first two plea offers led to federalization of petitioner's prosecution and a substantially increased sentence. App. 12–15. The district court concluded that "it is unnecessary for this Court to consider whether Counsel performed deficiently." App. 14. But the district court ruled that petitioner's claim—that the failure to resolve the state prosecution by means of a plea caused the state to turn the case over to the federal prosecutors who demanded a more severe sentence—was not definitively *established* by the § 2255 motion. App. 14–15. The district court explained its ruling as resting on the lack of showing in the record that resolution of the original state prosecution by plea would have affected whether the case taken up by federal prosecutors; the district court denied petitioner an opportunity to prove prejudice at an evidentiary hearing. App. 15 ("Because [petitioner] has not met his burden of showing *Strickland* [*v. Washington*, 466

U.S. 668 (1984),] prejudice, he cannot demonstrate ineffective assistance, and [the claim] is denied.") (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

The district court also denied a certificate of appealability, stating conclusorily that petitioner "has not made the requisite showing in these circumstances." App. 18 (citing *Tennard v. Dretke*, 542 U.S. 274, 282 (2004), and *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), as providing the applicable standard for deciding a certificate of appealability motion).

In his counseled motion for certificate of appealability in the Eleventh Circuit, petitioner contended that the district court had unduly extended the *Frady* requirement that a petitioner alleging actual innocence to overcome a procedural default must set forth factual assertions that would establish such prejudice. *See Frady*, 456 U.S. at 168 ("[W]e are confident [Frady] suffered no actual prejudice of a degree sufficient to justify collateral relief 19 years after his crime."). Petitioner contended that the record clearly supported granting an evidentiary hearing to hear from the attorneys involved to verify both the actual plea history in petitioner's case and the consequences of the deficient performance by counsel.

The Eleventh Circuit denied the motion for certificate of appealability without stating any grounds for its decision, just as the district court had done. App. 1a. The Eleventh Circuit then denied petitioner's motion for reconsideration, basing its denial solely on that court's rule that obtaining reconsideration by a second judge requires that

the petitioner raise "*new* evidence or arguments of merit warranting relief." App. 2a (emphasis added).

REASONS FOR ISSUING THE WRIT

The Court should grant certiorari because the decision of the district court is not fact-bound, but instead represents part of a steady stream of district court summary denials of evidentiary hearings in § 2255 cases on the mistaken theory that a petitioner must prove prejudice in the petition, rather than alleging it and then proving it at an evidentiary hearing. The right of habeas corpus remains an important protection of liberty. Particularly in cases where ineffective performance by counsel is conceded, and where prejudice is at least a facially reasonable possibility, denying an evidentiary hearing to the petitioner does not serve the interest of justice and runs counter to this Court's precedents.

In *Lafler v. Cooper*, 566 U.S. 156, 168 (2012), this Court explained: "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Id.* at 168. The district court assumed the truth of petitioner's allegations that counsel had inexcusably failed to convey a favorable plea offer that petitioner would have accepted, but ruled that petitioner's § 2255 motion had not established that resolving the state case by accepting the plea offer would have obviated a federal prosecution.

The validity of petitioner's allegations of ineffective assistance of counsel—where the government did not dispute that defense counsel failed to convey to petitioner

significantly favorable plea offers that petitioner would have accepted—make this case a particularly appropriate vehicle for certiorari review of certificate of appealability determinations following the summary denial of relief to *pro se* movants.

The district court treated petitioner's prejudice argument as one based merely on a *post hoc ergo propter hoc* argument, but that court failed to weigh the usual course of practice in state-federal matters for which local law enforcement was the sole investigating agency. There was not even an affidavit or an unsworn declaration by a federal prosecutor stating that the federal government would have proceeded with the case if a plea deal had already been reached in state court. Considered in the context of experience and the *Petite* policy,[1] petitioner's claim was not based on a logical fallacy, but a practical near-certainty that could readily have been fully proven at an evidentiary hearing.

The events—including both the decision of the state prosecutors to turn the case over to federal authorities only after petitioner appeared to have refused to even respond to plea offers and the purely local-police creation of the case—rendered subject

[1] *See Thompson v. United States*, 444 U.S. 248, 248 (1980) ("The Department of Justice has a firmly established policy, known as the '*Petite*' policy, under which United States Attorneys are forbidden to prosecute any person for allegedly criminal behavior if the alleged criminality was an ingredient of a previous state prosecution against that person. An exception is made only if the federal prosecution is specifically authorized in advance by the Department itself, upon a finding that the prosecution will serve "compelling interests of federal law enforcement.").

to dispute by reasonable jurists the district court's erroneous conclusion that what almost certainly occurred was merely a speculative possibility.[2]

The certificate of appealability gatekeeping function requires a petitioner to do no more than "make a preliminary showing that his claim was debatable." *Buck v. Davis*, 137 S.Ct. 759, 774 (2017). The denial of an evidentiary hearing to petitioner presented at least a debatable issue.

As this Court explained in *Lafler*, if "the right to effective assistance of counsel in considering whether to accept" a plea offer "is denied, prejudice can be shown if loss of the plea opportunity led to ... the imposition of a more severe sentence." *Id*. at 168. The district court's summary denial of relief precluded the *pro se* petitioner from proving what he had reasonably alleged, likely prejudice that was not refuted by anything in the record or anything submitted by the government.[3] *See also Glover v. United States*, 531 U.S. 198, 203-04 (2001) (a 6- to 21-month increase in a sentence would be prejudicial).

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[2] Particularly in light of modern plea practices over the past 40 years in which a defendant's plea rejection readily leads to substantially greater punitive consequences, *see Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978), the likelihood that petitioner could prove prejudice was substantial.

[3] The government's response to the plea representation claim was limited to an argument, unsupported by any affidavit or citation to the record, denying that petitioner's acceptance of the state court plea offer would have affected the decision to prosecute him federally: "The United States was not bound by any ... State plea offer and [petitioner] has *established no facts to support his contention that the United States would not have proceeded* with a prosecution in the face of a state conviction." U.S. Resp. to Petitioner's § 2255 Motion (Mar. 10, 2017) at page 16 (emphasis added).

The district court resolved the matter essentially on the premise that a favorable state court resolution of matters over which federal authorities share jurisdiction does not *guarantee* anything in federal court. But petitioner was not obligated to prove certainty of prejudice, and was not obligated to prove anything until an evidentiary hearing was conducted to determine what he reasonably alleged was at stake in the failure of counsel to convey the favorable offer, whether there was any actual probability of federal prosecution after a state plea, and whether the state sentence would, as petitioner alleged, have been at least five years less than the federal sentence.

A recent study supports petitioner's position that certificates of appealability are being denied by placing too heavy a burden on petitioners to establish the claims in advance of an evidentiary hearing and that the absence of reasoned explanations for the denial of the certificate creates a severe risk of injustice. *See* Luis Angel Valle, *Certificates of Appealability as Rubber Stamps* (Apr. 14, 2020), https://ssrn.com/abstract=3576026 (attached at App. 19–102). Reviewing all Eleventh Circuit certificate of appealability decisions available on Westlaw between January 2018 and September 2019, the study finds that in a large percentage of cases, the orders fail to reveal the reasoning for denial. The absence of such explanation in petitioner's case increases the risk that just as the district court failed to consider the practical realities of state-federal interactions in local law enforcement investigations as well as the impact of the *Petite* policy, the Eleventh Circuit also failed to incorporate such

factors while also elevating the § 2255 pleading burden to a level not warranted by this Court's decisions.

An evidentiary hearing on a § 2255 claim is required unless there is conclusive—and hence uncontradicted—proof in the files and records of the case showing that the claim *cannot* be established. "Unless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief," § 2255 mandates a hearing. 28 U.S.C. § 2255(b) (emphasis added). Because this Court has recognized the importance of the full and fair evidentiary hearing required by the statute, it has found the denial of a hearing an error worthy of reversal. *See Sanders v. United States*, 373 U.S. 1 16-17, 19-20 (1963) (holding petitioner entitled to second habeas petition to obtain "full and fair" hearing); *see also Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus."); *Machibroda v. United States*, 368 U.S. 487, 494-96 (1962); *Blackledge v. Allison*, 431 U.S. 63, 72-75 (1977) (affirming appellate ruling that denial of § 2255 hearing was reversible error).

The Rules Governing § 2255 Proceedings make clear that statutory language requiring a hearing absent conclusive refutation of the claim by the record is intended to incorporate the standards governing evidentiary hearings in habeas corpus cases stated in *Townsend v. Sain*, 372 U.S. 293, 312 (1963). *See* Advisory Committee Notes

to Rule 8, Rules Governing § 2255 Proceedings (incorporating Advisory Committee Notes to Rule 8 of the Rules Governing § 2254 Cases).

In *Townsend*, the Court held that the district court must hold an evidentiary hearing if: (1) the prisoner alleges facts that, *if true*, would entitle him to relief; and (2) the relevant facts have not yet been reliably found after a full and fair hearing. *Id.*, 372 U.S. at 312–13. Once the movant has alleged facts which, if true, would entitle him to relief, a hearing is required. Thus, unless the record facts conclusively show that the movant is *not* entitled to relief, a hearing is required under § 2255. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973) (relying upon § 2255's language to reverse summary dismissal and remand for a hearing because the record of the case did not "'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255").

Tellingly, the certificate of appealability "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (test is whether jurists of reason could disagree with failure to conduct an evidentiary hearing); *see id.* 537 U.S. at 338 ("We do not require petitioner [whose petition was denied without an evidentiary hearing] to *prove*, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.") (emphasis added).

The present case provides an excellent vehicle for addressing issues that are of special importance in assuring that this Court's precedents regarding the conducting

of evidentiary hearings and review for certificates of appealability are followed and thereby to enforce the important safeguard of habeas corpus.

CONCLUSION

The Eleventh Circuit's decision in petitioner's case warrants review.

Respectfully submitted,

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Miami, Florida
July 2020

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11350-E

LOUIS RUGGIERO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Louis Ruggiero's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11350-E

LOUIS RUGGIERO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before: GRANT and LUCK, Circuit Judges.

BY THE COURT:

Louis Ruggiero has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's November 22, 2019, order denying him a certificate of appealability ("COA") to appeal the district court's order denying his 28 U.S.C. § 2255 motion. Upon review, Ruggiero's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LOUIS RUGGIERO,

Petitioner,

v. Case No: 6:16-cv-1946-Orl-37TBS

UNITED STATES OF AMERICA,

Respondent.
_____/

OPINION AND ORDER

This cause comes before the Court on Louis Ruggiero's ("Petitioner's" or "Ruggiero's") motion to vacate, set aside, or correct an illegal sentence. (Doc. 1, filed November 7, 2016). Respondent filed a response in opposition to the motion (Doc. 4), and Ruggiero has filed a reply. (Doc. 21). The motion is ripe for review. Upon review of the pleadings, the Court concludes that Ruggiero's § 2255 motion must be denied.

I. Background and Procedural History

On February 21, 2013, a federal grand jury in Orlando, Florida returned an indictment charging Ruggiero with three counts of enticing a minor to engage in sexually explicit conduct in order to produce child pornography, in violation of 18 U.S.C. § 2251(a) (counts one through three); one count of attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b) (count four); and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (count five). (Cr. Doc. 13).

The charges against Ruggiero were based on two separate crimes. Count Four of the indictment was based on Ruggiero's communications with and attempts to engage in

sexual activity with a person he believed to be a 13-year-old child. *See* discussion *infra* Ground Four. After Ruggiero was arrested for this crime, law enforcement examined his personal computer and discovered that it contained photographs of Ruggiero engaging in sexual activity with a fifteen-year-old child. Counts One, Two, Three, and Five of the indictment are child pornography charges based upon Ruggiero's production of these photographs. (Cr. Doc. 13).

Ruggiero entered into an agreement with the government to plead guilty to counts one and four of the indictment, but he expressly reserved his right to challenge the constitutionality of 18 U.S.C. § 2251(a) on direct appeal. (Cr. Doc. 86 at 1-2; Cr. Doc. 123 at 7-11, 30, 36). Pursuant to the plea agreement, the government agreed not to prosecute Petitioner on the remaining counts. (Cr. Doc. 86 at 4). After holding a sentencing hearing, the Court sentenced Ruggiero to concurrent terms of 240 months in prison on counts one and four. (Cr. Doc. 107, 114).

On direct appeal, Ruggiero challenged the constitutionality of 18 U.S.C. § 2251(a), but on June 30, 2015, the Eleventh Circuit Court of Appeals rejected the challenge and affirmed the convictions and sentences. (Cr. Doc. 134); *United States v. Ruggiero*, 791 F.3d 1281 (11th Cir. 2015).

II. Legal standards

A. Standard of Review under 28 U.S.C. § 2255

Title 28 U.S.C. § 2255 provides federal prisoners with an avenue for relief under limited circumstances:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

> sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). If a court finds a claim under § 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* at § 2255(b). To obtain this relief on collateral review, a petitioner must clear a significantly higher hurdle than exists on direct appeal. *See United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

B. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Ruggiero must show that: (1) "counsel's representation fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). These two elements are commonly referred to as *Strickland*'s performance and prejudice prongs. *Reece v. United States*, 119 F.3d 1462, 1464 n.4 (11th Cir. 1997). If a petitioner fails to establish either *Strickland* prong, the Court need not consider the other prong in finding that there was no ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 at 689–90. Thus, a court, when considering an ineffectiveness claim, must judge the reasonableness of

counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id*. at 690; *see also Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals:

> [The test for ineffective assistance of counsel] has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. Strickland encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220–21 (11th Cir. 1992) (citation omitted). Under these rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. Analysis

Ruggiero raises nine grounds for relief in his § 2255 motion. (Doc. 1 at 13-14). He asserts that: (1) his sentencing enhancement was improper because there was no victim involved in count four of the indictment; (2) defense counsel Thomas Sommerville and Mark Horwitz (collectively, "Counsel") failed to object to the sentencing enhancement for "pattern of activity" even though both counts arose from one incident; (3) the imposition of a twenty-year sentence violates the Eighth Amendment to the United States Constitution; (4) Counsel was ineffective for failing to object to the twenty year sentence he received on Count Four on the ground that it violated the Eighth Amendment; (5)

Counsel was ineffective for failing to notify him of a state plea offer of five years in prison; (6) his plea was not knowing and voluntary because Counsel failed to discuss with him all elements of count one of the indictment; (7) 18 U.S.C. § 2251(a)(e) is so broad that it leads to an arbitrary and capricious result; (8) Counsel was ineffective for failing to object to 18 U.S.C. § 2251(a)(e) on the ground that Ruggiero's conduct did not meet the definition of a crime; and (9) 18 U.S.C. § 2251(a)(e) as a crime goes beyond the Commerce Clause of the United States Constitution that it is a violation of Florida's police powers. (*Id.*).

After Respondent filed a response to the claims, Ruggiero withdrew grounds one, two, and six from his § 2255 motion. (Doc. 16; Doc. 20). Accordingly, this Court will discuss Grounds Three, Four, Five, Seven, Eight, and Nine.

A. Grounds Three, Seven, and Nine

In Ground Three, Ruggiero asserts that his Eighth Amendment right against cruel and unusual punishment was violated by the Court's imposition of a twenty-year sentence on count one of the indictment. (Doc. 1 at 13). In Ground Seven, Ruggiero asserts that the jurisdictional provision of 18 U.S.C. § 2251(a) is unconstitutionally vague. (*Id.* at 14). In Ground Nine, Ruggiero asserts that 18 U.S.C. § 2251(a) is unconstitutionally vague, overbroad and exceeds Congress' Tenth Amendment Commerce Clause powers. (*Id.*).

Respondent contends that these grounds are procedurally barred because Ruggiero failed to raise them in the district court or on direct appeal. (Doc. 5 at 14, 18-19). Indeed, a motion to vacate under § 2255 is not a substitute for direct appeal, and

issues which could have been raised on direct appeal are generally not actionable in a § 2255 motion and will be considered procedurally barred. *Lynn v. United States*, 365 F.3d 1225, 1234–35 (11th Cir. 2004); *Bousley v. United States*, 523 U.S. 614, 621 (1998); *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011). An issue is "'available' on direct appeal when its merits can be reviewed without further factual development." *Lynn*, 365 F.3d at 1232 n. 14 (quoting *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994)).

Absent a showing that the ground of error was unavailable on direct appeal, a court may not consider it in a § 2255 motion unless the defendant establishes: (1) cause for not raising the ground on direct appeal and actual prejudice resulting from the alleged error; or (2) that he is "actually innocent." *Lynn*, 365 F.3d at 1234; *Bousley*, 523 U.S. at 622 (citations omitted). To show cause for procedural default, a defendant must show that "some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [defendant's] own conduct." *Lynn*, 365 F.3d at 1235. A meritorious claim of ineffective assistance of counsel can constitute cause. *See United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000).

In his reply, Ruggiero argues that his claims are not defaulted because they are "tied to or directly related to ineffective assistance of trial counsel." (Doc. 21 at 2). Ruggiero then urges that Grounds Three and Four are "related," as are Grounds Seven, Eight, and Nine. (*Id.* at 2, 21). Ruggiero raises separate Sixth Amendment claims of ineffective assistance of counsel in Grounds Four and Eight that are predicated on Counsel's failure to raise the constitutional issues argued in Grounds Three, Seven, and

Nine. (Doc. 1 at 13-14). However, a Sixth Amendment ineffective assistance claim is distinct from the defaulted constitutional claims raised in Grounds Three, Seven, and Nine, and such a claim has entirely different elements of proof. *See Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (rejecting the petitioner's argument of "identity" between his constitutional and Sixth Amendment claims, and noting that "[w]hile defense counsel's failure to [raise the appropriate constitutional claims] is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof."). Ruggiero advances no cause for his failure to raise Grounds Three, Seven, and Nine on direct appeal, and he does not offer new evidence to support a claim of actual innocence. Accordingly, Grounds Three, Seven, and Nine are defaulted, and the claims are dismissed.

B. Ground Four

Ruggiero asserts that:

> Counsel was ineffective for failing to object to a sentence of 240 months (20 yrs) in Count 4 of the indictment as "excessive" and which violates the 8th Amendment of the United States Constitution.

(Doc. 1 at 13). Ruggiero pleaded guilty to count four of the indictment: attempting to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b).[1] In the

[1] This statute reads:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who

factual basis for his plea, Ruggiero admitted that he responded to an advertisement on an e-commerce website placed by the Orange County Sheriff's Office.[2] Ruggiero contacted an undercover law enforcement officer (posing as the stepfather of a 13-year-old girl), and they discussed Ruggiero having sex with the child. (Cr. Doc. 86 at 22-23). Ruggerio sent the fictitious child photographs of his penis and described to an officer posing as the child the sexual activities he planned with her. Thereafter, Ruggiero traveled to the address provided by the undercover officer, where he was arrested. (*Id.*).

After accepting Ruggiero's plea, during which Ruggiero acknowledged the accuracy of the factual basis, a sentencing hearing was held. (Cr. Doc. 132). The Court acknowledged that the guidelines sentence for Ruggiero's offenses ranged from 27 to 33 years. (*Id.* at 14). However, because "the application of a guideline sentence on the facts of this case would result in an unjust sentence," the Court departed downward to impose concurrent terms of 240 months on counts one and four of the indictment. (*Id.* at 19-20).

> has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2422(b). The "attempt" clause of the statute can be violated when the defendant communicates with a government agent pretending to be an adult intermediary, rather than a minor, so long as the defendant believes he is communicating with an adult intermediary. *United States v. Murrell*, 368 F.3d 1283, 1286–88 (11th Cir. 2004).

[2] For the sake of brevity, neither the entire factual basis for Petitioner's plea nor details surrounding his arrest will be re-stated in this Order. The factual basis is appended to Petitioner's plea agreement. (Cr. Doc. 86 at 22-23).

Ruggiero now urges that Counsel was ineffective for not urging that this sentence violates the Eighth Amendment. (Doc. 1 at 13). The Cruel and Unusual Punishments Clause of the Eighth Amendment encompasses a "narrow proportionality principle that applies to non-capital sentences." *Harmelin v. Michigan*, 501 U.S. 957, 991 (1991). However, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence" and "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001. The Supreme Court has admonished that successful Eighth Amendment challenges should be "exceedingly rare" in noncapital cases. *Solem v. Helm*, 463 U.S. 277, 289-90 (1983).[3] Indeed, the Eleventh Circuit routinely rejects Eighth Amendment challenges to sentences imposed on defendants who attempt to entice children to engage in sex. *See Farley*, 607 F.3d at 1343-43 (rejecting an Eighth Amendment challenge to a 30-year mandatory minimum sentence for crossing a state line with intent to engage in a sexual act with a child under the age of 12); *United States v. Lecuyer*, 545 F. App'x 874, 875 (11th Cir. 2013) (a 120-month sentence is not grossly disproportionate to the crime of attempting to entice a 13-year-old child to engage in sex); *United States v. Worsham*, 479 F. App'x 200, 206 (11th Cir. 2012) (a life sentence for violation of 18 U.S.C. § 2422(b) does not violate the Eighth Amendment); *United States v. Levinson*,

[3] In the last century, *Solem* is the only case in which the Supreme Court has held that a non-capital sentence imposed on an adult was constitutionally disproportionate. That case involved a defendant sentenced to life in prison without parole for "uttering a 'no account' check for $100." 463 U.S. at 281. *See United States v. Farley*, 607 F.3d 1294 (11th Cir. 2010) (summarizing the Supreme Court's historical treatment of prisoner claims raised under the Cruel and Unusual Clause of the Eighth Amendment).

504 F. App'x 824, 830 (11th Cir. 2013) (480-month sentence for attempting to entice a minor to engage in sexual activity was "not grossly disproportionate to his crimes.").

The overwhelming precedent establishes that Ruggiero's proposed Eighth Amendment challenge to his below-guidelines sentence on the 18 U.S.C. § 2422(b) conviction would not have succeeded. Therefore, reasonable competent counsel could have declined to make such an argument. Counsel is not ineffective for failing to raise claims "reasonably considered to be without merit." *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). Moreover, because such a challenge would have been unsuccessful, Ruggiero was not prejudiced by Counsel's failure to make the arguments he now advances. Ground Four fails to satisfy either *Strickland* prong, and the claim is denied.

C. Ground Five

Ruggiero asserts that Counsel was ineffective for failing to notify him that the state offered a plea of sixty months in prison on the state enticement charges.[4] (Doc. 1 at 13). He asserts that his failure to accept this plea, "allowed" federal prosecution and a fifteen-year increase in his prison sentence. (*Id.*). Ruggiero urges that it was only after the plea offer lapsed that the state contacted federal authorities, and had he known of the offer, he "would have accepted the State's plea offer and federal authorities would never have become involved." (Doc. 21 at 10). In support of this claim, Ruggiero attaches portions of the state court record to his reply. (Doc. 21-1; Doc. 21-2; Doc. 21-3; Doc. 21-4; Doc. 21-5; Doc. 21-6; Doc. 21-7; Doc. 21-8).

[4] Petitioner was originally arrested by state law enforcement authorities. (Cr. Doc. 86 at 22-23).

On November 12, 2014, the state of Florida charged Ruggiero by information with: (1) traveling for the purpose of engaging in child abuse or other unlawful sexual conduct with a child after using an electronic device to entice or lure the child (or person believed to be a child) to engage in sexual activity, in violation of Florida Statue § 847.0135(4)(a) (count one); (2) utilizing a computer or other electronic device to attempt to seduce, solicit, lure or entice a child (or person believed to be a child) to engage in sexual activity, in violation of Florida Statute § 847.0135(3) (count two); and (3) attempting to engage in sexual activity with a person between the ages of twelve and sixteen, in violation of Florida Statute §§ 800.04(4)(a) and 777.04 (count three). (Doc. 21-4 at 5-7). All of these counts were directed towards Ruggiero's communication with the undercover agent and his attempt to engage in sexual activity with the agent's fictitious thirteen-year-old stepdaughter.

On November 27, 2012, Assistant State Attorney Jerry Jenkins made a plea offer to Counsel for five years in prison, three years of sex offender probation, and dismissal of counts two and three in exchange for Ruggiero's guilty plea to count one of the information. (Doc. 21-1). The offer was set to expire on January 21, 2013. (*Id.*). On January 2, 2013—before the expiration of the plea—Jenkins made a new offer, set to expire "at the next scheduled pre-trial date," of ten years in prison, five years of sex offender probation, and dismissal of count two in exchange for a guilty plea to counts one and three. (Doc. 21-1). On February 5, 2013, the State entered a *nolle prosequi* as to all counts because the case was "being prosecuted by federals." (Doc. 21-3). Ruggiero now urges that Counsel did not inform him of the State's plea offers, and had he done so, he would

have accepted the plea, avoided federal prosecution, and served only five years in prison. (Doc. 21 at 11-13).

Ruggiero is not entitled to relief on this claim. The State's five-year plea offer was withdrawn before the offer's expiration date, and it is unclear as to whether the ten-year offer had expired before the state entered a *nolle prosequi* on the state charges. Nevertheless, it is unnecessary for this Court to consider whether Counsel performed deficiently for failing to promptly inform Ruggiero of the State's plea offers because he cannot demonstrate *Strickland* prejudice from Counsel's failure to do so.

First, neither of the state's plea offers encompassed Ruggiero's production of child pornography or potential state charges for lewd and lascivious battery on a minor; rather, they encompassed only the charges involving Ruggiero's communications with and attempted sexual activity with the fictitious thirteen-year-old child. Had the state prosecuted Ruggiero separately on the pornography and sexual battery charges, there is no assurance that his sentence would not have exceeded that which he received in federal court.[5] Although Ruggiero asserts that he would not have faced prosecution (state or federal) on the pornography charges had he accepted the state's offer on the enticement charges (Doc. 21 at 13-14), he offers nothing to support this assertion. Mere speculation cannot support an ineffective assistance claim. *United States v. Frady*, 456 U.S. 152, 170

[5] Statements made by Counsel suggests Petitioner would have received a substantial sentence on the state pornography and sexual battery charges. At Petitioner's plea colloquy, Counsel told the Court that he had an agreement with the Statewide Prosecutor's Office to dismiss Ruggiero's pending charges (presumably the charges stemming from his sexual activity with a minor) if Petitioner received at least fifteen years in prison on his federal charges. (Cr. Doc. 123 at 39-40).

(1982) (A movant "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.").

Next, nothing in the record suggests that the federal government would have abandoned its own prosecution—on either the enticement or the pornography charges—had Ruggiero pleaded guilty to the state enticement charges. Under the "dual sovereignty doctrine," even separate prosecutions for two identical offenses does not violate the Double Jeopardy Clause if they are prosecuted by different sovereigns. *Heath v. Alabama*, 474 U.S. 82, 92 (1985) (citing *United States v. Lanza*, 260 U.S. 377 (1922)). Thus, even had Ruggiero accepted the plea in state court on the state enticement charges, it would not have barred his federal prosecution on either the pornography or the enticement charges, or both.[6] *Lanza*, 260 U.S. at 382 ("[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."). Because Ruggiero has not met his burden of showing *Strickland* prejudice, he cannot demonstrate ineffective assistance, and Ground Five is denied.

D. Ground Eight

Ruggiero asserts that Counsel was ineffective for failing to argue that his conduct under the indictment did not meet the definition of a crime under § 2251(a) and (e). (Doc.

[6] Nor would it have stopped the Statewide Prosecutor from pursuing the state sexual battery charges.

1 at 14). Specifically, he urges that the statute is "so broad, that enforcement leads to an arbitrary and compricious [sic] result, as it is only state governments that have general police power, and not the federal government." (*Id.*). He argues that the statue "goes beyond" the Commerce Clause of the United States Constitution and that it is "a violation of Florida's police powers that are reserved to it under the 10th Amendment of the United States Constitution." (*Id.*).

Again, Ruggiero cannot demonstrate deficient performance or resulting prejudice from Counsel's alleged failure; any objection based on the arguments now urged would have been overruled. In *United States v. Parton*, the Eleventh Circuit rejected an identical argument as Ruggiero currently raises. 749 F.3d 1329 (11th Cir. 2014). In that case, Parton, (like Ruggiero) was charged under § 2251(a) with producing child pornography. He urged (as does Ruggiero) that '"the sole interstate commerce nexus asserted by the government [was] that the electronic device that [he] used to make the videos or photos traveled in interstate commerce." *Id.* at 1330. Parton argued that "such an interstate commerce nexus is too tenuous to support a federal prosecution." *Id.* However, relying on binding precedent, the Eleventh Circuit concluded that § 2251(a) criminalized the production of child pornography, and that "Congress has the power, as part of a comprehensive regulation of economic activity, to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 1331 (citing *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006); *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006)).

Given that binding Eleventh Circuit precedent foreclosed Ruggiero's instant argument, Counsel was not deficient for failing to raise it, and Ruggiero cannot demonstrate prejudice from his failure to do so. Ground Eight is denied.

Any of Ruggiero's allegations not specifically addressed herein have been found to be without merit. Because each claim raised in the petition is conclusory, meritless, or affirmatively contradicted in the record, an evidentiary hearing is not required. *See Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989).

Accordingly, it is hereby **ORDERED AND ADJUDGED:**

1. Ruggiero's motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) is **DENIED**.

2. The **Clerk of the Court** is directed to terminate any pending motions, enter judgment accordingly, and close this case.

3. The **Clerk of the Court** is further directed to file a copy of this Order in criminal case number 6:13-cr-32-Orl-37TBS and to terminate the motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Cr. Doc. 140) pending in that case.

IT IS FURTHER ORDERED:

A CERTIFICATE OF APPEALABILITY IS DENIED. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180 (2009). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Ruggiero must demonstrate that

"reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) or, that "the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003) (citation and quotation omitted). Ruggiero has not made the requisite showing in these circumstances. Because Ruggiero is not entitled to a certificate of appealability, he is not entitled to proceed *in forma pauperis* on appeal.

DONE and **ORDERED** in Orlando, Florida on March 9th, 2018.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties
SA: OrlP-4

Certificates of Appealability as Rubber Stamps

Luis Angel Valle[1]

INTRODUCTION

In 1997, Duane Buck was convicted of murdering his girlfriend and one of her friends.[2] During the sentencing phase of the trial, the jury—pursuant to the Texas Code of Criminal Procedure—could impose the death penalty only if it found Buck was "likely to commit acts of violence in the future."[3] Buck's attorney retained psychologist Dr. Walter Quijano, who produced a report that stated race was relevant to predicting Buck's future dangerousness.[4] Defense counsel nonetheless called Dr. Quijano to testify during the penalty phase of the proceeding, and, on cross-examination, Quijano reaffirmed his conclusion that because he was Black, Buck was more likely to act violently in the future.[5] The jury sentenced Buck to death.[6]

After unsuccessfully attacking his conviction and sentence through a direct appeal and petitions for state collateral review, Buck filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254 alleging, inter alia, that his trial counsel had rendered ineffective assistance by introducing Quijano's testimony regarding race as an indicator of future dangerousness. Because Buck had not raised this claim in his first state habeas petition, the district court found it was procedurally defaulted.[7] Ten years later, Buck, citing recent changes in the law that provided an

1 Columbia Law School, Class of 2021.
2 Buck v. Davis, 137 S. Ct. 759, 769 (2017).
3 Id. at 767--68 (citing Tex. Code Crim. Proc. Ann. Art. 37.071, § 2(b)(1) (Vernon 1998)).
4 Brief for Petitioner at 5, *Buck*, 137 S. Ct. 759 (No. 15-8049), 2016 WL 4073689.
5 *Buck*, 137 S. Ct. at 769.
6 Id.
7 Id. at 771.

excuse for this procedural default,[8] filed a motion to reopen the district court's judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).[9] The district court denied it.

As a federal habeas petitioner, Buck had no appeal as of right; instead, he needed to obtain a Certificate of Appealability ("COA"),[10] which requires making a "substantial showing of the denial of a constitutional right."[11] The Supreme Court has interpreted this language to require that a petitioner "show that reasonable jurists could debate whether . . . [his] petition should have been resolved in a different manner . . . ."[12] Either the district court or the circuit court may issue a COA. Both declined to do so in Buck's case.[13]

The Supreme Court reversed the Fifth Circuit,[14] criticizing it for reaching the underlying issue[15] at the COA stage, which should "not [be] coextensive with a merits analysis."[16] Instead, the court of appeals should merely have asked whether the district court's decision was

[8] In 2004, when Buck filed his [first] federal habeas petition, Supreme Court precedent did not consider ineffective assistance an excuse to procedural default. Coleman v. Thompson, 501 U.S. 722, 752-53 (1991). By 2014, two cases in the previous two terms had relaxed this bar, allowing ineffective assistance to constitute an excuse to a procedural default under certain circumstances. Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013); Martinez v. Ryan, 566 U.S. 1, 9 (2012).

[9] Id. at 767. This Rule allows a court to relieve a party of the effect of a judgment for certain specific reasons, Fed. R. Civ. P. 60(b)(1)-(5), or for "any other reason that justifies relief," Fed. R. Civ. P. 60(b)(6). The Court has interpreted subsection (6) to require a party demonstrate "extraordinary circumstances" in order to obtain relief. See Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

[10] See 28 U.S.C. § 2253(c)(1) (2012).

[11] See 28 U.S.C. § 2253(c)(2) (2012).

[12] Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Justice Scalia argued the debatability standard was distinct from the substantial showing one, and that the latter was thus a necessary but not sufficient condition of issuing a COA. See Section III.C.I.

[13] *Buck*, 137 S. Ct. at 771.

[14] Id. at 770. As Section I.C.3 discusses, the Court did not merely order the circuit court to issue a COA and consider the merits of whether the district court wrongly denied Buck's Rule 60(b)(6) motion. The Court itself assessed the merits of this claim, finding that Buck was entitled to Rule 60(b)(6) relief. Id. at 777-80.

[15] In this case, whether Buck had shown extraordinary circumstances so that the district court's denial of Rule 60(b)(6) relief was thus an abuse of discretion.

[16] Id. ("This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" (citing *Miller-El*, 537 U.S. at 336)).

debatable—the standard for whether to issue a COA.[17] The Court cautioned that "[w]hen a reviewing court . . . inverts the statutory order of operations and 'first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage."[18]

The proper standard with which to analyze COA requests has generated controversy[19] and litigation[20] since the mechanism was introduced in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[21] The Supreme Court has consistently reminded lower courts "not to unduly restrict . . . appellate review" [22] at this stage, but circuit courts continue to grant COAs at a low rate,[23] calling into question the integrity of the writ of habeas corpus. While the general demise of the writ has prompted vast academic discussion,[24] little scholarship has

[17] *Buck*, 137 S. Ct. at 774 (citing *Miller El*, 537 U.S. at 348).

[18] Id. (citing *Miller–El*, 537 U.S. at 326, 336--37).

[19] See, e.g., Ryan Hagglund, Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions, 72 U. Chi. L. Rev. 989 (2005) (arguing that the fact that half of circuit courts review the merits of COAs, even when granted improvidently, creates unfairness to defendants, is contrary to what Congress has expressly excluded from such review, and misallocates resources at different stages of the habeas appellate process); Margaret A. Upshaw, The Unappealing State of Certificates of Appealability, 82 U. Chi. L. Rev. 1609 (2015) (arguing that circuit courts should be allowed neither to review COAs *sua sponte* nor to accept defective COAs while ignoring party challenges).

[20] Tharpe v. Sellers, 138 S. Ct. 545 (2018); *Buck*, 137 S. Ct. 759; *Miller-El*, 537 U.S. 322; Slack v. McDaniel, 529 U.S. 473 (2000).

[21] Pub. L. No. 104-132, 110 Stat. 1214.

[22] McGee v. McFadden, 139 S. Ct. 2608, 2611 (2019); see, e.g., *Tharpe*, 138 S. Ct. 545; *Buck*, 137 S. Ct. 759; *Miller-El*, 537 U.S. 322; *Slack*, 529 U.S. 473.

[23] See, e.g., Nancy J. King, Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis, 24 Fed. Sent'g Rep. 308, 308 (2012) (noting that in a study of 2,384 randomly selected noncapital habeas cases, circuit courts as a whole granted only 7.52% of COAs).

[24] See, e.g., Stephen R. Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1219 (2015) ("Once hailed as the Great Writ, and still feted with all the standard rhetorical flourishes, habeas corpus has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution."); Lincoln Caplan, The Destruction of Defendants' Rights, New Yorker (June 21, 2015), https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights (noting that AEDPA "gutted the federal writ of habeas corpus" and that the "reversal rate of state courts in death penalty cases has been reduced by about forty per cent").

focused on the question of the COA process in general and circuit-court grant rates of COAs in particular, and how this question sheds light on the current state of habeas corpus.[25]

This article argues that in the COA context—especially in the Supreme Court cases evaluating COA denials—a tension arises between the formality of the law and substantive justice. In analyzing the rates at which courts of appeals deny COAs and the ways the Supreme Court reacts to such denials, we can begin to evaluate to what extent our legal system uses the "COA standard of review [as] a rubber stamp"[26] that effectively precludes meaningful appellate review and promotes a logic of detention while still paying lip service to the ideals judges reflect.[27]

Part I of this article contextualizes COAs, by sketching a history of habeas corpus, describing the statutory regime that created and governs COAs, and detailing the standard of review the Supreme Court has developed. Part II presents the results of empirical research conducted in support of this article, making limited empirical claims regarding the extremely disparate rates at which the Eleventh Circuit and Fifth Circuit grant COAs. It then provides two

[25] But see David Goodwin, An Appealing Choice: An Analysis of and a Proposal for Certificates of Appealability in Procedural Habeas Appeals, 68 N.Y.U. Ann. Surv. Am. L. 791 (2012) (exploring the standards federal appellate courts appear to be using when making a COA determination following the Supreme Court decisions in *Slack* and *Miller-El* and proposing a more lenient standard at the COA stage); Jonah J. Horwitz, Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging, 17 Roger Williams U. L. Rev. 695 (2012) (proposing that district court judges not be allowed to make a COA determination after having already ruled on the merits and suggesting that similar self-judging elsewhere in the judicial system should be eliminated).

[26] McGee v. McFadden 139 S. Ct. 2608, 2608 (2019) (Sotomayor, J., dissenting from the denial of certiorari).

[27] In an article titled "Habeas Corpus: From England to Empire," Professor Paul Halliday argues that the value of examining the development of habeas corpus law is not necessarily to "seek analogies . . . across time," but rather to observe the dynamic between two competing tendencies of legal systems that employ the writ: the "logic of detention" and the "persistent judge." See Paul D. Halliday, Habeas Corpus: From England to Empire 309 (2010). The former produces a system in which exceptional "classificatory approach[es] to detention" gradually subsume the determination of the propriety of detention in individual cases. *Id.* at 311. The latter embodies the innate sense that justice requires judges have the ability to provide individual prisoners with equitable relief.

potential explanations for this disparity, ultimately concluding that the disparity results from circuit courts' continued misapplication of the COA standard of review. Part III uses two recent Supreme Court cases involving COAs—*Tharpe v. Sellers*[28] and *McGee v. McFadden*[29]—to demonstrate how COAs operate as rubber stamps. Finally, Part III assesses a potential doctrinal shift—namely, granting COAs upon a substantial showing of a denial of a constitutional right without incorporating AEDPA deference—that could lead to more uniform application of the COA standard and increased COA grant rates in circuit courts, thereby creating more space for substantive justice.

I. The Writ of Habeas Corpus and AEDPA

A. Brief History of the Writ of Habeas Corpus

The writ of habeas corpus can be traced to the time of Henry VI, when it was "a means of relief from private restraint."[30] Use of the writ "became more frequent, and in the time of Charles I[], it was held an admitted constitutional remedy."[31] The writ was "well known to and used in

[28] 138 S. Ct. 545, 546 (2018).

[29] 139 S. Ct. 2608 (2019) (Sotomayor, J., dissenting from the denial of certiorari).

[30] Rollin C. Hurd, Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It: With a View of the Law of Extradition of Fugitives 145 (Albany, W.C. Little 1876); see also Nancy J. King & Joseph L. Hoffman, Habeas for the Twenty-First Century: Uses, Abuses and the Future of the Great Writ 5 (2011) ("Habeas corpus was employed by judges in England possibly as early as the fourteenth century and was well developed by the seventeenth century.").

[31] King and Hoffman, supra note 31, at 5; see also 17B Charles A. Wright et al., Federal Practice and Procedure § 4261 (3d ed. 2019) ("After a checkered career in which it was involved in the struggles between the common law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the Habeas Corpus Act of 1679.").

the Colonies . . . at least as early as 1692."[32] By 1787, all thirteen colonies and even the Northwest Territory enjoyed the benefits of the common-law writ of habeas corpus.[33]

The writ was not merely an inheritance of the English common law, but achieved great popularity in the colonies even "before the rest of England's legal traditions" caught on.[34] Furthermore, "it was the liberating power rather than the centralizing structure that inspired the colonists and motivated them to incorporate the writ into their legal order."[35] The colonists "adopted habeas in their own way, copying portions of the Habeas Act word for word, incorporating it into their common law, or affirming it through practice and legislation."[36] Anthony Gregory describes this process as the "Americanization of Habeas"---a process that resulted in a "decentralized, anti-royal, revolutionary conception of habeas corpus."[37] Key to this Americanization was the "reject[ion] [of] the British government's authority to define and circumscribe this right."[38]

Ultimately, the Constitution preserved the writ, providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the

[32] James F. Johnston, The Suspending Power and the Writ of Habeas Corpus 22 (Philadelphia, Hansebooks 1862) (noting also that the privilege of the writ of habeas corpus was known and used in England "nearly one hundred years before . . . [the] Constitution was made"); Postconviction Remedies § 1:4 (2019) (noting that the writ of habeas corpus was "omitted from early state constitutions precisely because it was thought to be too fundamental to be questioned").

[33] William F. Duker, A Constitutional History of Habeas Corpus 115 (1980).

[34] Anthony Gregory, The Power of Habeas Corpus in America, From the King's Prerogative to the War on Terror 50 (2013).

[35] Gregory, supra note 36, at 49--50 (noting that American colonists used the writ at a time when they were indifferent to the common law, suggesting "it was habeas corpus that facilitated the partial reception of the common law, and not vice versa" (quoting Badshah Mian, American Habeas Corpus 39 (1984))).

[36] Id. at 52

[37] Id. at 56--57

[38] Id. at 56 ("First demanding English rights while using English law as cover, then insisting on English rights under American law, then seeing those rights less in terms of the British legacy but rather in terms of their own national identity and . . . as a function of their status as human beings, the American colonists claimed their independence.").

public Safety may require it."[39] The Judiciary Act of 1789 further enshrined the writ, authorizing its use by the federal judiciary.[40]

In 1867, Congress expanded the "range of cognizable [habeas] claims from those drawing upon due process notions to constitutional claims of all sorts."[41] The next year, Chief Justice Chase, in *Ex parte Yerger* explained that "the great spirit and genius of our institution has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States."[42]

While the habeas corpus statutes were recodified several times after the 1867 Act, the "scope of the writ, insofar as the statutory language [i]s concerned, [was] not . . . altered substantially between 1867 and 1996, when Congress adopted the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA]."[43] Although the history of habeas corpus has been the "subject of intense, even bitter, debate,"[44] there is consensus that "[t]he Framers viewed freedom

[39] U.S. Const. Art. 1, § 9, cl. 2.

[40] Wright et al., supra note 32, § 4261.

[41] 1 Federal Habeas Corpus Practice and Procedure § 2.4(c) (2019); see also King and Hoffman, supra note 32, at 9 (noting that the 1867 act "empowered the lower federal courts to protect federal officials and the newly freed slaves from abusive imprisonment by the defeated Confederate states"). But see 1 Federal Habeas Corpus Practice and Procedure, supra, § 2.4(c) ("[The Habeas Corpus Act of 1867] had little effect because of the Court's adoption . . . of a *Catch 22* preclusion doctrine . . . . [E]xhaustion of state remedies doctrine required state prisoners to [first] challenge unconstitutional incarceration in state . . . courts . . . but then made the state courts' resolution of the issues *res judicata* in subsequent habeas corpus proceedings unless the detaining court lacked jurisdiction, had convicted the petitioner under an unconstitutional statute, or had imposed an unconstitutional sentence." (citing Ex parte Royall, 117 U.S. 241, 241 (1886))).

[42] Duker, supra note 34, at 6 (quoting Ex parte Yerger, 75 U.S. 85, 95 (1868)).

[43] Wright et al., supra note 32, § 4261 (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, title I, 110 Stat. 1214) ("[AEDPA] includes multiple important limitations on the availability of habeas relief in postconviction cases."). For an overview of the amendments to the habeas corpus statutes prior to AEDPA, see Limin Zheng, Note, Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions, 90 Calif. L. Rev. 2101, 2109--10 (2002). For a discussion of the changes AEDPA made to federal habeas corpus procedures, see infra Section I.B.

[44] For a description of the two competing standard descriptions of the writ, see generally 1 Federal Habeas Corpus Practice and Procedure § 2.3(c). See also Wright et al, supra note 32, § 4261 n.8 (describing a historical debate between Justices of the Supreme Court regarding the history of the writ).

from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."[45]

The history of habeas corpus provides two key insights. First, as Nancy King and Joseph Hoffman suggest, an analysis of habeas law must primarily rely on Supreme Court decisions because "the Court largely controls the ultimate interpretation of both the habeas statutes and the United States Constitution."[46] Indeed, although Congress initially defines the "role that habeas plays in contemporary America" through various statutes, the writ's "scope and applicability are controlled ultimately by the Supreme Court through interpretation of those statutes as well as of the Suspension Clause."[47] Second, although it relies on the "court's prevailing consensus about habeas history as the starting point for [its] theoretical and normative analyses,"[48] "[t]he constitutional importance of the writ of habeas corpus is in its function," and therefore, a consideration of the history in this section[49] may be instructive in deciding modern habeas cases.[50]

[45] 1 Federal Habeas Corpus Practice and Procedure § 2.3 (quoting Boumediene v. Bush, 553 U.S. 723, 739--740 (2008)). The Court has pointed to both "the care taken to specify the limited grounds for . . . suspension" and the ratification debates as "evidence that the Framers deemed the writ . . . an essential mechanism in the separation-of-powers scheme." Boumediene, 553 U.S. at 743.

[46] King and Hoffman, supra note 31, at x.

[47] Id. at 8. Because the statutory language did not change substantially between 1867 and 1996, the Supreme Court cases interpreting habeas law post-AEDPA will be most important to this Note's COA analyses. See supra note xx and accompanying text; see also Zheng, supra note 44, at 2103, 2114 ("[T]he Court has taken the lead in developing the modern writ. Until the enactment of the AEDPA, statutory amendments of federal habeas corpus law had largely been codifications of Supreme Court decisions. In sum, it is the interplay between federal statutes and common-law equitable principles that has defined the scope of federal habeas corpus review.").

[48] King and Hoffman, supra note 31, at x.

[49] See supra note 28--42 and accompanying text.

[50] Eric M. Freedman, Making Habeas Work: A Legal History 3.

B. Antiterrorism and Effective Death Penalty Act of 1996

1. *Legislative History*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law by President Clinton on April 24, 1996.[51] President Clinton claimed AEDPA did not make "substantive changes in the standards for granting the writ," maintaining that the statute would not "undercut . . . meaningful Federal habeas corpus review."[52] Yet AEDPA made major changes to federal habeas statutes for both state and federal prisoners, as well as to the Federal Rules of Appellate Procedure 22.[53]

James Liebman notes that AEDPA began as a proposal by Congress to cut federal habeas review of capital and noncapital criminal convictions.[54] The proposal moved slowly through Congress until Timothy McVeigh bombed the Murrah Federal Building in Oklahoma City, resulting in 168 deaths.[55] It only took a couple of weeks for Congress to attach "the Effective Death Penalty Act to a version of a Clinton administration proposal for an Antiterrorism Act."[56] It soon became a bipartisan effort, and AEDPA received enough support to pass.[57] AEDPA's

[51] 1 Federal Habeas Corpus Practice and Procedure, supra note 42, § 3.2.

[52] Id. (quoting Statement of the President of the United States upon Signing the Antiterrorism Bill (available in LEXIS, 32 Weekly Comp. Pres. Doc. 719 (White House, Apr. 24, 1996))). But see John H. Blume, AEDPA: The "Hype" and the "Bite," 91 Cornell L. Rev. 259, 259 & n.2 (2006) (noting that President Clinton made no attempt to derail AEDPA, but instead encouraged Democrats to vote for it, paying lip service to "meaningful federal court review of state court convictions" in his signing statement); James Liebman, An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases, 67 Brook. L. Rev. 412, 413 (2001) (arguing that President Clinton "demanded [AEDPA's] passage" after it encountered resistance in the House).

[53] Liebman, supra note 53, at 413.; Goodwin, supra note 24, at 807--08.

[54] Liebman, supra note 53, at 412.

[55] Id.

[56] Id.

[57] Id. at 413 ("AEDPA, thus, was the product of the bizarre alignment of three ill-starred events: Timothy McVeigh's twisted patriotism and disdain for 'collateral damage,' the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation.").

habeas provisions have been analyzed extensively;[58] nonetheless, it is worth considering AEDPA's restrictions to better understand how, and to what extent, they altered the writ of habeas corpus.

2. *Relevant AEDPA Provisions*

i. Statute of Limitation

One of the most substantial changes came in the form of AEDPA's one-year statute of limitations for habeas petitions.[59] Before AEDPA, no such time limit existed;[60] instead, "the Supreme Court had declared that 'habeas corpus provides a remedy for jurisdictional and constitutional errors at the trial, without limit of time.'"[61] According to Liebman, this statute of limitations, in combination with the state-remedy exhaustion requirement,[62] posed notable dangers for state prisoners because "states [could] easily lure prisoners into missing the time bar simply by withholding lawyers from them at the state post-conviction stage of review."[63] The complexity of AEDPA's scheme further contributes to the risk a state prisoner will inadvertently miss this deadline. Due to the exhaustion requirement, the statute of limitations is tolled while the petitioner makes his way through state court—but only during the period that a *properly filed*

[58] See, e.g., Liebman, supra note 53; Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1 (1997); Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 Buff. L. Rev. 381 (1996); see also Blume, supra note 53, at 270 n.63 (collecting sources).

[59] 28 U.S.C. § 2244(d) (2012); 28 U.S.C. § 2255(f) (2012); see also Liebman, supra note 53, at 416 (arguing that the statute of limitations was "unprecedented in the history of habeas corpus").

[60] Blume, supra note 53, at 270 (noting that prior to AEDPA, there was no time limit on habeas petitions).

[61] Zheng, supra note 44, at 2127 (quoting United States v. Smith, 331 U.S. 469, 475 (1947)).

[62] For a federal court to have jurisdiction over a state prisoner's habeas petition, the petitioner must have exhausted state remedies, generally by raising his claims in a state post-conviction petition. 28 U.S.C. § 2254(b)--(c) (2012); Liebman, supra note 53, at 417. Only claims that were raised in the state petition may be considered on federal habeas review. 28 U.S.C. § 2244(b)--(c) (2012); Liebman, supra note 53, at 417.

[63] Liebman, supra note 53, at 416.

state post-conviction petition is actually pending.[64] Furthermore, AEDPA prohibits successive federal habeas petitions,[65] incentivizing state prisoners to wait as long as possible to file their petitions, but not so long that they miss the one-year deadline. Thus, although not a change of the writ's substance, AEDPA's statute of limitations serves to profoundly limit access to federal habeas review.

ii. Unreasonable Application of Law Standard

Section 2254(d), widely considered the "centerpiece of AEDPA,"[66] allows a federal judge to grant a state prisoner's habeas petition only if he finds that the state-court adjudication:

> (1) resulted in a decision that was *contrary to*, or involved an *unreasonable application* of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an *unreasonable determination* of the facts in light of the evidence presented in the State court proceeding.[67]

Section 2254(d), unlike other habeas statutes,[68] did not derive "from any Supreme Court decision . . . nor was it part of any previous habeas reform proposal offered by Congress or a habeas scholar."[69] Moreover, AEDPA's legislative history provides little guidance regarding this provision, leaving to federal courts the responsibility of elucidating its meaning.[70] The Supreme Court has decided that a state court decision is contrary to federal law if it "contradicts the governing law set forth in our cases, or if it confronts a set of facts that [are] materially

[64] 28 U.S.C. § 2244(d)(2) (2012) . The chances that such a petition may be improperly filed are not insignificant, especially since habeas petitioner usually complete this process without the help of a lawyer. Liebman, supra note 53, at 417.

[65] 28 U.S.C. § 2244(b).

[66] Blume, supra note 53, at 272 & n.84.

[67] 28 U.S.C. § 2254(d) (2012) (emphasis added).

[68] See, e.g., 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 CPC standard announced in Barefoot v. Estelle.").

[69] Blume, supra note 53, at 272--73.

[70] Id. at 273.

indistinguishable from a decision of this Court but reaches a different result."[71] A finding of "unreasonable application," on the other hand, is appropriate if the state court applied Supreme Court "precedents to the facts in an objectively unreasonable manner."[72] Liebman observes that this interpretation could produce the peculiar result of a court finding that the state court "decision violated supreme federal law," but nonetheless "be[ing] required to give legal effect to that illegal decision, including where the effect is a human being's execution."[73]

The Court has further interpreted § 2254(d) to restrict review "to the record that was before the state court that adjudicated the claim on the merits."[74] Samuel Wiseman argues that in eliminating prior safeguards such as allowing federal courts discretion to order "additional discovery, hold hearings, or supplement the record," the *Pinholster* decision "significantly exacerbates" the problems created by AEDPA.[75] Specifically, Wiseman highlights the fact that AEDPA not only "expanded the deference that federal courts must give to state court fact development and . . . interpretation of federal law," but also "remov[ed] the pre-AEDPA requirement that state postconviction review hearings be 'full and fair' before receiving deference."[76] The result of this deference in combination with the Supreme Court's decision in

[71] Id. at 274 (quoting Brown v. Payton, 544 U.S. 133, 141 (2005)).

[72] Id. at 274 (quoting Brown, 544 U.S. at 141 (citations omitted)).

[73] Liebman, supra note 53, at 418. See also id. at 419--20 ("[I]n . . . *Williams v. Taylor*, the Supreme Court indeed interpreted § 2254(d) to limit habeas corpus relief to only "unreasonable" constitutional violations . . . ."). Liebman further argues that such an interpretation of § 2254(d) is unconstitutional because it appears to deny Article III judges "'effectual power to restrain or correct' state court 'infractions' of federal law . . . thereby [preventing them from] enforc[ing] the Supremacy Clause of the Constitution." Id. at 420--21.

[74] Cullen v. Pinholster, 563 U.S. 170, 180 (2011). Just as in the statute-of-limitations context, the state-exhaustion requirement contributed to the severity of this result; the Court's decision rested on the notion that "[i]t would be contrary to that [requirement's] purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court . . . ." Id. at 182.

[75] Samuel R. Wiseman, Habeas After *Pinholster*, 53 B.C. L. Rev. 953, 972 (2012).

[76] Id.

Pinholster, Wiseman argues, is that a habeas petitioner with a deficient factual record before the state court "will have little chance of success in obtaining relief."[77]

iii. Certificate of Appealability Replaces Certificate of Probable Cause

Most centrally to this article, AEDPA amended the habeas appeal procedure set forth in 28 U.S.C. § 2253, by providing that both § 2254 and § 2255 petitioners must obtain a COA before an appeal may be taken to the court of appeals.[78] Prior to AEDPA, a habeas petitioner had to obtain a "certificate of probable cause" (CPC) in order to appeal, by "mak[ing] a substantial showing of the denial of [a] federal right" so that the court was convinced the appeal consisted of "something more than the absence of frivolity."[79] Some courts, echoing the sentiment of the Conference Committee Report, have argued that the COA requirement similarly prevents "frivolous appeals."[80]

Once a district court "enters the 'final order adverse to the applicant,' it 'must issue or deny a certificate of appealability.'"[81] If the district court grants a COA, the court must specify which issues satisfy § 2253(c)(2)'s requirement of a substantial showing of the denial of a constitutional right.[82] If, however, the district court denies a COA, the petitioner must apply for one to a circuit judge or the court of appeals.[83] Appellate Rule 22(b) provides that "[i]f no express request for a certificate [of appealability] is filed, the notice of appeal constitutes a

77 Id.

78 28 U.S.C. § 2253(c)(1) (2012).

79 Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (quoting Harry A. Blackmun, Allowance of in Forma Pauperis Appeals in S 2255 and Habeas Corpus Cases., 43 F.R.D. 343, 352 (1968)).

80 Wright et al., supra note 32, § 3968.1 (citing Sengenberger v. Townsend, 473 F.3d 914, 915 (9th Cir. 2006)).

81 2 Federal Habeas Corpus Practice and Procedure, supra note 42, § 35.4 (first quoting Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts; then quoting Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts). Before entering such final order, a district court may also request that parties brief the COA issue. See id.

82 Id.

83 Id.

request addressed to the judges of the court of appeals."[84] If a circuit court denies a COA, the petitioner can appeal such decision via certiorari to the Supreme Court.[85] In addition to these procedures, circuit courts "may have their own local rules for COA applications.[86]

The procedural steps for seeking a COA are not dissimilar from those for obtaining a CPC.[87] "Indeed, except for substituting the word 'constitutional' for the word 'federal,' § 2253 is a codification of the CPC standard"[88] the Supreme Court had articulated. Despite the facial similarities between the CPC and COA mechanisms, however, the ways in which the Court has refined the standard for issuing COAs has altered the role this threshold inquiry plays in regulating access to habeas review.

C. *Slack* and its Progeny: The Court Defines the COA Standard

1. *Slack v. McDaniel*

The Supreme Court has, on numerous occasions, attempted to clarify the proper COA standard.[89] The Court's first major decision concerning COAs was *Slack* v. *McDaniel*. Convicted of second-degree murder in state court, Slack sought a writ of habeas corpus in federal

[84] Id. (internal quotation marks omitted) (quoting Fed. R. App. 22(b)(2)).

[85] Id.

[86] Id. For example, in the Fifth Circuit, all COA applications and responses must conform to the formatting requirements and the length limitations of Fed. R. App. P. 32(a), and 5th Cir. R. 32. Pro se habeas petitioners are given a deadline to file a COA, "filing any briefs, for paying fees, or for complying with other directives of the court. Federal Rules of Appellate Procedure with Fifth Circuit Rules and Internal Operating Procedures 42-1 (2018). If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal without further notice, 15 days after the deadline date." Id.

[87] 1 Federal Habeas Corpus Practice and Procedure, supra note 42, § 3.2 (noting that the requirements of a COA are similar to those of the CPC, but noting that a COA "must indicate not only that the case as a whole, but also that a specific issue or issues satisfy the requisite standard").

[88] Slack v. McDaniel, 529 U.S. 473, 483 (2000). The CPC standard, set forth in *Barefoot v. Estelle*, required a petitioner to make "a substantial showing of the denial of a federal right." 463 U.S. 880, 893 (1983).

[89] See supra note 19.

court, which the district court dismissed on procedural grounds.[90] After finding that the post-AEDPA version of § 2253—that is, the COA rather than the CPC mechanism—applied to the petitioner,[91] the Court proceeded to lay out the proper standard for evaluating COA requests.[92]

The State argued that § 2253 only allowed appeal of constitutional rulings and thus Slack should not receive a COA since the district court did not address the merits of his constitutional claims in dismissing his petition. The Court rejected this argument, noting that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights" and that Congress "expressed no intention to allow [district] court procedural error to bar vindication of substantial constitutional rights on appeal."[93]

In order to "make [the] substantial showing of the denial of a constitutional right" required to obtain a COA, a petitioner must show 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.'"[94] That is, a petitioner has to show that "reasonable jurists" would find debatable the district court's decision, regardless of whether it rested on an assessment of the petitioner's constitutional claims or on a procedural ruling.[95] In the latter case, the court of appeals must find debatable not only of the correctness of the procedural ruling, but also of "whether the petition states a valid claim of the denial of a

[90] *Slack*, 529 U.S. at 478--79. Slack had previously filed a petition containing claims he had not raised in state court, which the district court dismissed without prejudice so that he could exhaust his state remedies. When Slack returned to federal court, he raised additional claims he had not included in his first federal petition. The district court dismissed as successive these Slack's claims on the grounds that they constituted a successive petition barred by 28 U.S.C. § 2244(b). Id. at 479.

[91] Though Slack filed his federal habeas petition before AEDPA, he did not seek appellate review until two years after AEDPA's effective date. Id. at 482.

[92] Id. at 481.

[93] Id. at 483.

[94] Id. at 483--84 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)).

[95] Id. at 484.

constitutional right."[96] Though it does not matter the order in which a court assesses these issues and "a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent," constitutional avoidance counsels resolving the procedural question first.[97] Finally, the Court explained, in cases where a "plain procedural bar is present" and properly invoked, by definition "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further."[98]

Because Slack did not address the debatability of whether his petition raised a valid constitutional claim before the Supreme Court—he only challenged the district court's procedural ruling—the Court only undertook the procedural inquiry, ultimately finding that the district court improperly concluded Slack's petition was successive. Therefore, "reasonable jurists could conclude that the District Court's . . . holding was wrong."[99] Accordingly, the Court reversed the court of appeals judgment and remanded the case for a determination of whether Slack satisfied the other component necessary to obtain a COA of a procedural denial: that jurists of reason would at least find it debatable whether his petition stated a valid constitutional claim.[100]

[96] Id. at 484--485.
[97] Id. at 485.
[98] Id. at 484.
[99] Id. at 486--489 (explaining that a petition filed after dismissal of an initial petition "for failure to exhaust state remedies is not a second or successive petition"). Central to this conclusion were two previously decided cases, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1988); and *Rose v. Lundy*, 466 U.S. 510 (1982), that clearly contemplated allowing state prisoners to file a valid federal habeas petition after initially filing one that raised unexhausted claims.. Id.
[100] Id. at 484, 490.

Scalia joined the majority's opinion with the exception of the parts discussing whether Slack's petition was successive.[101] Scalia argued that Slack was thus not entitled to a COA and that the Court should affirm the court of appeals's decision.[102] Because Scalia did not explicitly disagree with the COA standard of review, as articulated by the majority opinion it is not clear how he could have reached that conclusion. That is, the fact that Scalia disagreed with the majority opinion's holding—that the District Court's abuse of the writ holding was wrong—demonstrates that reasonable jurists would find this issue *debateable*.

2. *Miller-El v. Cockrell*

The Court again took up the issue of whether a circuit court improperly denied a COA in *Miller-El v. Cockrell*. Miller-El raised in his habeas petition an Equal Protection claim stemming from the prosecution's allegedly racially discriminatory use of preemptory strikes during jury selection.[103] After assessing the merits of this claim, the district court denied relief. Miller-El then sought a COA from the court of appeals. Though the circuit court correctly stated the COA standard (as announced in *Slack*),[104] it based its decision to deny a COA on the grounds that the state court's resolution of Miller-El's claim was not "unreasonable" and that Miller-El did not present "clear and convincing evidence" otherwise.[105] Importantly, this language comes not from § 2253—which structures the appeal process, including the COA mechanism—but from § 2254—which governs federal courts' resolution of the *merits* of state prisoners' habeas

[101] Id. at 490 (Scalia, J., concurring in part and dissenting in part). According to Scalia, "neither the holdings nor even the language of [the] opinions" cited by the majority supported the proposition that "a prisoner whose federal petition is dismissed to allow exhaustion may return to federal court without having his later petition treated as second or successive." Id. at 491.

[102] Id. at 493.

[103] Miller-El v. Cockrell, 537 U.S. 322, 326 (2003).

[104] Id. at 330.

[105] Id. at 330-31.

petitions and prescribes the level of deference they must accord state courts in this process.[106] The case thus required the Court to explore the roles merits review and deference play when a circuit court makes a COA determination.[107]

The Court reiterated that the COA inquiry does "not occasion . . . a ruling on the merits of petitioner's claim,"[108] but nonetheless requires "a general assessment" of them.[109] The Court emphasized, however, that "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it."[110] Indeed, the COA "determination is a separate proceeding, one distinct from the underlying merits."[111] The Court clarified that though the COA standard should not be interpreted as always requiring a COA to issue, nor does it "require a showing that the appeal will succeed."[112] This discussion

[106] In the broader habeas literature, decisions such as the circuit court's in Miller-El's may be described as procedural, rather than as an assessment of the merits; the adjudication of whether Miller-El presented clear and convincing evidence that a state court's factual determination was wrong does not resolve the ultimate issue of whether he was denied equal protection of the law. By contrast, in the COA context, §§ 2254(d) and (e) are not procedural because they relate to the ultimate issue of whether a petitioner is entitled to relief, as opposed to the procedural issue of whether he is entitled to a COA.

[107] Id. at 327, 340-41.

[108] Id. at 331.

[109] Id. at 336. Interestingly, the Court itself nonetheless devotes an entire subsection of its discussion of the facts to the evidence supporting petitioner's equal protection claim, see id. at 331-35, and another five pages to a "preliminary, though not definitive consideration of [the meaning of these facts under] the three-step framework mandated by *Batson*," see id. at 3338, 42-47. For example, the Court noted that all but one of the black jurors was excluded by peremptory strike, id. at 331; that "the manner in which members of the venire were questioned varied by race," id. at 332; that the prosecution requested jury shuffling "when there were a predominant number of African-Americans in the front of the panel, id. at 334; that a district judge who had served in the District Attorney's office that prosecuted petitioner testified that he was warned that he would be fired if any black people were to serve on a jury, id.; and that a jury manual from that DA's office adopted a "formal policy to exclude minorities from jury service," id. at 334--335. This review of the record included testimony from judges and prosecutors who observed the prosecutor in petitioner's case systematically exclude African-Americans from juries.

[110] Id.

[111] Id.

[112] Id. at 337 ("By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not."); id. at 337-38 ("The holding in *Slack* 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. . . . [A] claim can be debatable even though

reflects the Court's particular concern that a court of appeals would judge a habeas petition on the merits and then justify its COA decision based on such analysis---doing so would be "deciding an appeal without jurisdiction."[113]

Turning to deference, the Court first acknowledged its centrality to § 2254, noting that, "[i]n the interest of finality, AEDPA constrains a federal court's power to disturb state-court convictions."[114] Nonetheless, the majority found that the court of appeals had erected "too demanding a standard" by merging the "independent requirements" of two separate AEDPA deference provisions: § 2254(d) and § 2254(e)(1).[115] That is, a petitioner does not have to prove by clear and convincing evidence that the lower court's *decision* was unreasonable.[116] Further, subsection (d)(2)'s unreasonable requirement "applies to the *granting of habeas relief* rather than to the granting of a COA."[117] Thus, the circuit court's conflation of these two provisions was erroneous not only because it misunderstood the clear-and-convincing-evidence provision,[118] but

every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.").

[113] Id. at 342.

[114] Id. at 326. See also id. at 324 ("When 28 U.S.C. § 2254 applies, our habeas jurisprudence embodies this deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).") For a general discussion of AEDPA deference, see Section I.B.2.b.

[115] *Miller-El*, 537 U.S. at 341. The former prevents federal judges from granting habeas relief to state prisoners on claims previously adjudicated on the merits by the state (which means virtually all claims given the state-exhaustion requirement) unless the state-court *decision* was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts. The latter establishes a presumption of correctness for state-court *determinations* of factual issues, which the petitioner can rebut by clear and convincing evidence.

[116] Id. at 341--42 ("The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement . . . .").

[117] Id. at 342 (emphasis added).

[118] Id. at 341 (noting that the court of appeals incorrectly interpreted § 2254 as "requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence").

also because it allowed the court to reach the merits of Miller-El's constitutional claim at the COA stage.[119] Instead of determining "whether the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1), to petitioner's *Batson* claim was debatable amongst jurists of reason," the circuit court analyzed "whether the trial court's determination of [this claim] was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary."[120]

The Court then applied the COA standard of review as articulated in *Slack* to petitioner's application[121] and concluded that a COA should have issued.[122] The Court noted that the "statistical evidence alone"—the prosecutor had used ten of his fourteen peremptory strikes on African Americans—was sufficient to "raise some debate" as to whether the prosecutor excluded jurors based on race.[123]

Justice Thomas, dissenting, argued that § 2254(e)(1) applies at the COA stage because the provision "draws no distinction between the merits appeal and the COA."[124] Indeed, § 2254(e)(1) applied to the CPC, the COA's predecessor.[125] Because this section "establishes a presumption of correctness," and because AEDPA does not "create exceptions to factual deference for procedural infirmities," Justice Thomas concluded that Miller-El was required, and failed, to "demonstrat[e] by clear and convincing evidence that even one of the preemptory

[119] Id. at 342 ("The question is the debatability of the underlying constitutional claim, not the resolution of that debate.").

[120] Id. at 341.

[121] Id. at 327 ("A petitioner satisfies [the § 2253(c)(2)] standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.").

[122] Id. at 334--35.

[123] Id. at 342.

[124] Id. at 356 (Thomas, J., dissenting). See also id. at 355 ("Instead of presuming the state court's factfindings to be correct, as § 2254(e)(1) requires, the Court holds that petitioner need only show that reasonable jurists could disagree as to whether he can provide clear and convincing evidence that the finding was erroneous.");

[125] Id at 356--57.

strikes at issue was the result of racial discrimination."[126] He thus would have affirmed the denial of a COA.[127]

3. *Buck v. Davis*

In *Buck v. Davis*, the petitioner sought a writ of habeas corpus claiming ineffective assistance of counsel.[128] In its denial of a COA, the Fifth Circuit held that Buck's claims were "unremarkable as far as . . . claims go" and that he had not "shown extraordinary circumstances that would permit relief."[129] The Court criticized this framing, explaining that the "[q]uestion for the Fifth Circuit was not whether Buck had 'shown extraordinary circumstances' or 'shown why [Texas's broken promise] would justify relief from the judgment.'"[130] Instead, the court of appeals should have asked whether the district court's decision that Buck had not demonstrated such circumstances was debatable.[131]

The respondent argued that because the Fifth Circuit conducts extensive briefing and occasionally hears oral arguments at the COA stage, it properly made a determination on the merits of Buck's claim.[132] The Court rejected this claim, merely using it as yet more evidence that the court of appeals's inquiry was too broad for the COA stage.[133]

[126] Id. at 358, 359-60, 370 ("[R]easonable jurists could debate whether a *Batson* violation occurred only if petitioner first meets his burden under § 2254(e)(1).").

[127] Id. at 370.

[128] Buck v. Davis, 137 S. Ct. 759, 767 (2017). For a more detailed discussion of the facts underlying the case, see the Introduction.

[129] Id. at 773 (citing Buck v. Stephens, 623 F. App'x 668, 673 (5th Cir. 2015)). Buck had moved pursuant to Fed. R. Civ. P. 60(b)(6) to reopen the district court's denial of his habeas petition, which requires demonstrating extraordinary circumstances. See supra note 8 and accompanying text.

[130] Id. (citing *Stephens*, 623 F. App'x at 669, 774).

[131] Id.

[132] Id. ("Indeed, in one recent case, it 'received nearly 200 pages of initial briefing, permitted a reply brief, considered the parties' supplemental authorities, invited supplemental letter briefs from both sides, and heard oral argument before denying the request for a COA.'" (quoting Brief for Respondent at 50--51)).

[133] Id. at 774.

After issuing these rebukes, the Court noted that § 2253 does not "limit the scope of [its own] consideration of the underlying merits" and decided to "meet the decision below . . . on [its] own terms" by considering the merits of Buck's ineffective assistance of counsel and Rule 60(b)(6) claims.[134] The Court found that petitioner demonstrated both that he had received ineffective counsel and that he was entitled to relief under Rule 60(b)(6).[135] Because the court made such a finding, it reasoned that the circuit court necessarily "erred in denying Buck the COA required to pursue these claims on appeal."[136]

Justice Thomas dissented, arguing that while the majority correctly identified the COA standard articulated in *Slack* and *Miller-El*, it "wrongly criticize[d]" the Fifth Circuit for holding that petitioner "ha[d] not shown extraordinary circumstances" and therefore could not be eligible for Rule 60(b)(6) relief .[137] Justice Thomas urged that a court, in denying a COA, must "necessarily find" a petition meritless.[138] Under the Court's COA standard, Justice Thomas argued, *no* petition could be denied—a result contrary to 28 U.S.C. § 2253(c)(2).[139] Justice Thomas observed the irony that the Court performed its own merits analysis—even deciding the ineffective assistance of counsel claim which had not been considered by the Fifth Circuit—in justifying its reversal of the Fifth Circuit on the grounds it had improperly reached the merits.[140]

[134] Id. at 775--80.
[135] Id. at 780.
[136] Id.
[137] Id. at 781 (Thomas, J., dissenting) (quoting majority opinion at 773).
[138] Id. ("A reviewing court cannot determine that a claim is indisputably meritless (that is, nondebatable) without first deciding that it is meritless.").
[139] Id. at 782.
[140] Id. at 782. ("The majority also has things just backwards. It criticizes the Fifth Circuit for undertaking a merits inquiry to deny a COA (when such an inquiry is required) and then it conducts a merits inquiry to decide that petitioner's claim is debatable (when such an inquiry is inappropriate).").

II. COA STUDY

Buck's counsel appended to his petition for certiorari a study that measured the rates at which district courts and courts of appeals within the Eleventh, Fifth, and Fourth Circuits granted COAs in capital cases.[141] This study revealed that while courts in the Eleventh and Fourth Circuit granted COAs in nearly all capital cases, those in the Fifth Circuit granted COAs in only 41% of capital cases.[142] The *Buck* court did not mention these statistics in its opinion, but Justice Kagan questioned the respondent about this discrepancy during oral arguments.[143] Justice Kagan noted that although the Fifth Circuit and the Eleventh Circuit are "roughly similar circuits," COAs are "denied in capital cases ten times more in the Fifth Circuit" suggesting that "one of these two circuits is doing something wrong."[144]

This article, like the *Buck* study, focuses on the Fifth and Eleventh Circuits. The Supreme Court's most recent COA jurisprudence is a product of COA judgments from these circuits.[145] Moreover, the dramatic difference between the Fifth and Eleventh Circuit in capital COA grants urges examining whether this trend persists in noncapital cases.

A. Methodology

The results of the Eleventh Circuit are taken from a study I helped design and to which I provided research support and supervision.[146] I conducted a separate study to obtain the results of

[141] Petition for Writ of Certiorari at i, *Buck*, 137 S. Ct. 759 (No. 15-8049), 2016 WL 3162257; see also Brief for Petitioner, supra note 3, at i.

[142] Brief for Petitioner, supra note 3, at i. The Fourth Circuit granted 100%, the Eleventh Circuit 93.7%, and the Fifth Circuit 41% of their respective COA applications in capital cases. See Brief for Petitioner at 4a, 19a, & 34a, Buck v. Davis, 137 S. Ct. 759 (2017) (No. 15-8049).

[143] Oral Argument Transcript at 38, *Buck*, 137 S. Ct. 759 (No. 15-8049), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-8049_4f15.pdf.

[144] Id. at 38.

[145] See, e.g., Tharpe v. Sellers, 138 S. Ct. 545 (2018); *Buck*, 137 S. Ct. 759; Miller-El v. Cockrell, 537 U.S. 322 (2003).

[146] See Julia Udell, Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study (December 24, 2019), https://ssrn.com/abstract= 3506320 (on file with author).

the Fifth Circuit. Both studies used the same methodology: the search term—(c.o.a. (cert! /2 appeal!) /7 deny! denied denial grant!) /20 2018 2019—was entered into Westlaw's docket search function to identify all cases involving a certificate of appealability in each respective circuit court.[147] The study is limited to cases between January 2018 and September 2019. The range was limited to those specific dates because petitions during this time period occurred after the Court's opinions in *Buck v. Davis* and *Tharpe v. Sellers*. The search term yields about 1,400 results for the Eleventh Circuit and about 350 results for the Fifth Circuit. For each case, the COA determination, date, and judge's initials were recorded.

This study also reviewed all COA orders available on Westlaw in the Fifth Circuit and Eleventh Circuit from January 2018 to September 2019. To obtain these orders, the search term "28 U.S.C. 2253" was entered into Westlaw; then the cases citing this statute were filtered by date and jurisdiction. A search within these results for "certificate #of appealability" or "COA" further narrowed the results. For each COA order, the following was recorded: whether the habeas petition was made pursuant to 28 U.S.C. § 2254 or §2255, whether the petition was granted, the length of the order granting or denying the COA,[148] the COA standard cited, the language used to justify the COA determination, and whether the petitioner was pro se.

[147] See id. at 4--5. These studies, unlike that in *Buck*, did not include COA determinations by district courts.

[148] Any decision shorter than three full paragraphs was labeled "short"; every other decision was labeled "long."

B. Results

1. *Declining grant rates in capital cases in the Fifth and Eleventh Circuits*

Of the cases reviewed by the Eleventh Circuit, 1,091 contained a COA determination.[149] The grant rate for capital cases was 58.3%.[150] Of the cases reviewed in the Fifth Circuit, 259 contained a COA determination.[151] The grant rate for capital cases was only 13.33%.[152] The grant rate in capital cases appears to have decreased sharply in both circuits, with rates dropping from 41% to 13.33% in the Fifth Circuit and from 93.7% to 58.3% in the Eleventh. Despite the drastic decrease in the Eleventh Circuit, the circuit split identified in the *Buck* study persists.

Udell's study also notes that the grant rate among individual judges in the Eleventh Circuit varies widely; one judge granted 25.81% of the ninety-three COA applications before him, while another granted only 5.49% of the ninety-one applications he heard.[153] Justice Kagan's criticism of the discrepancy between grant rates in the Fifth and Eleventh circuit applies with equal force to the variation in grant rates between judges *within* the Eleventh circuit; "one of these two [judges] is doing something wrong."[154]

[149] Other cases were excluded for a variety of reasons including, for example, a COA request still pending in the circuit court or the circuit court making a COA determination outside the designated date range.

[150] See Udell, supra note 148, at 7.

[151] See Certificates of Appealability as Rubber Stamps Data Set, on file with author. Other cases were excluded for a variety of reasons including, for example, a COA request is still pending in the circuit court or the circuit court made a COA determination outside the designated date range. Around 30% of the excluded cases were not included because they did not meet the Fifth Circuit Rules and Internal Operating Procedures' COA requirements. See Federal Rules of Appellate Procedure with Fifth Circuit Rules and Internal Operating Procedures, http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/federalrulesofappellateprocedure.pdf. These dismissals are discussed further in Section II.B.2.iii.

[152] Id.

[153] Udell, supra note 148, at 10.

[154] Oral Argument Transcript, supra note 145, at 38.

2. *Why are COAs being Denied?*

The second part of the study provides critical insight into the standard being used to resolve and the reasons for denying these applications. This part of the study reviewed all COA orders available on Westlaw for the prescribed date range,[155] which included 258 cases in the Eleventh Circuit and 95 cases in the Fifth Circuit.[156]

i. Overview

The study demonstrates that a large portion of the COA orders—43% in the Eleventh Circuit and 47.3% in the Fifth Circuit—are fewer than three paragraphs long.[157] In the Eleventh Circuit, 70% of the orders cite only *Slack*, 18% cite the statutory language[158] alone, and the remaining 3% solely cite *Miller-El*.[159] By contrast, in the Fifth Circuit, a combination of cases is more likely to be cited: 58% of COA orders cite *Slack*, 44% *Miller-El*, and 18.9% *Buck*.[160] In both circuits, COA-application decisions typically consist of a citation to § 2253, the *Slack/Miller-El* standard of review, a brief procedural history, and a conclusory sentence stating that the petitioner failed to meet his burden or that reasonable jurists would not disagree with the district court's decision.[161] Twelve percent of orders in the Eleventh Circuit and 21% percent in the Fifth Circuit were explicitly decided on procedural grounds.[162] The prevalence of short orders

[155] See methodology in Section II.A.

[156] See Certificates of Appealability as Rubber Stamps Data Set, on file with author. For a list of reasons certain cases were excluded see supra note 148.

[157] See Certificates of Appealability as Rubber Stamps Data Set, on file with author. Any COA order fewer than three paragraphs was labeled as "short".

[158] See 28 U.S.C. § 2253(c)(2)("Substantial showing of the denial of a constitutional right.").

[159] See Certificates of Appealability as Rubber Stamps Data Set, on file with author.

[160] See id.

[161] See, e.g., Bell v. USA, No. 19-12465-A, 2019 WL 4755712 (11th Cir. Sept. 26, 2019); LeBlanc v. Davis, No. 19-40244, 2019 WL 4467094, at *1 (5th Cir. Aug. 30, 2019); Kinney v. Attorney Gen., Fla., No. 19-10728-B, 2019 WL 4034421, at *1 (11th Cir. Aug. 26, 2019); United States v. Martinez, 768 F. App'x 285 (5th Cir. 2019).

[162] Procedural grounds in this context means that the habeas claims were either defaulted and not subject to an exception or not exhausted in lower courts. Because a large percentage of orders are decided

containing very limited information makes it difficult in many instances to determine why the judge denied a COA.

ii. The Role of AEDPA Deference in COA Determinations

Two trends emerge in the data that are arguably a product of AEDPA deference: the tendency for courts to interpret §§ 2254(d) and (e) as calling for merits analysis at the COA stage and the tendency for courts to issue brief COA orders that rely principally on deference to lower court findings.

Miller-El demonstrated the confusion AEDPA's deference provisions can insert into COA determinations.[163] Despite the Supreme Court's instruction in that case that, at the COA stage, a circuit court should ask whether the "District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1), to petitioner's . . . claim was debatable amongst jurists of reason,"[164] this study reveals the extent to which judges continue to struggle to understand the role §§ 2254(d)(2) and (e)(1) play at the COA level under *Slack* and its progeny.

Slater v. Davis, a Fifth Circuit death penalty case, best illustrates the difficulty of incorporating AEDPA deference into the COA analysis. The habeas petitioner sought a COA from the Fifth Circuit after his claim that his trial counsel rendered ineffective assistance by, inter alia, failing to request a jury instruction on the lesser-included offense of murder failed.[165]

with vague language (e.g., the petitioner has not made requisite showing), it is not clear how many other orders were decided on these grounds.

[163] See Section I.C.2.

[164] Miller-El v. Cockrell, 537 U.S. 322, 341 (2003). The Court also explained that Subsection (d)(2) only applies to the granting of habeas relief, not the granting of a COA, id. at 341--42, cautioning that even if the merits of the case will turn on agreement or disagreement with the state court's factual findings, a circuit court need not make a definitive inquiry into these findings because "a COA determination is a separate proceeding, one distinct from the underlying merits." Id. (citing Slack v. McDaniel, 529 U.S. 473, 481 (2000)). To the extent that a habeas petition does turn on such findings, "the clear and convincing evidence and objective unreasonableness standards will apply. See id. at 342.

[165] Slater v. Davis, 717 F. App'x 432, 435 (5th Cir.), cert. denied, 139 S. Ct. 99 (2018).

Petitioner's trial attorney submitted an affidavit stating that this decision was made at the petitioner's request, which the petitioner disputed.[166] In denying the COA, the Fifth Circuit judge explained that "Slater has not presented clear and convincing evidence that would rebut the state court's finding that [his lawyer's] affidavit was reliable and Slater's was not credible."[167] The judge then concluded that the petitioner also failed to show that "the district court's finding under [ineffective-assistance-of-counsel caselaw] is debatable among jurists of reason."[168] Even assuming the court meant to cite to § 2254(e)(1), it still appears that it is no longer merely deciding the threshold inquiry—the debatability of the underlying constitutional claim—but instead resolving that debate.[169] That is, it appears as though the court has decided the merits of the ineffective assistance of counsel claim and then used this determination to justify its denial of a COA .[170]

Such overreach repeats itself in the Fifth Circuit cases the study reviewed. In *Batiste v. Davis*, another death penalty case, the court acknowledges that the COA inquiry is a limited one that avoids using "the merits of the appeal as a means to justify a denial of a COA."[171] However, the court proceeded to list the requirements of § 2254d(1) and (2).[172] While incorporating this standard is not technically incorrect,[173] the court's holding[174] suggests that its invocation of

[166] Id.

[167] Id. (citing 28 U.S.C. § 2254(d)(1)). Note that the clear-and-convincing-evidence requirement is actually contained in § 2254(e)(1).

[168] Id.

[169] See *Miller-El*, 537 U.S. at 342.

[170] Buck v. Davis, 137 S. Ct. 759, 774 (2017) (citing *Miller–El*, 537 U.S. at 326, 336--37).

[171] Batiste v. Davis, 747 F. App'x 189, 193 (5th Cir. 2018), cert. denied, 139 S. Ct. 1601, 203 L. Ed. 2d 757 (2019).

[172] Id.

[173] See infra note 265.

[174] *Batiste*, 747 F. App'x at 194–195 ("The district court found the state court habeas resolution of this issue to be reasonable, and we agree without reaching the issue of prejudice. . . . Batiste's trial counsel acted in an objectively reasonable manner in investigating, selecting and presenting mitigation evidence.").

AEDPA deference allowed it to reach the merits of the case, instead of merely to evaluate the debatability of the district court's determination. In *Thompson v. Davis*, for example, the Court held that where a petitioner "seeks a COA on claims denied on the merits by the state habeas court" he must meet the substantive requirements of §2254(d).[175] *Milam v. Davis* similarly discusses at length the level of deference § 2254d(1) and (2) afford state courts before accepting the district court's conclusion that the petitioner "failed to show that his ineffective-assistance-of-trial-counsel claim has any merit sufficient to overcome the . . . hurdle [posed by ineffective-assistance-of-counsel caselaw]."[176] Based on this finding, the circuit court concluded the petitioner's claims did not satisfy the COA debatability requirement.[177]

The Eleventh Circuit is also replete with examples in which the circuit court appears to surpass the threshold COA inquiry of debatability. In fact, the data suggest that judges who write short orders are likely surpassing the threshold COA inquiry of debatability. Consider, for instance, *Winslow v. Secretary, Department of Corrections*, where the circuit court explained that "[a]pplying deference, the state court's denial of relief was not contrary to federal law or based on an unreasonable determination of the facts."[178] Or *Campana v. Secretary, Department of Corrections,* which held that, "[t]o succeed on an ineffective-assistance claim . . ., a [§ 2254] petitioner must establish that the relevant state court decision was contrary to, or an unreasonable

[175] Thompson v. Davis, 916 F.3d 444, 453 (5th Cir. 2019) ("Thompson's petition is 'also subject to the deferential standards of AEDPA.' . . . [H]e must show that the state court's decision was 'contrary to' or 'involved an unreasonable application of' clearly established federal law, or that it 'was based on an unreasonable determination of the facts' given the record before the state court." (first quoting *Charles v. Stephens*, 736 F.3d 380, 387 (5th Cir. 2013) (per curiam), then quoting *Harrington v. Richter*, 562 U.S. 86, 100 (2011))). In *Thompson*, the court held that "[g]iven the deferential AEDPA review standards, jurists of reason would not debate the state court's denial of relief in light of the lack of factual support for this contention." Id. at 454.

[176] 733 F. App'x 781, 785 (5th Cir.), cert. denied, 139 S. Ct. 335 (2018).

[177] Id.

[178] Winslow v. Sec'y, Dep't of Corr., No. 18-13525-K, 2019 WL 948355, at *1 (11th Cir. Jan. 24, 2019).

application of, *Strickland v. Washington*."[179] After evaluating the merits of both *Strickland* factors, the order concluded "the state court's denial of these claims was not contrary to, or an unreasonable application of, *Strickland*, and no COA should issue . . . ."[180]

Similarly, the court in *Coleman v. Florida Department of Corrections* explained, "Because [the petitioner] has not established that the state court either unreasonably applied clearly established federal law or made an unreasonable determination of the facts, his motion for a COA is denied."[181]

Compounding this overreach is the brevity of most COA orders, which makes it difficult to determine the extent to which a circuit court has gone beyond the threshold inquiry and "place[d] too heavy a burden on the prisoner at the COA stage."[182]

iii. Pro Se Petitioners

[179] Campana v. Sec'y, Dep't of Corr., No. 18-13236-K, 2019 WL 3545591, at *1 (11th Cir. Jan. 31, 2019). *Strickland*, the backbone of ineffective-assistance jurisprudence, lays out a two-prong test: did counsel's performance fall below an objective standard of reasonableness and if so, did this ineffective performance prejudiced the petitioner's defense. 466 U.S. 668, 687 (1984).

[180] *Campana*, 2019 WL 3545591, at *1.

[181] Coleman v. Fla. Dep't of Corr., No. 18-11358-B, 2018 WL 7954623, at *2 (11th Cir. Sept. 5, 2018) (capitalization altered).

[182] See, e.g., Woodruff v. Davis, No. 18-10133, 2018 WL 9815191, at *1 (5th Cir. Sept. 20, 2018), cert. denied, 140 S. Ct. 108 (2019) ("This court looks to the district court's application of the Antiterrorism and Effective Death Penalty Act in making that determination." (first citing *Miller-El*, 537 U.S. at 336; then citing 28 U.S.C. § 2254(d) (2012)). For other examples in which the Eleventh Circuit appears to surpass the threshold COA inquiry see Mollica v. United States, No. 18-14100-J, 2019 WL 4784788, at * 2 (11th Cir. Mar. 14, 2019) (noting that the petitioner "failed to show how counsel's performance was deficient or how she was prejudiced by counsel's alleged deficiency in this regard" and, on this basis, concluding that a COA was not warranted); Fortune v. Sec'y, Dep't of Corr., No. 18-13813-E, 2019 WL 1163849, at *2 (11th Cir. Feb. 12, 2019) ("The state post-conviction court's decision was not contrary to, or an unreasonable application of, *Strickland* . . . . Fortune was not prejudiced by his counsel's failure to consult an expert witness, more thoroughly cross-examine the state's expert, or object to the prosecutor's statements during closing argument . . . ." (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); 28 U.S.C. § 2254(d)(1) (2012))); Milling v. Sec'y, Dep't of Corr., No. 17-15095-B, 2018 WL 2254674, at *1 (11th Cir. Mar. 21, 2018) ("The state habeas court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts in denying [petitioner's] claim . . . . No COA is warranted on this claim."); Ramos v. Sec'y, Fla. Dep't of Corr., No. 18-12078-G, 2018 WL 6131829, at *1 (11th Cir. Nov. 15, 2018) ("The state court's denial of Ramos's ineffective-assistance claim was neither contrary to, nor did it involve an unreasonable application of, clearly established federal law . . . .").

Importantly, around 82.4%[183] of the applications for a COA in the Eleventh Circuit cases and 67.3%[184] of those in the Fifth Circuit cases were filed pro se. Notably, although § 2254 contemplates an initial screening to be performed by a judge,[185] some local procedures delegate this task to "nonjudicial pro se staff."[186] This second-hand treatment is reminiscent of that in cases attacking criminal convictions or asserting prisoners' rights, especially those that involve pro se litigants.[187] In the Third Circuit, for example, "in any habeas case requiring a certificate of appealability . . . and any other civil matter in which one of the parties is proceeding pro se," it is court staff-attorneys who first assess a case's merits in "a memorandum and proposed order."[188] Moreover, pro se petitioners face insurmountable resource constraints and lack the expertise needed to navigate AEDPA's framework.[189] Given that COA applicants are overwhelmingly pro

[183] See Certificates of Appealability as Rubber Stamps Data Set, on file with author. Of the 257 noncapital petitions, 83% were filed pro se. The only capital petition in the dataset was not. Id.

[184] See id. Ten percent of capital petitions and 94% of noncapital ones were filed pro se. Id.

[185] 28 U.S.C. § 2254(a) (2012) ("The *Supreme Court*, a *Justice* thereof, a circuit *judge*, or a *district court* shall entertain an application for a writ of habeas corpus . . . ." (emphasis added)).

[186] Katherine A. Macfarlane, Shadow Judges: Staff Attorney Adjudication of Prisoner Claims, 95 Or. L. Rev. 97, 119–20 (2016)

[187] William M. Richman & William L. Reynolds, Injustice on Appeal: The United States Courts of Appeals in Crisis (2013) (citing an interview with a Senior Member of the Staff Attorney Office in the U.S. Court of Appeals for the Third Circuit); see also, Macfarlane, supra note 186, at 107 ("The District of Colorado's local rules refer to a 'judicial officer designated by the Chief Judge' who 'shall review the pleadings of a prisoner . . . to determine whether the pleadings should be dismissed summarily' for several reasons, including 'challenging prison conditions' or 'asserting claims pertinent to his or her conviction or sentence.'").

[188] Marin K. Levy, The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts, 61 Duke L.J. 315, 391 (2011).

[189] See Emily Garcia Uhrig, "The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus," 14 U. Pa. J. Const. L. 1219, 1273 (2012) ("But once the procedural barricade of AEDPA was erected and pro se inmates were required to navigate the intricacies of a short statute of limitations, together with the exhaustion and procedural default doctrines and the new bar on successive petitions, the courthouse doors in effect slammed shut.").

se, AEDPA's one-year statute of limitations, strict exhaustion requirement, and intricate procedural default doctrines "ha[ve] erected an impenetrable barrier to federal habeas review."[190]

In addition to the obstacles imposed by AEDPA, the docket in the Fifth Circuit reveals further barriers facing pro-se COA petitioners.[191] Around 30% of the cases that were excluded from the data set—35 in total—were disposed of administratively for failure to comply with local Fifth Circuit rules concerning COAs, such as filing deadlines and fee schedules.[192] The rules further provide that failure to comply within 15 days of these deadlines will result in dismissal of the COA application (and thus the appeal) *without further notice*.[193] Therefore, a pro se petitioner may be under the impression his COA application is pending only to find out it has been dismissed for failure to pay a filing fee, since which time AEDPA's statute-of-limitations clock has been running.

III. COAs as Rubber Stamps

In one sense, the results of these studies are not surprising; the difficulty of receiving a COA may at first seem like just another way in which the writ of habeas corpus has weakened over time. But a deeper meaning is evident if one heeds Paul Halliday's advice and views the studies' purpose as demonstrating "how . . . the conflict between two principles persist[s]."[194] On the one hand is the principle of public safety, which "generate[s] a persistent logic of detention, a logic by which people, regardless of the many factual circumstances that distinguish[] them,

[190] Id. Uhrig also proposes recognizing a limited right to counsel to "ensure the indigent state inmate's constitutional right of access to the courts in federal habeas proceedings."

[191] See Certificates of Appealability as Rubber Stamps Data Set, on file with author.

[192] See e.g, Clerk Order Dismissing Appeal Pursuant to 5th Circuit Rule 42, United States v. Clifton, 19-60038, 9098790-2; Clerk Order Dismissing Appeal Pursuant to 5th Circuit Rule 42, United States v. Dignam, 18-30416 ("CLERK ORDER DISMISSING APPEAL PURSUANT TO 5TH CIRCUIT RULE 42 FOR FAILURE TO COMPLY WITH THE COURT'S NOTICE OF 06/18/2018.").

[193] Federal Rules of Appellate Procedure with Fifth Circuit Rules and Internal Operating Procedures 42-1 (2018).

[194] Halliday, supra note 25, at 309.

[are] gathered together in the same broad category in order to contain them, legally and literally."[195] On the other is the principle of "judicial supremacy, by which the sighs of individual prisoners might be heard and their prayers answered by an equitable majesty."[196] Halliday argues that "[t]he history of habeas corpus traces an ongoing tension between the logic of detention and the persistent judge: between what is in our law and what we would like to be in it."[197] This tension is further complicated by the fact that even those who have "trumpeted the writ's virtues have comforted themselves as they bound the judge and muffled the prisoner's sigh."[198]

The Supreme Court's opinion in *Tharpe v. Sellers*, Justice Sotomayor's statement respecting the denial of certiorari in *Tharpe v. Ford*, and her dissental in *McGee v. McFadden* illuminate a tension similar to the one identified by Halliday: high rates of COA denials, and the summary manner in which they are issued, indicate the overwhelming grip of the logic of detention in the habeas context. This section considers these cases and then proposes a potential doctrinal shift that would resolve the problems the studies in Part II identified and, in so doing, counteract the power of the logic of detention.

A. The Detention of Logic Prevails: *Tharpe I & II*

The saga of Keith Tharpe—whose application for a COA the Supreme Court remanded to the Fifth Circuit in *Tharpe v. Sellers* only to deny his second petition for certiorari in *Tharpe v. Ford*—deserves more attention, as it demonstrates the extent to which the logic of detention has become entrenched in the habeas corpus context.

The district court denied Tharpe's Rule 60(b) motion to reopen his federal habeas petition, on the grounds that Tharpe's claim that a racist juror had affected the verdict in favor of

195 Id.
196 Id.
197 Id. at 316.
198 Id. ("Perhaps, by understanding this history better, we will be able to hear those sighs again.").

the death penalty was procedurally defaulted in state court.[199] In order to overcome this procedural default, Tharpe would have to produce clear and convincing evidence contradicting the state court's determination that the juror's presence did not prejudice him; the district court noted that Tharpe had not met this burden.[200] The Eleventh Circuit declined to issue a COA, determining that reasonable jurists could not debate the accuracy of the district court's procedural ruling.[201]

The Supreme Court reversed, but did not actually grant the COA, instead remanding to the circuit court for a final determination of whether one should issue.[202] In the majority's view, the COA denial rested "solely on [the] conclusion, rooted in the state court's factfinding" that Tharpe had not shown prejudice.[203] After independently reviewing the record,[204] the Court reached a different conclusion, holding that "jurists of reason could debate whether Tharpe ha[d] shown by clear and convincing evidence that the state court's factual [prejudice] determination was wrong."[205] The Court thus remanded for consideration of whether "jurists of reason could

[199] Tharpe v. Sellers, 138 S. Ct. 545, 545 (2018). The claim was defaulted at the state level because Tharpe had not raised it on direct appeal. Tharpe v. Warden, No. 17-14027, 2017 WL 4250413, at *1 (11th Cir. Sept. 21, 2017). A federal court cannot review a claim procedurally defaulted under state law "unless the petitioner can show cause for failure to properly present the claim and actual prejudice." Tharpe v. Warden, 898 F.3d 1342, 1346 (11th Cir. 2018) (citing Wainwright v. Sykes, 432 U.S. 72, 87 (1977)).

[200] *Tharpe*, 138 S. Ct. at 545.

[201] Id. at 546.

[202] Id. at 546—47.

[203] Id. at 546.

[204] Id. Specifically, the Court pointed to a signed affidavit by the juror in question, which stated, "[T]here are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did." (citing App. B to Petition for Certiorari at 15–16 (internal quotation marks omitted). In the Court's view, this affidavit "present[ed[a strong factual basis for the argument that Tharpe's race affected [the juror's] vote for a death verdict"—in other words, that Tharpe suffered prejudice. Id.

[205] Id.

disagree whether the District Court abused its discretion in denying [Tharpe's Rule 60(b)(6)] motion."[206]

Justice Thomas, joined by Justices Alito and Gorsuch, dissented, calling the majority's interpretation of the Eleventh Circuit's decision as resting solely on Tharpe's failure to present clear and convincing evidence of prejudice a "misreading."[207] Even if this issue *were* the sole basis of the COA denial, the Court's analysis disregarded "the deference that federal habeas courts must give to state courts' factual findings."[208]

Most interesting is the dissent's assessment of the futility of the Court's remand. As even the majority acknowledged, "[i]t may be that, at the end of the day, Tharpe should not receive a COA."[209] Conceding that reasonable jurists could debate prejudice "says little about how a court of appeals could ever rule in Tharpe's favor on the merits of that question."[210] In Justice Thomas's mind, the remand "merely delay[ed] Tharpe's inevitable execution."[211] Worse, it resulted from the Court overstepping its assigned role as "a policeman of self-evidently fixed jurisdictional boundaries" to adopt that of a "judge of behavior within those bounds."[212] Rather than abiding by the "considered judgments about the balance of competing interests" embodied in the law, the majority "ben[t] the rules . . . to show its concern for a black capital inmate."[213] In Halliday's terms, the majority acted as a persistent judge, attempting to disrupt the logic of detention.

[206] Id. at 546--47. The Court took this step, instead of simply issuing a COA, to allow the circuit court to address the reasons other than prejudice for the district court's denial. Id.
[207] Id. at 551 (Thomas, J., dissenting).
[208] Id. (citing 28 U.S.C. § 2254(e)(1) (2012)).
[209] Id. at 546 (majority opinion).
[210] Id. at 553 (Thomas, J., dissenting).
[211] Id.
[212] Halliday, supra note 25 at 315.
[213] *Tharpe*, 138 S. Ct. at 547 (Thomas, J., dissenting).

Its success in doing so was only temporary, as Justice Thomas's predictions regarding the ultimate COA determination proved right. On remand, the court of appeals found Tharpe had not shown "cause to overcome his procedural default."[214] The Supreme Court denied certiorari.[215]

Justice Sotomayor, though concurring in the Court's denial of certiorari, took the unusual step of issuing a statement, in order to comment on "the magnitude of the potential injustice that procedural barriers are shielding from judicial review."[216] Justice Sotomayor acknowledged the slim "likelihood that [the Court] would reverse the Court of Appeals' factbound conclusion," but nonetheless lamented the fact that "[t]o this day, Tharpe's racial-bias claim has never been adjudicated on the merits."[217] Ultimately, however, despite the "truly striking evidence of juror bias" that "suggest[ed] an appalling risk that racial bias swayed Tharpe's sentencing," Justice Sotomayor did not contest the conclusion that the Court could offer Tharpe no relief.[218] While this statement may strike some as an important acknowledgment of the justice system's racism, at the end of the day it is hard to see Justice Sotomayor as accomplishing anything other than "comfort[ing] [herself] as [she] . . . muffled the prisoner's sigh."[219]

B. AEDPA Deference and Hasty Decisions: *McGee v. McFadden*

In 2006, Shannon McGee was charged and indicted with sexually abusing his stepdaughter.[220] At trial, the prosecution relied on the testimony of two witnesses: the alleged victim—who testified that she had contacted McGee's trial counsel, after her mother pressured

[214] Tharpe v. Warden, 898 F.3d 1342, 1344 (11th Cir. 2018).
[215] Tharpe v. Ford, 139 S. Ct. 911 (2019).
[216] Id. at 913.
[217] Id. at 913; id. at 912.
[218] Id. at 913.
[219] Halliday, supra note 25, at xx.
[220] McGee v. McFadden, No. CV 1:16-3866, 2017 WL 8794894, at *1--2 (D.S.C. Oct. 3, 2017), report and recommendation adopted, No. 1:16-CV-3866, 2018 WL 797532 (D.S.C. Feb. 9, 2018), appeal dismissed, 733 F. App'x 134 (4th Cir. 2018), cert. denied, 139 S. Ct. 2608 (2019).

her to do so, and informed him that she "lied about the sexual abuse out of revenge and spite"[221]—and a jailhouse informant named Aaron Kinloch, who testified that McGee confessed to him, while the two men were in county jail.[222] Kinloch claimed he was motivated to share this conversation with the prosecutor because "if whatever [McGee] did took place, that's nasty to me, me myself. I've got kids of my own."[223] In his closing, the prosecutor emphasized Kinloch's supposed altruism in his closing argument.[224]

McGee was convicted of sexually abusing his stepdaughter and sentenced to life without parole.[225] Soon after the trial, the prosecutor turned over a previously undisclosed letter from Kinloch "in which [he] volunteered his testimony in exchange for the prosecutor's 'help' with pending charges."[226] McGee subsequently appealed, but was denied relief "on both direct and postconviction review."[227] McGee then filed a § 2254[228] habeas petition in the district court, which denied both his petition and a COA.[229] The court of appeals similarly denied a COA. On June 28, 2019, the Supreme Court denied Shannon McGee's pro se petition for a writ of certiorari.[230]

Justice Sotomayor, dissenting from denial of certiorari, argued that because at the COA stage the circuit court need only find that the district court's decision was "debatable," the case

[221] Id.; id. at *2 ("Victim stated her mother told her if she did not tell Petitioner's counsel that Petitioner had not molested her, that her mother would go to jail and her sisters would go to foster care.").

[222] *McGee*, 139 S. Ct. at 2608 (Sotomayor, J., dissenting from the denial of certiorari).

[223] Id. (citing ECF Nos. 16-1 at 113).

[224] *McGee*, 139 S. Ct. at 2608 (Sotomayor, J., dissenting from the denial of certiorari) ("Normally you will hear a . . . defense lawyer get up here and scream about a deal . . . or . . . some kind of expectation of reward for this lie, but . . . I don't know what motive [Kinloch] would have to come in here and fabricate this awful story." (quoting App. at 152--53, McGee v. State, No. 2014–000297 (D.S.C.))).

[225] Id.

[226] Id. ("Kinloch wrote: 'I'm willing to help, if you are cause I do need your help.... P.S. If Need Be I WILL Testify!'" (quoting App. at 524, *McGee*, No. 2014–000297)).

[227] Id.

[228] 28 U.S.C. § 2254 (2012).

[229] *McGee*, 139 S. Ct. at 2608--09.

[230] Id.

"should have gone to a merits panel of the Fourth Circuit for closer review."[231] She cautioned that "[u]nless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down."[232] If judges do not approach this inquiry properly, "the large volume of COA requests, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a *rubber stamp*, especially for *pro se* litigants."[233] *McGee*, in Justice Sotomayor's view, illustrates the danger of conducting a "hasty" COA review: the question of whether the petitioner is "in custody in violation of the Constitution" remains unexplored.[234]

In other words, in *McGee*, Sotomayor argued that had the Court accepted the case and required the circuit court to redo the COA inquiry in the proper manner,[235] thus allowing the appeal to proceed to a merits panel, the petitioner's constitutional claims would have received adequate attention.[236] This conflicts with her position in *Tharpe v. Ford*, where she expressed concern that the petitioner's claims were never fully considered on the merits, even upon remand of the COA issue to the Eleventh Circuit.[237] Justice Sotomayor missed an opportunity in *McGee* to extend her criticism to the deference § 2254(d) mandates, as she did when she acknowledged in *Tharpe* the potential injustices that procedural barriers "shield from judicial review," even when courts conduct the COA inquiry with an open mind.[238] If the COA inquiry is to be "more

[231] Id. at 2611.
[232] Id.
[233] Id. (emphasis added).
[234] Id. (citing 28 U.S.C. § 2254(a) (2012)).
[235] Justice Sotomayor assumes that this analysis would lead to a COA grant.
[236] See supra text accompanying note 285.
[237] See supra note 270 and accompanying text.
[238] Id.

limited and forgiving than 'adjudication of the actual merits,'"[239] then the Court should reconsider § 2254(d)'s role at this stage.

C. Return of the Persistent Judge: A Potential Doctrinal Solution

1. *AEDPA Deference as a Distinct Inquiry*

In his concurring opinion in *Miller-El*, Justice Scalia noted that it was not clear from the majority's opinion why a circuit justice should look to the "*District Court's application of AEDPA* to [a habeas petition's] constitutional claims and ask whether *that resolution* was debatable amongst jurists of reason."[240] Justice Scalia observed that "[h]ow the district court applied AEDPA has nothing to do with whether a COA applicant has made "a substantial showing of the denial of a constitutional right, . . . so the AEDPA standard should seemingly have no role in the COA inquiry."[241] However, he proceeded to explain that under § 2253(c)(2), a substantial showing of the denial of a constitutional right is a necessary condition of a COA, but not a sufficient one.[242] Therefore, § 2253(c)(2) does not preclude a judge from "imposing additional requirements."[243]

Justice Scalia argued that the Court in *Miller-El* again imposed an additional requirement: "A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of" AEDPA—namely, its deference requirements—"bars

[239] *McGee*, 139 S. Ct. at 2609 (citing Buck v. Davis, 137 S. Ct. 759, 773 (2017)).

[240] Miller-El v. Cockrell, 537 U.S. 322, 349 (2003) (Scalia, J., concurring) (quoting majority opinion at 336).

[241] Id.

[242] Id. ("Section 2253(c)(2), however, provides that '[a] certificate of appealability *may issue ... only if* the applicant has made a substantial showing of the denial of a constitutional right.' (Emphasis added).").

[243] Id. Indeed, Scalia notes that the Court in *Slack* required the petitioner to prove both a "substantial showing of the denial of a constitutional right" and also to "demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." See id. (quoting Slack v. McDaniel*,* 529 U.S. 473, 484 (2000)).

relief."[244] Therefore, in *Miller-El*, the circuit court had to resolve two questions: First, did the petitioner make a substantial showing of a *Batson* violation, and second, could the petitioner demonstrate that reasonable jurists would find debatable his ability to "obtain habeas relief in light of AEDPA."[245] Justice Scalia concluded that when Miller-El's *Batson* claims are evaluated *through AEDPA deference*,[246] the case for granting a COA becomes "close, rather than . . . clear . . . ."[247]

In conceptualizing the COA standard of review as two *distinct*—albeit related—inquiries, Justice Scalia illuminates a potential doctrinal shift: removing AEDPA deference from the COA inquiry. This shift could ameliorate both of the problematic tendencies courts exhibit when evaluating COA applications: misinterpreting AEDPA's deference provisions as requiring a full review of the merits of the appeal at this stage, on the one hand, and using AEDPA deference to block any meaningful consideration of a case's individual merit.

2. *Substantial Showing: A Sufficient Condition of Granting a COA*

Given the circuit courts' struggles applying §§ 2254(d) and (e)(1) at the COA stage,[248] the Court should consider making § 2253(c)'s substantial showing requirement a sufficient condition of granting a COA.[249] Under this approach, an appellate court would not be bound by AEDPA deference when making the initial determination of whether the district court's decision was

[244] Id. at 350. Scalia explains that under this requirement, a state prisoner who presents a "constitutional claim that reasonable jurists might find debatable" would be denied a COA if he is, for example, "unable to find any 'clearly established' Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings)." That is, "all reasonable jurists would agree that habeas relief is impossible to obtain under § 2254(d)." See id.

[245] Id.

[246] Id. Scalia identifies AEDPA deference as including §§ 2254(e)(1) and 2254(d). For instance, 2254(e)(1) requires "that state-court factual determinations can be overcome only by clear and convincing evidence to the contrary." See id.

[247] Id.

[248] See Part II.B.2.ii.

[249] 28 U.S.C. § 2254(d)(2)(i) (2012).

debatable (that is, whether a substantial showing has been made). The proposed standard would look very similar to the current one: a circuit court would ask whether the petitioner has "made a substantial showing of the denial of a constitutional right"[250] by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[251] However, it would explicitly prohibit incorporating AEDPA deference[252] into the COA analysis.[253]

This change provides the doctrinal language to achieve the more limited COA inquiry Justice Sotomayor envisioned in *McGee* as a means of allowing further consideration of potential constitutional violations.[254] David Goodwin articulated a similar approach in an essay that proposed granting a COA when an applicant whose petition the district court *denied on procedural grounds* "facially alleges the deprivation of a constitutional right."[255] For reasons set forth below, this framework should be expanded to encompass all COA requests, including those involving petitions whose constitutional claims the district court analyzed on the merits and denied.[256]

[250] 28 U.S.C. § 2253(c)(2) (2012).

[251] Slack v. McDaniel, 529 U.S. 473, 484 (2000).

[252] *Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.").

[253] See infra tbl.1.

[254] See supra notes 285--287 and accompanying text.

[255] Goodwin, supra note 24, at 829. In his Note, Goodwin argued that "the permissive approach---taking only the briefest look at the merits of a petition before granting a COA on procedural grounds . . . most accurately follow[s] the letter of *Slack* and the spirit of *Miller-El*" and is thus the one courts should employ. See id. However, it is not clear that this approach is in fact the most doctrinally consistent. Importantly, Goodwin's proposal does not account for the Court's requirement that, in addition to making a substantial showing of a constitutional claim under § 2253(c), the petitioner also demonstrate that the district court's application of AEDPA to this constitutional claim was debatable. To be fair, Goodwin did not have the benefit of the Court's insight in *Buck* and *Tharpe* when writing his Note. Nonetheless, his proposed change is best described as a *deviation* from the Court's intended COA standard as articulated in *Slack* and its progeny. See Section I.C.

[256] Goodwin argues that habeas petitions not resolved on procedural grounds have already been "afforded one full look at the merits" and that their claims are therefore properly "subject[ed] to a higher

Circuit courts have struggled to apply § 2254(d) and/or (e) in the COA inquiry[257] without fully considering the "factual or legal bases adduced in support of the [petitioner's] claims,"[258] both when evaluating district courts' resolutions of a constitutional claim[259] and when evaluating district courts' procedural rulings.[260] Such a searching COA inquiry especially disadvantages petitioners where the record is underdeveloped.[261]

Moreover, even when cases, unlike those discussed in Part II.B.2.ii, do not explicitly apply § 2254(d) and (e)(1) at the COA stage, AEDPA deference may still prevent further exploration of constitutional claims. For example, in *Wardlow v. Davis*, the Fifth Circuit explained that "deference to the state court factfinding that our caselaw and AEDPA requires is a big part of why [the petitioner] cannot meet the COA threshold on his substantive claims."[262] The court further noted that it could not find debatable the district court's resolution of such claims debatable, "[e]ssentially for the reasons the district court provided when analyzing the merits" of [petitioner]'s claims under that deferential lens."[263] While § 2254(d) or (e)(1) was cited in only

standard of scrutiny before being granted a COA**."** Goodwin, supra note 24, at 834. However, the reasons for adopting a more permissive standard for COA applications are equally applicable to those petitions resolved on the merits of their constitutional claims.

257 *Miller-El*, 537 U.S. at 338 (whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." (quoting Slack v. McDaniel 529 U.S. 473, 484 (2000)).

258 That is, making a definitive assessment of the merits. Id. at 336.

259 See, e.g., id. at 336 (criticizing circuit court determination of COA application challenging a non-procedural dismissal).

260 See, e.g., Buck v. Davis, 137 S. Ct. 759, 774 (2017) (observing that when the circuit court, in a COA application challenging a procedural dismissal, "'first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage." (quoting *Miller–El*, 537 U.S. at 336–337)).

261 Goodwin, supra note 24, at 832.

262 Wardlow v. Davis, 750 F. App'x 374, 378 (5th Cir. 2018), cert. denied, No. 18-9273, 2019 WL 5150494 (Oct. 15, 2019).

263 Id.

19.4% of orders in the Fifth Circuit and 7.2% in the Eleventh Circuit, the brevity of most COA orders[264] likely obscures the full effects of AEDPA deference at the COA stage.[265]

In contrast to this pattern of exceeding the COA inquiry's scope, courts can also conduct COA proceedings too hastily.[266] Consider, for example, the circuit court's COA order in *McGee*.[267] In two paragraphs, the court purported to "independently review[] the record" and find that the petitioner had not made the "requisite showing" to obtain a COA.[268] In her dissental, Justice Sotomayor noted that the magistrate judge's report and recommendation—which the district court adopted despite acknowledging the petition had a strong *Brady* claim—merely recited the state court's reasoning.[269] Moreover, neither the state court, the magistrate judge, nor the district court discussed any evidence against the petitioner aside from the testimony of a jailhouse snitch whose credibility likely would have been impeached absent the complained-of *Brady* violation.[270]

Despite this apparent tension, both the overly searching inquiries and the hasty decisions are a product of invoking AEDPA deference at the COA stage. Put another way, a searching inquiry would be less troubling if AEDPA deference did not apply at the COA stage; it would allow a more robust review of the record—benefitting pro se petitioners—without offering the temptation of denying the petition because it does not meet § 2254(d) or (e)'s more demanding

264 See supra note 164 and accompanying text.

265 See, e.g., Stewart v. Sec'y, Fla. Dep't of Corr., No. 18-13679-A, 2019 WL 1025040, at *1 (11th Cir. Feb. 1, 2019) (citing only § 2253(c)'s substantial showing requirement, but finding that the state court's decision was not contrary to, or an unreasonable application of established law); Winslow v. Sec'y, Dep't of Corr., No. 18-13525-K, 2019 WL 948355, at *2 (11th Cir. Jan. 24, 2019) (same). See also Goodwin, supra note 24, at 797 ("COA orders are generally unreported, . . . rarely carry the weight of precedent, and provide few indications as to the extent of the court's reasoning.").

266 McGee v. McFadden, 139 S. Ct. 2608, 2609 (2019).

267 McGee v. McFadden, 733 F. App'x 134 (4th Cir. 2018), cert. denied, 139 S. Ct. 2608, reh'g denied, 140 S. Ct. 318 (2019).

268 Id.

269 *McGee*, 139 S. Ct at 2610.

270 Id. Indeed the district court did not conduct a careful review of the trial court record.

standard. A clear consequence of this doctrinal shift is that courts would have to invest more resources and energy at the COA stage.[271] But the Court has acknowledged that such commitment is necessary to preserve the protections of the writ of habeas corpus.[272] Moreover, since eliminating AEDPA deference at the COA stage will allow judges to be more "vigilant and independent in reviewing petitions for the writ," these resources would not be "diminished and misspent," as they are when courts "disregard . . . established principles" and misapply § 2254 (d) and (e).[273] Rather, this increase would be fully consistent with the Court's vision of a limited COA inquiry.

CONCLUSION

While the COA standard, in theory, is supposed to weed out frivolous cases, in practice it has effectively served as a rubber stamp in habeas appellate review. The practice reinforces a logic of detention, by simultaneously promoting a false sense of protection for constitutional rights and the notion that the vast majority of habeas claims are not meritorious. While there is no assurance that more habeas petitioners will ultimately obtain relief if more COAs are granted, my proposed change will, at a minimum, lead to further exploration of potential constitutional violations. Indeed, it may turn out that eliminating AEDPA's influence at the COA stage will, as Justice Thomas put it, "merely delay[] [the] . . . inevitable."[274] But, such a result would reveal a more critical flaw in the current statutory scheme: even deserving habeas petitioners cannot obtain relief because § 2254(d) and (e) are too demanding. The Court would then be forced to confront a more disturbing fact: AEDPA has transformed habeas corpus into a system of classificatory detention.

[271] See Goodwin, supra note 24, at 837.
[272] Harrington v. Richter, 562 U.S. 86, 91 (2011).
[273] Id. at 91--92.
[274] Tharpe v. Sellers, 138 S. Ct. 545, 553 (2018) (Thomas, J., dissenting).

Certificate of Appealability Inquiry Under Proposed Standard
Table 1

Case Name	Issue Under Current Standard **Whether reasonable jurists could debate. . .**	Issue Under Revised Standard **Whether reasonable jurists could debate. . .**
Miller-El v. Cockrell	. . . the district court's application of AEDPA deference to petitioner's *Batson* claim.	. . . the district court's assessment of petitioner's *Batson* claim.
Tharpe v. Sellers	. . . the district court's application of AEDPA deference in holding that the petitioner had not produced clear and convincing evidence contradicting the state court's factual determination that the presence of a racist juror did not unconstitutionally prejudice him.	. . . the district court's determination that the presence of a racist juror did not unconstitutionally prejudice the petitioner.
McGee v. McFadden	. . . the district court's application of AEDPA deference in holding that the state court did not unreasonably apply clearly established federal law or unreasonably determine facts in denying petitioner's *Brady* claim.	. . . district court's determination that undisclosed favorable evidence did not undermine confidence in petitioner's verdict, and thus no merit to the *Brady* claim.
Definitions: **AEDPA Deference**: deference to the district court's conclusion that the state court's decision was not (1) an unreasonable application of clearly established federal law or (2) was not based upon an unreasonable determination of the facts in light of the evidence presented; and that (3) the petitioner did not rebut the presumption of correctness of state-court determinations of factual issues by clear and convincing evidence.		

APPENDIX: COA DATA

Any questions about he data can be directed to Luis Angel Valle at valle.luis@columbia.edu

11th Circuit COA Orders

All COA orders available on Westlaw in the Eleventh Circuit from January 2018 to September 2019. **Note all cases reviewed in this section resulted in a COA denial except for one which listed first and highlighted.**

Case Citation	Short/Long	Cases/Standard	Decision Language	Judge(s) Initials	Counsel v. Pro Se (C/P)
Griffin v. Sec'y, Dep't of Corr., No. 18-13193-C, 2019 WL 367694, at *1 (11th Cir. Jan. 7, 2019)	Short	28 USC 2253(c)(2)	Griffin's petition states a facially valid ineffective assistance of counsel claim, Griffin's motion for a COA is GRANTED on the following issue only	S. Marcus	P
Steven Wayne Pratt v. Secretary, Florida Department of Corrections, No. 18-14120-A, 2019 WL 4858244 (11th Cir. July 24, 2019)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the state court's denial of Pratt's first claim because he could not show prejudice	?	P
Darrin J. Bell v. United States, No. 19-12465-A, 2019 WL 4755712 (11th Cir. Sept. 26, 2019)	Short	Slack	"Because Bell has failed to satisfy he Slack test for his claims, his motion for a COA is DENIED."	C. Wilson	C
Carter v. Dep't of Corr., No. 19-12200-H, 2019 WL 6699695, at *1 (11th Cir. Sept. 26, 2019)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate he district court's dismissal of Carter's § 2254 petition as untimely	K. Newsom	P
Hinson v. United States, No. 19-12218-H, 2019 WL 6909584, at *1 (11th Cir. Sept. 26, 2019)	Short	28 USC 2253(c)(2); Slack	failed to satisfy the Slack test for his claims	C. Wilson	C
Bradley v. Sec'y, Dep't of Corr., No. 19-12577-F, 2019 WL 5079542, at *1 (11th Cir. Sept. 24, 2019)	Long	28 USC 2253(c)(2); Slack	easonable jurists would not debate the district court's determination that Bradley was not entitled to equitable tolling; time barred	R. Rosenbaum	P
Collando-Pena v. Sec'y, Fla. Dep't of Corr., No. 19-11753-G, 2019 WL 5730780, at *1 (11 h Cir. Sept. 9, 2019)	Short	28 USC 2253(c)(2)	failed to make “a substantial showing of the denial of a constitutional right.”		P
Joyner v. Inch, No. 19-11814-D, 2019 WL 5869749, at *1 (11th Cir. Sept. 5, 2019)	Short	28 USC 2253(c)(2); Slack	"failed to make the requisite showing"	?	P
Kinney v. Attorney Gen., State of Fla., No. 19-10728-B, 2019 WL 4034421, at *1 (11th Cir. Aug. 26, 2019)	Short	Slack	"failed to make requisite showing"	S. Marcus	P

KARA SINGLETON ADAMS, Peti ioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee., No. 19-11068-C, 2019 WL 4643730, at *1 (11th Cir. Aug. 20, 2019)	Long	Slack; 28 U.S. C. § 2253(c)(2)	"reasonable jurists would not debate the district court's..."	A. Jordan	P			
Luzula v. United States of Am., No. 19-11029-F, 2019 WL 4467091, at *1 (11th Cir. Aug. 6, 2019)	Short	Slack	"failed to make the requisite showing"	C. Wilson	P			
Gee v. Fla. Dep't of Corr. Sec'y, No. 19-10539-C, 2019 WL 3886879, at *1 (11th Cir. Aug. 2, 2019)	Short	Slack	"failed to make the requisite showing"	W. Pryor	P			
Strattan v. Sec'y, Dep't of Corr., No. 19-10417-H, 2019 WL 3714566 (11th Cir. July 30, 2019)	Short	Slack	"failed to make the requisite showing"	G. Tjoflat	P			
Persinger v. Warden, No. 19-11774-D, 2019 WL 3714568, at *1 (11th Cir. July 30, 2019)	Short	Slack	"failed to make the requisite showing"	G. Tjoflat	P			
Parrish v. Warden, Attorney Gen. State of Alabama, No. 19-10307-H, 2019 WL 3406608, at *1 (11th Cir. July 25, 2019)	Long	Slack; 28 U.S. C. § 2254(d)(1), (2).	"Reasonable jurists would not debate the district court's determination that" "None heless, he is not entitled to a COA on the matter because he failed to state a valid claim of a denial of a constitutional right, as he failed to establish that the prosecutor's questioning was improper and the court's curative instructions stymied any prejudice that might have resulted."	J. Pryor	P			
Benjamin v. Dep't of Corr., No. 19-10594-C, 2019 WL 3941159 (11th Cir. July 25, 2019)	Long	Slack; 28 U.S. C. § 2253(c)(2); 28 U.S.C. § 2254(d)(1), (2).	"failed to show that... counsel was deficient, prejudiced by counsel's motion"	J. Pryor	P			
McConico v. Warden, No. 19-11993-D, 2019 WL 3976432 (11th Cir. July 23, 2019)	Long	Slack	"The claim asserted in Mr. McConico's petition...did not challenge the legality of his confinement nor did it challenge the fact or duration of confinement." "Moreover, even if this challenge was successful, it would not result in Mr. McConico's speedier release from prison, a necessary prerequisite for habeas corpus relief" "Therefore, Mr. McConico's mo ion for a COA is DENIED and his motion for IFP status is DENIED AS MOOT."	J. Pryor	P			
ANTONIO MACLI, Pe itioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee., No. 19-11174-K, 2019 WL 4747995 (11th Cir. July 19, 2019)	Short	Slack	"failed to sa isfy this standard, and his mo ion for a COA is DENIED."	W. Pryor	C			
Uyanna v. United States, No. 19-10294-B, 2019 WL 3406529 (11th Cir. July 9, 2019)	Short	28 USC 2253(c)(2)	"His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right."	S. Marcus	P			

Bell v. United States, No. 19-10612-H, 2019 WL 3941161 (11th Cir. July 9, 2019)	Short	Slack	"failed to make the requisite showing"	E. Branch	P			
MICHAEL LEON HALL, Pe itioner-Appellant, v. SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA, Respondents-Appellees., No. 18-14058-C, 2019 WL 4858238 (11th Cir. July 9, 2019)	Short	28 USC 2253(c)(2); Slack	"failed to make the requisite showing"	S. Marucs	P			
DARRYL RUTH, Pe itioner-Appellant, v. SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent-Appellee., No. 19-11153-E, 2019 WL 4860643 (11th Cir. July 9, 2019)	Long	28 USC 2253(c)(2); Slack	has not sa isfied the Slack test for his claims	R. Rosenbaum	C			
Wait v. Sec'y, Fla. Dep't of Corr., No. 19-10956-J, 2019 WL 4409997 (11th Cir. July 5, 2019)	Short	28 USC 2253(c)(2)	"failed to make a substantial showing of the denial of a constitutional right"	B. Grant	C			
Oates v. United States, No. 19-11014-J, 2019 WL 4467089 (11th Cir. July 5, 2019)	Short	28 USC 2253(c)(2)	"DENIED because he has not made a substantial showing of the denial of a constitutional right"	E. Branch	P			
Kelly v. United States, No. 19- 10794-F, 2019 WL 4138402, at *1 (11th Cir. July 2, 2019)	Short	Slack	IAC, gov misconduct	E. Branch	P			
Massey v. Alabama Bd. of Pardons & Paroles, No. 19-11336-C, 2019 WL 3072580, at *1 (11th Cir. June 27, 2019)	Long	Slack; 28 U.S. C. § 2253(c)(2)	Because there is no constitutional violation shown from this interpretation, reasonable jurists would not debate the state court's interpretation of its own parole scheme//In his equal protection claim, Massey has not shown: (1) any other similar inmates who received the more favorable treatment under § 15-22-28(e); (2) a discriminatory purpose or intent by the Parole Board in applying the 85% or 15 year rule to him; or (3) that his treatment was discriminatory and based on a cons itutionally protected interes	K. Newsom	P			
Spitalieri v. Sec'y, Dep't of Corr., No. 19-11384-F, 2019 WL 3072579, at *1 (11th Cir. June 27, 2019)	Long	Slack; 28 U.S. C. § 2253(c)(2)	Reasonable jurists would not debate he denial of his claims of trial court error because they are procedurally defaulted on federal habeas review . . . Reasonable jurists also would not debate his other claim, that counsel was ineffective for not objecting to the jury instruction on manslaughter. Counsel was not deficient, and Spitalieri has not shown prejudice in his claim	K. Newsom	C			
Averett v. Attorney Gen., No. 18-13399-B, 2019 WL 3887369, at *5 (11 h Cir. June 19, 2019)	Long	Slack; 28 U.S. C. § 2253(c)(2)	reasonable jurists would not debate the District Court's finding that, absent statutory or equitable tolling, Mr. Averett was required to file his § 2254 petition by April 18, 2016.	B. Martin	P			

Karr v. Stewart, No. 19-10622-J, 2019 WL 3940946, at *1 (11th Cir. June 19, 2019)	Long	Slack; 28 U.S. C. § 2253(c)(2)	Reasonable jurists would not debate he denial of his sufficiency of the evidence claim because the state court, on direct appeal, did not unreasonably apply federal law, Jackson v. Virginia, 443 U.S. 307, 319 (1979), or make unreasonable determina ions of fact The state court did not unreasonably apply federal law in determining that its statutes involved proof of different facts, and so Karr's convictions did not violate double jeopardy under Blockburger v. United States, 284 U.S. 299 (1932).	A. Jordan	P			
Djenasevic v. United States, No. 18-12680-H, 2019 WL 2881260 (11th Cir. June 6, 2019)	Long	Slack	"failed to show that reasonable jurists would debate both the district court's procedural rulings and its denial of his constitutional claims."	J. Pryor	P			
Eloi v. United States, No. 19-10288-B, 2019 WL 3406664 (11th Cir. June 5, 2019)	Long	Slack	"Reasonable jurists would not debate the district court's denial of Mr. Eloi's § 2255 mo ion. " "Mr. Eloi has not shown the substantial denial of a constitu ional right on any of his claims."	J. Pryor	P			
Mendelson v. Fla. Dep't of Corr., No. 19-10130-J, 2019 WL 3206630 (11th Cir. May 30, 2019)	Long	Slack	"Reasonable jurists would not debate that Mr. Mendelson's § 2254 petition failed to show the substantial denial of a constitutional right. "	J. Pryor	C			
Anderson v. Fla. Dep't of Corr., No. 19-10611-C, 2019 WL 3941162 (11th Cir. May 30, 2019)	Long	Slack	"Here, reasonable jurists would not debate the state court's denial of this claim."	E. Branch	P			
White v. United States, No. 19-10725-E, 2019 WL 4010175 (11th Cir. May 30, 2019)	Long	Slack	"Reasonable jurists would not debate the denial of Claims"	E. Branch	P			
Early v. United States, No. 19-10687-J, 2019 WL 4013318 (11th Cir. May 30, 2019)	Short	Slack	"failed to make the requisite showing"	C. Wilson	P			
Terrell Pope v. Dunn, No. 18-12404-E, 2019 WL 2461697 (11th Cir. May 29, 2019)	Short	Slack	"failed to make the requisite showing"	C. Wilson	P			
Davis v. Warden, No. 19-11000-E, 2019 WL 2544250 (11th Cir. May 29, 2019)	Short	Slack	"failed to make the requisite showing"	C. Wilson	P			
Shaffer v. Sec'y, Fla. Dep't of Corr., No. 19-10747-D, 2019 WL 4034326 (11th Cir. May 29, 2019)	Short	Slack	"failed to make the requisite showing"	C. Wilson	P			
Lucy v. Cooks, No. 19-10005-B, 2019 WL 2912202 (11th Cir. May 23, 2019)	Short	Slack	"failed to make the requisite showing" ... "he failed to fully exhaust his state postconviction remedies, as required prior to seeking federal habeas review."	B. Grant	P			
Murray v. Sec'y, Dep't of Corr., No. 19-10487-B, 2019 WL 3776045 (11th Cir. May 23, 2019)	Short	Slack	"failed to make the requisite showing"	B. Grant	P			

Mack v. United States, No. 19-11138-H, 2019 WL 2725846 (11th Cir. May 22, 2019)	Long	Slack	"Reasonable jurists would not debate the district court's denial of Mack's § 2255 mo ion."	R. Rosenbaum	C			
Munayco v. United States, No. 19-10634-K, 2019 WL 2285470 (11th Cir. May 21, 2019)	Long	Slack	"Reasonable jurists would not debate the denial of Munayco's motion."	R. Rosenbaum	P			
Kircus v. United States, No. 19-10206-C, 2019 WL 3284845 (11th Cir. May 17, 2019)	Long	Slack	"failed to make the requisite showing"	A. Jordan	P			
Thomas v. United States, No. 19-11235-E, 2019 WL 2897778 (11th Cir. May 16, 2019)	Short	Slack	"failed to make the requisite showing"	W. Pryor	P			
Abrams v. Sec'y, Dep't of Corr., No. 19-10723-A, 2019 WL 4010133 (11th Cir. May 16, 2019)	Short	Slack	"failed to make the requisite showing"	G. Tjoflat	P			
McCarthan v. United States, No. 19-10710-H, 2019 WL 4034279 (11th Cir. May 16, 2019)	Short	Slack	"failed to sa isfy the Slack test for his claims"	G. Tjoflat	C			
Terry v. United States, No. 18-13587-C, 2019 WL 4138400 (11th Cir. May 15, 2019)	Long	Slack: "reasonable jurists would debate (1) whether the motion states a valid claim of the denial of a constitutional right and (2) whether the district court was correct in its procedural ruling."	"Here, reasonable jurists would not debate the denial of Terry's claims. "... "reasonable jurists would not debate the district court's denial of Terry's § 2255 motion"	R. Rosenbaum	P			

Adams v. Sec'y, Dep't of Corr., No. 18-14763-B, 2019 WL 2183801 (11th Cir. May 15, 2019)	Long	Slack: "reasonable jurists would debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the District Court was correct in its procedural ruling." ... "If the petitioner fails to satisfy either prong of this two-part test, this Court will deny a COA.'	"Reasonable jurists would not dispute this procedural ruling."	B. Martin	P			
Crayton v. Sec'y, Dep't of Corr., No. 17-15290-C, 2019 WL 2374452 (11th Cir. May 15, 2019)	Long	Slack: "reasonable jurists would debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the District Court was correct in its procedural ruling." ... "If the petitioner fails to satisfy either prong of this two-part test, this Court will deny a COA.'	"No COA is warranted on Claim _" "Mr. Crayton did not show that reasonable jurists would find debatable the denial of his § 2254 petition"	B. Martin	P			
Tomlin v. Patterson, No. 19-10494-HH, 2019 WL 2142889 (11th Cir. May 8, 2019)	Short	28 USC 2253(c)(2)	"failed to make a substantial showing of the denial of a constitutional right"	C. Wilson	C			
Dennis v. Warden, No. 19-10143-B, 2019 WL 3073941 (11th Cir. May 8, 2019)	Long	Slack	"reasonable jurists would not debate the district court's dismissal of Mr. Dennis's § 2254 petition"	J. Pryor	P			
Shropshire v. Sec'y, Dep't of Corr., No. 19-10203-F, 2019 WL 3216851 (11th Cir. May 8, 2019)	Short	Slack	"failed to make the requisite showing"	S. Marcus	P			
Brown v. United States, No. 19-10617-B, 2019 WL 3941160 (11th Cir. May 7, 2019)	Short	Slack	"failed to make the requisite showing"	B. Grant	P			

Smith v. Warden, No. 19-10272-B, 2019 WL 3318541 (11th Cir. May 6, 2019)	Long	Slack	"No COA is warranted for the denial of this claim." "No COA is warranted for the dismissal of any of these claims."	E. Branch	P			
Yisrael v. Sec'y, Dep't of Corr., No. 18-14791-B, 2019 WL 2183722 (11th Cir. May 6, 2019)	Long	Slack	"No COA is warranted for the denial of this claim."	E. Branch	C			
Merilien v. Warden, No. 17-13117-H, 2019 WL 3079386 (11th Cir. May 3, 2019)	Long	Slack	"Because Merilien has not made the requisite showing under Slack, 529 U.S. at 484, his motion for a COA is DENIED."	R. Rosenbaum	P			
Anzalone v. United States, No. 18-11959-J, 2019 WL 2108062 (11th Cir. Apr. 30, 2019)	Long	Slack	"Reasonable jurists would not debate the District Court's decision" ... "Mr. Anzalone is therefore not entitled to a COA on this claim."... "Because Mr. Anzalone has not shown that reasonable jurists would find the denial of his § 2255 mo ion debatable, his motion for a COA is DENIED."	B. Martin	C			
O'Brien v. Fla., No. 18-15054-D, 2019 WL 2416761 (11th Cir. Apr. 25, 2019)	Long	Slack	"O'Brien's claims do not entitle him to relief because Florida's post-conviction courts reasonably applied federal law in its denial of each claim." ... "Reasonable jurists would not debate that any of the above explanation were reasonable bases on which the state court could find that counsel was not ineffective"... "Because O'Brien has not satisfied the Slack test for any of his claims, his mo ion for a COA is DENIED."	K. Newsom	P			
Purvis v. Sec'y Dep't of Corr., No. 18-15077-C, 2019 WL 2452719 (11th Cir. Apr. 25, 2019)	Long	Slack	"Because Purvis has not satisfied the Slack test for any of his claims, his motion for a COA is DENIED. "	K. Newsom	C			
Collins v. Sec'y, Dep't of Corr., No. 18-12925-D, 2019 WL 3079370 (11th Cir. Apr. 25, 2019)	Long	Slack:	"The Court concludes Mr. Collins is not enti led to a COA to appeal the District Court's dismissal of his petition."	B. Martin	P			
Ramirez v. Sec'y, Fla. Dep't of Corr., No. 19-10293-D, 2019 WL 3406514 (11th Cir. Apr. 18, 2019)	Short	Slack	"failed to make the requisite showing"	W. Pryor	P			
Price v. Warden, No. 18-13756-H, 2019 WL 4298196 (11th Cir. Apr. 8, 2019)	Short	28 USC 2253(c)(2)	"failed to make a substantial showing of the denial of a constitutional right."	G. Tjoflat	P			
Morrow v. Warden, No. 18-14254-H, 2019 WL 1649724 (11th Cir. Apr. 5, 2019)	Long	Slack	"Reasonable jurists would not debate that Mr. Morrow is not entitled to federal habeas relief on this claim" ... "Based on the foregoing, Morrow's motion for a COA is DENIED."	R. Rosenbaum	P			
Joseph v. Sec'y, Dep't of Corr., No. 18-14848-C, 2019 WL 2256382 (11th Cir. Apr. 5, 2019)	Short	Slack	"failed to make the requisite showing."	C. Wilson	P			
Toliver v. Sec'y, Dep't of Corr., No. 18-15278-A, 2019 WL 2613182 (11th Cir. Apr. 4, 2019)	Short	Slack	"failed to make the requisite showing"	S. Marcus	C			

Miles v. Sec'y, Fla. Dep't of Corr., No. 18-13241-C, 2019 WL 3714551 (11th Cir. Apr. 3, 2019)	Short	Slack	"failed to make the requisite showing"	S. Marcus	P			
Howard v. Warden, No. 18-14571-B, 2019 WL 1931866 (11th Cir. Mar. 29, 2019)	Long	Slack	"Reasonable jurists would not debate the district court's determination that Claims 1 through 4 were procedurally defaulted under state law. The state postconviction court held that these claims were procedurally defaulted because Howard did not raise them in his motion to withdraw his guilty plea."	A. Jordan	P			
Melillo v. United States, No. 18-14643-C, 2019 WL 1995539 (11th Cir. Mar. 28, 2019)	Long	Slack	"Melillo has not shown that reasonable jurists would find debatable the denial of his § 2255 motion"	K. Newsom	P			
Lee v. United States, No. 18-14565-E, 2019 WL 1931867 (11th Cir. Mar. 27, 2019)	Long	Slack	"Reasonable jurists would not debate the district court's determination that Lee's § 2255 motion was untimely under § 2255(f)(1)."	J. Pryor	P			
Porter v. United States, No. 18-15082-F, 2019 WL 2452772 (11th Cir. Mar. 27, 2019)	Long	Slack	"reasonable jurists would not debate the district court's denial of Porter's claim" ... "Because Porter has not shown that reasonable jurists would find debatable the denial of his § 2255 motion, for the reasons stated above, his mo ion for a COA is DENIED."	K. Newsom	C			
Barnes v. Sec'y, Fla. Dep't of Corr., No. 18-15273-E, 2019 WL 1472977 (11th Cir. Mar. 27, 2019)	Long	Slack	"reasonable jurists would not debate the district court's denial of this claim."	J. Pryor	P			
Lee v. United States, No. 18-14464-J, 2019 WL 1856407 (11th Cir. Mar. 22, 2019)	Long	Miller-El; Slack	"Reasonable jurists would not debate the District Court's dismissal of Mr. Lee's § 2255 motion"	B. Martin	P			
Netting v. State, No. 18-14052-D, 2019 WL 1377024 (11th Cir. Mar. 20, 2019)	Short	28 USC 2253(c)(2)	"To merit a COA, Netting must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). He has not met this standard, and his mo ion for a COA is DENIED. "	C. Wilson	P			
Sloppy v. Sec'y, Dep't of Corr., No. 18-14024-K, 2019 WL 1380178 (11th Cir. Mar. 20, 2019)	Long	Slack	"Reasonable jurists would not debate the district court's determination that Sloppy's original and amended § 2254 petitions were time-barred." ... "Accordingly, Sloppy's motion for a COA is DENIED."	J. Pryor	P			
Mollica v. United States, No. 18-14100-J, 2019 WL 4784788 (11th Cir. Mar. 14, 2019)	Long	Slack	"No COA is warranted for the denial of these claims." "The denial of these claims does not merit a COA."	E. Branch	P			
Allen v. Sec'y, Fla. Dep't of Corr., No. 18-12732-B, 2019 WL 2881389 (11th Cir. Mar. 13, 2019)	Short	Slack	"failed to make the requisite showing"	B. Grant	P			
Mar. v. United States, No. 18-13546-F, 2019 WL 4061493 (11th Cir. Mar. 13, 2019)	Short	Slack	"failed to make the requisite showing"	B. Grant	P			
Hinson v. Fla. Dep't of Corr. Sec'y, No. 18-15129-H, 2019 WL 2525014 (11th Cir. Mar. 12, 2019)	Long	Slack	"reasonable jurists would not debate whether the district court abused its discretion in denying Hinson's motion for an evidentiary hearing"	C. Wilson, W. Pr	P			

Benzant v. Sec'y, Fla. Dep't of Corr., No. 18-11137-A, 2019 WL 4580529 (11th Cir. Mar. 5, 2019)	Long	Slack	"Accordingly, there is no issue on which reasonable jurists would debate"	K. Newsom	C			
Plunkett v. FCI Tallahassee Warden, No. 18-13634-E, 2019 WL 4138401 (11th Cir. Mar. 4, 2019)	Short	28 USC 2253(c)(2)	"failed to make a substantial showing of the denial of a constitutional right"	S. Marcus	P			
Ali v. State, No. 18-12628-J, 2019 WL 2635710 (11th Cir. Mar. 1, 2019)	Short	29 USC 2253(c)(2)	"failed to make a substantial showing of the denial of a constitutional right."	W. Pryor	P			
Holifield v. Stewart, No. 18-13974-E, 2019 WL 4785528 (11th Cir. Feb. 28, 2019)	Short	Slack	"failed to make the requisite showing"	W. Pryor	P			
McDonald v. United States, No. 18-14737-K, 2019 WL 2219697 (11th Cir. Feb. 28, 2019)	Short	Slack	"failed to make the requisite showing"	G. Tjoflat	P			
Washington v. Sec'y, Dep't of Corr., No. 18-14855-E, 2019 WL 2285469 (11th Cir. Feb. 27, 2019)	Short	Slack	"failed to make the requisite showing"	G. Tjoflat	P			
Barnes v. United States, No. 18-12687-E, 2019 WL 2881405 (11th Cir. Feb. 27, 2019)	Short	Slack	"failed to show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, or that the issues deserve encouragement to proceed further."	G. Tjoflat	P			
Miller v. United States, No. 18-13565-F, 2019 WL 4061496 (11th Cir. Feb. 27, 2019)	Long	Slack	"Reasonable jurists would not debate the district court's denial of Miller's motion, as he had at least three qualifying prior convictions for either violent felonies or serious drug offenses."	A. Jordan	C			
Fields v. United States, No. 18-14466-F, 2019 WL 3526490, at *1 (11th Cir. Feb. 21, 2019)	Long	28 USC 2253(c)(2)	The district court determined that several of Fields's ineffective-assistance claims were either too vague and conclusory to support relief or were clearly unsupported by the record. Reasonable jurists would not debate his determination. Moreover, a review of the record does not indicate that he district court acted inappropriately.	B. Grant	P			
Intakanok v. United States, No. 18-13575-C, 2019 WL 978772 (11th Cir. Feb. 20, 2019)	Long	28 USC 2253(c)(2); Slack	counsel properly advised Intakanok about his exposure under the Adam Walsh Act; Johnson v. United States, 135 S. Ct. 2551 (2015), did not render § 2422 (b) unconstitu ionally void for vagueness.	R. Rosenbaum	P			
Griffin v. United States, No. 17-15763-D, 2019 WL 2744723, at *1 (11th Cir. Feb. 19, 2019)	Long	28 USC 2253(c)(2); Slack	Any argument that Mr. Griffin's convictions for violations of § 893.13(1) do not constitute a serious drug offense under either the ACCA or § 4B1.1 of the Guidelines has been foreclosed by this Court's precedent and therefore does not merit a COA. Reasonable jurists would not debate the District Court's denial of this claim.	B. Martin	P			
Patterson v. Fla. Dep't of Corr. Sec'y, No. 18-12961-K, 2019 WL 3284794, at *1 (11th Cir. Feb. 14, 2019)	Long	28 USC 2253(c)(2)	Here, the state court reasonably concluded that a mistrial was not warranted and would not have been granted; Patterson does not show prejudice, as, even if counsel had filed such a motion, the State would have been able to show hat it was en itled to a recapture window pursuant to Rule 3.191(p)(3).	E. Branch	P			

Graves v. United States, No. 18-13070-E, 2019 WL 3318012, at *1 (11th Cir. Feb. 14, 2019)	Long	Miller-el; Slack	Reasonable jurists would not debate he District Court's resolution of Mr. Graves's claims	B. Martin	P			
Baker v. Attorney Gen., No. 18-12880-H, 2019 WL 3216850, at *1 (11th Cir. Feb. 13, 2019)	Long	28 USC 2253(c)(2)	The district court considered his constitu ional claims on their merits, and, as discussed above, they were meritless. Accordingly, Baker did not adequately plead an actual injury for which the federal courts may grant relief.	E. Branch	P			
Miller v. Sec'y, Dep't of Corr., No. 18-13208-K, 2019 WL 3543089, at *1 (11 h Cir. Feb. 13, 2019)	Long	28 USC 2253(c)(2)	the record supported the state court's rejection of this claim, as Miller did not clearly indicate that he did not understand his rights, and counsel reasonably could have concluded that his statement was voluntarily given; The state court's rejection of this claim was consistent with federal law	E. Branch	P			
Fortune v. Sec'y, Dep't of Corr., No. 18-13813-E, 2019 WL 1163849, at *1 (11th Cir. Feb. 12, 2019)	Long	28 U.S.C. § 2253(c)(2); Slack	Reasonable jurists would not debate he district court's determination that the Williams Rule claim was procedurally defaulted. The state post-conviction court's decision was not contrary to, or an unreasonable application of, Strickland	R. Rosenbaum	P			
Reed v. Warden, No. 18-14394-B, 2019 WL 1772491, at *1 (11th Cir. Feb. 11, 2019)	Short	Slack	failed to make the requisite showing,	S. Marcus	P			
Seward v. Sloan, No. 18-13678-J, 2019 WL 1024938, at *1 (11th Cir. Feb. 6, 2019)	Short	Slack	failed to make the requisite showing	G. Tjoflat	P			
Reed v. Sec'y, Fla. Dep't of Corr., No. 18-14288-H, 2019 WL 1749222, at *1 (11th Cir. Feb. 6, 2019)	Long	28 USC 2253(c)(2); Slack	Reed has not shown by clear and convincing evidence that the state obtained the denial of his § 2254 petition by fraud;	R. Rosenbaum	P			
Stewart v. Sec'y, Fla. Dep't of Corr., No. 18-13679-A, 2019 WL 1025040, at *1 (11th Cir. Feb. 1, 2019)	Long	28 USC 2253(c)(2); Slack	Mr. Stewart failed to establish hat counsel's performance was deficient. Accordingly, the state post-conviction court's decision was not contrary to, or an unreasonable application of, Strickland,	J. Pryor	P			
Campana v. Sec'y, Dep't of Corr., No. 18-13236-K, 2019 WL 3545591, at *2 (11th Cir. Jan. 31, 2019)	Long	28 USC 2253(c)(2); Slack	To succeed on an ineffective-assistance claim in a § 2254 petition, a petitioner must establish that the relevant state court decision was contrary to, or an unreasonable applica ion of, Strickland;	J. Pryor	P			
Winslow v. Sec'y, Dep't of Corr., No. 18-13525-K, 2019 WL 948355, at *2 (11 h Cir. Jan. 24, 2019)	Long	28 USC 2253(c)(2); Slack	Applying deference, the state court's denial of relief was not contrary to federal law or based on an unreasonable determination of the facts; Thus, applying deference, the state court reasonably concluded that Winslow was competent when he entered his guilty plea based on Drs. Mhatre's and Neidigh's reports, and the postconviction court's denial of relief was not contrary to, or an unreasonable applica ion of Strickland	E. Branch	C			
Peoples v. Sec'y, Dep't of Corr., No. 18-13573-D, 2019 WL 948788, at *1 (11th Cir. Jan. 23, 2019), cert. denied sub nom. Peoples v. Inch, 139 S. Ct. 1613, 203 L. Ed. 2d 764 (2019	Short	Slack	Peoples's petition is plainly barred by § 2254's one-year statute of limitations and he has not shown that he is entitled to equitable tolling, he has failed to satisfy the second prong of Slack's test	C. Wilson	P			

Mohd v. Sec'y, Fla. Dep't of Corr., No. 18-12312-F, 2019 WL 2406943, at *1 (11th Cir. Jan. 23, 2019)	Short	28 USC 2253(c)(2)	appellant has failed to make the requisite showing	W. Pryor	P			
Wilcox v. United States, No. 18-11984-K, 2019 WL 2152737, at *1 (11th Cir. Jan. 16, 2019)	Short	Slack	failed to satisfy the Slack test for his claims	C. Wilson	P			
Boone v. Warden, No. 18-13097-E, 2019 WL 309870, at *1 (11th Cir. Jan. 10, 2019)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the district court's conclusion that it lacked jurisdiction to consider Mr. Boone's § 2254 petition challenging his drug-possession conviction.	J. Pryor	P			
Lane v. United States, No. 18-12712-C, 2019 WL 2881377, at *1 (11th Cir. Jan. 9, 2019)	Short	28 USC 2253(c)(2)	motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right.	G. Tjoflat	P			
Walker v. Bolling, No. 18-13429-E, 2019 WL 549564, at *1 (11th Cir. Jan. 7, 2019)	Short	Slack	failed to make the requisite showing.	G. Tjoflat	P			
Griffin v. Sec'y, Dep't of Corr., No. 18-13193-C, 2019 WL 367694, at *1 (11th Cir. Jan. 7, 2019)	Short	28 USC 2253(c)(2)	Griffin's petition states a facially valid ineffective assistance of counsel claim, Griffin's motion for a COA is GRANTED on the following issue only	S. Marcus	P			
Nestor v. United States, No. 18-13626-C, 2019 WL 989415, at *1 (11 h Cir. Jan. 7, 2019)	Short	28 USC 2253(c)(2)	has not made a substantial showing of the denial of a constitutional right	S. Marcus	P			
Brown v. Blackwood, No. 18-14005-E, 2018 WL 7825752, at *1 (11th Cir. Dec. 27, 2018)	Short	Slack	failed to make the requisite showing,	W. Pryor	P			
Morman v. United States, No. 18-13593-A, 2018 WL 9490361, at *1 (11th Cir. Dec. 11, 2018)	Long	28 USC 2253(c)(2); Slack	The district court did not err by denying Morman's § 2255 motion because he did not meet his burden of showing that the sentencing court relied solely on the residual clause. here was no case in this Circuit, at the time, holding that Alabama third-degree robbery qualified as a violent felony only under the ACCA's residual clause.	K. Newsom	C			
Bruce v. Sec'y, Fla. Dep't of Corr., No. 18-13361-G, 2018 WL 7286079, at *1 (11th Cir. Dec. 6, 2018)	Long	28 USC 2253(c)(2); Slack	he failed to exhaust these claims and he is procedurally barred from pursuing federal habeas review on them; the record shows that Bruce's trial counsel moved for a judgment of acquittal and that the outcome at trial came down to a credibility determination, which was within the province of the jury. T	K. Newsom	P			
Kraft v. Stewart, No. 18-10355-C, 2018 WL 8918477, at *1 (11th Cir. Nov. 28, 2018)	Long	28 USC 2253(c)(2); Slack	The district court correctly concluded that the petition was untimely.//he district court correctly concluded that he did not demonstrate that he was en itled to equitable tolling.	J. Carnes	P			
Estupinan-Gonzalez v. United States, No. 17-15586-J, 2018 WL 6919305, at *1 (11th Cir. Nov. 28, 2018)	Long	Slack	Estupinan-Gonzalez cannot show deficient performance with respect to any of the assertions that he makes under Claim 3. He cannot show that counsel performed deficiently by failing to discuss the right to appeal.	J. Carnes	P			

Roberson v. United States, No. 18-13288-G, 2018 WL 7201491, at *1 (11th Cir. Nov. 19, 2018)	Short	28 U.S.C. § 2253(c)(2); Slack	failed to make the requisite showing	G. Tjoflat	P			
Preston v. Sec'y, Dep't of Corr., No. 17-14618-H, 2018 WL 8061783, at *1 (11th Cir. Nov. 16, 2018)	Long	28 U.S.C. § 2253(c)(2); Slack	The state court's denial of these claims was not contrary to, and did not involve an unreasonable application of, Strickland, nor was it based on an unreasonable determina ion of the facts.		P			
Ramos v. Sec'y, Fla. Dep't of Corr., No. 18-12078-G, 2018 WL 6131829, at *1 (11th Cir. Nov. 15, 2018)	Long	28 USC 2253(c)(2); Slack	A rational jury could find Ramos guilty based on the evidence submitted at trial; The trial court did not err in allowing a defense witness to testify about the wrongful-death lawsuit he had filed against the apartment complex for Nathan's death; he state court's denial of Ramos's ineffective-assistance claim was neither contrary to, nor did it involve an unreasonable application of	R. Rosenbaum	P			
Mosley v. Jones, No. 17-13114-E, 2018 WL 6982924, at *1 (11th Cir. Nov. 15, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate hat there is no double-jeopardy violation; the Florida courts' rejec ion of Mosley's ineffective-assistance-of-counsel claim was not contrary to federal law or based on an unreasonable determination of fact.	J. Carnes	P			
Kirksey v. Sec'y, Fla. Dep't of Corr., No. 17-13369-A, 2018 WL 7139263, at *1 (11th Cir. Nov. 15, 2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate whether the state court misapplied Strickland in denying Kirksey's Claim 2. Because Kirksey has not shown a reasonable probability that the outcome of his trial would have been different, he has not shown that he was prejudiced by any deficient performance, and therefore, the First DCA's denial of this claim was not an unreasonable applica ion of Strickland.	J. Carnes	P			
McCormick v. Attorney Gen., Alabama, No. 18-13335-J, 2018 WL 6047592, at *1 (11th Cir. Nov. 9, 2018)	Short	Slack	failed to satisfy the Slack test for any of his claims	W. Pryor	P			
Tannehill v. United States, No. 18-12646-J, 2018 WL 8667009 (11th Cir. Nov. 6, 2018)	Long	28 U.S.C. § 2253(c)(2); Slack	As reasonable jurists would not debate the dismissal of Tannehill's § 2255 motion, his motion for a COA is DENIED.	A. Jordan	C			
Spence v. United States, No. 18-12372-K, 2018 WL 6523998 (11th Cir. Nov. 6, 2018)	Long	28 U.S.C. § 2253(c)(2); Slack	reasonable jurists would not debate the district court's denial of Spence's § 2255 mo ion because he failed to make the requisite showings of deficient performance and prejudice necessary for a successful claim of ineffective assistance of counsel.	A. Jordan	P			
Lockett v. Warden, No. 17-13480-B, 2018 WL 7201555, at *3 (11th Cir. Nov. 1, 2018)	Long	28 USC 2253(c)(2); Slack	not contrary to federal law or based on unreasonable factual determina ions; As there is no evidence to support Lockett's characteriza ion of the plea agreement	J. Carnes	P			
Farley v. United States, No. 17-13250-F, 2018 WL 7050478 (11th Cir. Nov. 1, 2018)	Long	28 U.S.C. § 2253(c)(2); Slack	Because Farley has not shown that jurists of reason would debate the district court's denial of his authorized, successive § 2255 motion and his motion for reconsideration, it is recommended that this Court deny a COA	J. Carnes	P			
Borghi v. Attorney Gen., No. 17-13197-F, 2018 WL 7050482 (11th Cir. Nov. 1, 2018)	Long	28 U.S.C. § 2253(c)(2); Slack	Because reasonable jurists would not find debatable the district court's denial of Borghi's § 2254petition, his motion for a COA is DENIED.	J. Carnes	P			
Frazier v. United States, No. 17-12151-G, 2018 WL 6046417 (11th Cir. Oct. 31, 2018), cert. denied, 139 S. Ct. 1399, 203 L. Ed. 2d 629 (2019)	Long	28 USC 2253(c)(1)(B); Slack	Reasonable jurists would not debate that Frazier cannot show hat counsel performed deficiently. He cannot succeed with Claim 7 and is not entitled to a COA on the claim...Reasonable jurists would not debate that the district court's properly denied Frazier's § 2255 mo ion.	J. Carnes	P			

Lloyd v. United States, No. 17-13276-K, 2018 WL 7108249 (11th Cir. Oct. 31, 2018)	Long	28 USC 2253(c)(1)(B); 2253(c)(2); Slack	reasonable jurists would not debate the district court's assessment of the three claims that Lloyd raised in his § 2255 motion. See Slack, 529 U.S. at 484.	J. Carnes	P			
Holmes v. United States, No. 18-10608-F, 2018 WL 7364872 (11th Cir. Oct. 29, 2018), cert. denied, 139 S. Ct. 1580, 203 L. Ed. 2d 738 (2019)	Long	28 USC 2253(c)(2), Miller-El	Reasonable jurists would not debate hat conclusion, because there was no valid objection to make.	B. Martin	P			
Cooper v. United States, No. 18-12962-K, 2018 WL 7046610 (11th Cir. Oct. 22, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			
Broomfield v. United States, No. 18-12405-H; 2018 WL 6504083 (C.A.11 (Fla.))	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not find debatable or wrong the District Court's denial of Mr. Broomfield's § 2255 motion	B. Martin	P			
O'Kelley v. Fountain CF Warden, No. 18-12471-J, 2018 WL 8619731 (11th Cir. Oct. 17, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate hat this conclusion does not constitute an unreasonable finding of fact, nor is it contrary to the Supreme Court's decision in Santobello, which involved an undisputed breach ... reasonable jurists would not debate that O'Kelley has failed to establish that the state court's conclusion was "so lacking in justification that there was an error well understood and comprehended in exis ing law beyond any possibility for fairminded disagreement."	E. Branch	C			
Carter v. United States, No. 18-12723-B, 2018 WL 8667010 (11th Cir. Oct. 12, 2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the district court's denial of Carter's first claim that his counsel was ineffective at the pretrial stage.	R. Rosenbaum	P			
Thompson v. Sec'y, Dep't of Corr., No. 18-10623-H, 2018 WL 7436522 (11th Cir. Oct. 2, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	S. Marcus	P			
Smith v. Sec'y, Dep't of Corr., No. 17-14357-C, 2018 WL 4846910 (11th Cir. Sept. 26, 2018), cert. denied sub nom. Smith v. Inch, 139 S. Ct. 1570, 203 L. Ed. 2d 732 (2019)	Long	28 USC 2253(c)(2); Slack	Although Mr. Smith may be able to maintain an actual-innocence claim, a COA is DENIED because reasonable jurists would not debate whether he can show a separate valid claim of the denial of an underlying constitutional right. (Mr. Smith's actual-innocence claim is only half of the inquiry. Because this circuit does not recognize stand-alone claims of actual innocence, see Cunningham v. Dist. Att'y's Office for Escambia Cty., 592 F.3d 1237, 1272 (11th Cir. 2010), he must also separately show "a valid claim of the denial of a constitutional right.")	B. Martin	C			
Artica-Romero v. United States, No. 18-13638-J, 2018 WL 7503916 (11th Cir. Sept. 24, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	G. Tjoflat	C			
Hawkins v. Sec'y, Fla. Dep't of Corr., No. 18-10577-G, 2018 WL 7364871 (11th Cir. Sept. 19, 2018), cert. denied sub nom. Hawkins v. Inch, 139 S. Ct. 1305, 203 L. Ed. 2d 416 (2019)	Long	28 USC 2253(c)(2); Slack	because Hawkins has waived the challenge he seeks to assert on appeal, his motion for a COA is DENIED. Moreover, **even assuming that Hawkins did not waive any challenge to the district court's order, he still has not shown that he is entitled to a COA. Although reasonable jurists could debate whether the district court was correct in its procedural ruling that the state courts rejected Hawkins's public-trial-violation claim on adequate and independent state procedural grounds, where no state court ever "clearly and expressly" applied a procedural bar to his claim, reasonable jurists would not debate the merits of Hawkins's underlying constitutional claim.**	K. Newsom	C			

Timmons v. Sec'y, Dep't of Corr., No. 17-14604-J, 2018 WL 5306395 (11th Cir. Sept. 14, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate he District Court's denial of these claims.	B. Martin	C			
Porter v. United States, No. 17-13743-F, 2018 WL 7458652 (11th Cir. Sept. 13, 2018)	Long	28 USC 2253(c)(2); Slack	Because the District Court was correct in its rulings that Mr. Porter's § 2255 motion was untimely, that his claims were procedurally defaulted, and that his claims lacked merit, Mr. Porter has not made a substan ial showing of he denial of a constitutional right.	B. Martin	P			
Wilson v. United States, No. 17-14204-J, 2018 WL 4676492 (11th Cir. Sept. 13, 2018)	Long	28 USC 2253(c)(2)	His Rule 60(b) mo ion was simply an attempt to reargue claims that he had raised in his § 2255 motion and that had already been rejected by this Court on direct appeal. Accordingly, Mr. Wilson is not enti led to a COA on the denial of his Rule 60(b) motion.	B. Martin	P			
Chi v. United States, No. 17-15233-F, 2018 WL 6264060 (11th Cir. Sept. 13, 2018)	Long	28 USC 2253(c)(2); Slack	has not shown that reasonable jurists would find the denial of her § 2255 motion debatable	B. Martin	C			
Briner v. Sec'y, Dep't of Corr., No. 18-10793-F, 2018 WL 7508611 (11th Cir. Sept. 13, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	G. Tjoflat	P			
Duong Thanh Ho v. Sec'y, Fla. Dep't of Corr., No. 17-14447-D, 2018 WL 4871094 (11th Cir. Sept. 12, 2018)	Long	28 USC 2253(c)(2); Slack	has not made a substantial showing of the denial of a constitutional right on any of his Claims.	B. Martin	P			
Hughes v. Sec'y, Dep't of Corr., No. 18-11941-D, 2018 WL 5821715 (11th Cir. Sept. 12, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	G. Tjoflat	P			
Lawrence v. Sec'y, Dep't of Corr., No. 18-12523-B, 2018 WL 4511858 (11th Cir. Sept. 11, 2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the denial of Lawrence's first claim because he failed to rebut by clear and convincing evidence the state court's finding that he did not invoke his right to counsel... Reasonable jurists also would not debate the district court's ruling that the claim of ineffective assistance of appellate counsel was procedurally defaulted because the state appellate court dismissed as untimely both his petition for a writ of habeas corpus raising the claim, and his amended Fed. R. Crim. P. 3.850 motion to the extent that it raised the claim.	R. Rosenbaum	P			
Cobb v. Sec'y, Fla. Dep't of Corr., No. 18-12603-A, 2018 WL 4587098 (11th Cir. Sept. 11, 2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the district court's conclusion that Cobb's claim was procedurally defaulted.	R. Rosenbaum	P			
Jackson v. Sec'y, Dep't of Corr., No. 18-11514-E, 2018 WL 4988607 (11th Cir. Sept. 11, 2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the state court's merits denials on Claims 1 through 8 because its rejections of these claims were not contrary to federal law or based on unreasonable factual determinations. ... Reasonable jurists also would not debate the district court's denial of Claim 2 in part and Claims 9 through 12 as procedurally defaulted.	R. Rosenbaum	P			
Bing v. Sec'y, Fla. Dep't of Corr., No. 16-16827-D, 2018 WL 5503154 (11th Cir. Sept. 11, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate he District Court's ruling.	B. Martin	P			

Cowan v. United States, No. 17-12702-D, 2018 WL 6919887 (11th Cir. Sept. 11, 2018)	Long	28 USC 2253(c)(2); Slack	has not shown that reasonable jurists would find debatable both the District Court's rulings and the denial of his cons itutional claims, his motion for a COA is DENIED.	B. Martin	C			
Borgwald v. Sec'y, Fla. Dep't of Corr., No. 17-13168-H, 2018 WL 7108247 (11th Cir. Sept. 6, 2018)	Long	28 USC 2253(c)(2); Slack (We will deny a COA if the petitioner fails to satisfy either prong of this two-part test.)	reasonable jurists would not debate the District Court's dismissal of Mr. Borgwald's § 2254 petition, his motion for a COA is DENIED.	B. Martin	P			
Earner v. Sec'y, Dep't of Corr., No. 18-11747-E, 2018 WL 5473006 (11th Cir. Sept. 5, 2018)	Long	28 USC 2253(c)(2); Slack	Because Barner has not shown that reasonable jurists would find debatable the district court's dismissal of his § 2254 petition as untimely and procedurally defaulted, his motion for a COA is DENIED	A. Jordan	P			
Coleman v. Fla. Dep't of Corr., No. 18-11358-B, 2018 WL 7954623, at *1 (11th Cir. Sept. 5, 2018)	Long	28 USC 2253(c)(2); Slack	Coleman did not allege or establish cause and prejudice, or a fundamental miscarriage of justice, to excuse his procedural default. The state postconviction court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts by denying this claim.	A. Jordan	P			
Morris v. Warden, No. 18-12966-K, 2018 WL 5284086, at *1 (11th Cir. Sept. 4, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	G. Tjoflat	P			
McDavid v. Fla. Dep't of Corr., No. 18-11073-D, 2018 WL 4510433, at *1 (11th Cir. Aug. 31, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	G. Tjoflat	P			
Roberts v. Sec'y, Dep't of Corr., No. 18-12410-B, 2018 WL 4352792, at *1 (11th Cir. Aug. 29, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate he district court's dismissal of Roberts's § 2254 petition as time barred. Roberts did not make he requisite showing to justify equitable tolling because he did not show due diligence or that extraordinary circumstances prevented timely filing.	K. Newsom	P			
Crews v. United States, No. 18-12262-C, 2018 WL 4203388, at *1 (11th Cir. Aug. 29, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make requisite showing	S. Marcus	P			
Wilmore v. United States, No. 18-11653-J, 2018 WL 5295886, at *1 (11th Cir. Aug. 28, 2018), cert. denied, 139 S. Ct. 833, 202 L. Ed. 2d 606 (2019), reh'g denied, 139 S. Ct. 1310, 203 L. Ed. 2d 431 (2019)	Long	28 USC 2253(c)(2); Slack	Wilmore's argument that his counsel was ineffective for failing to argue constructive amendment based on post office box numbers is meritless	K. Newsom	P			
Newell v. United States, No. 18-12072-D, 2018 WL 6047642, at *1 (11th Cir. Aug. 22, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make requisite showing	W. Pryor	P			

Matias v. United States, No. 18-11819-H, 2018 WL 5819638, at *1 (11th Cir. Aug. 21, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	S. Marcus	C			
Dewitt v. Fla., No. 17-15211-E, 2018 WL 6324757, at *1 (11th Cir. Aug. 20, 2018)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2), Strickland	Mr. Dewitt did not show that counsel's performance was deficient, and he state court decision was not contrary to, or an unreasonable application of Strickland.	B. Martin	P			
Belser v. Warden, No. 18-10256-B, 2018 WL 7135390, at *1 (11th Cir. Aug. 16, 2018)B	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate he District Court's conclusion that Mr. Belser's § 2254 petition was un imely; The District Court did not err in its conclusion that Mr. Belser's § 2254 petition was untimely.	B. Martin	P			
Simmons v. Sec'y, Fla. Dep't of Corr., No. 18-11058-H, 2018 WL 4599681, at *1 (11th Cir. Aug. 15, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	C			
Mekowulu v. United States, No. 18-11255-C, 2018 WL 4739946, at *1 (11th Cir. Aug. 14, 2018), cert. denied, 139 S. Ct. 1296, 203 L. Ed. 2d 415 (2019)	Long	28 USC 2253(c)(2); Slack	Here, reasonable jurists would not dispute the district court's decision that Mekowulu's claims were procedurally barred because he did not raise them on direct appeal.	R. Rosenbaum	C			
Riquene v. United States, No. 18-11821-D, 2018 WL 5734221, at *1 (11th Cir. Aug. 10, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make a substantial showing of the denial of a constitutional right	G. Tjoflat	P			
Miller v. Alabama, No. 18-10766-C, 2018 WL 7503907, at *1 (11th Cir. Aug. 3, 2018), cert. denied, 139 S. Ct. 1642, 203 L. Ed. 2d 916 (2019)	Long	28 USC 2253(c)(2); Slack	Miller cannot avail himself of any exception to the statute of limitations because he has not shown that extraordinary circumstances prevented him from timely filing his petition or that he has new, reliable evidence that he was actually innocent.	A. Jordan	P			
McCloud v. Sec'y, Fla. Dep't of Corr., No. 18-11411-H, 2018 WL 4871123, at *1 (11th Cir. Aug. 3, 2018), cert. denied sub nom. McCloud v. Jones, 139 S. Ct. 927, 202 L. Ed. 2d 654 (2019)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2).	McCloud cannot show that the state court's denial of his first and third claims was contrary to or a misapplication of law or an unreasonable determination of fact because he cannot make the requisite showing of deficient performance and prejudice for Claims One and Three	A. Jordan	P			
Maldonado v. Sec'y, Dep't of Corr., No. 17-15746-H, 2018 WL 6918942, at *1 (11th Cir. Aug. 1, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	S. Marcus	P			
Mack v. State, No. 18-11781-F, 2018 WL 5617112, at *1 (11th Cir. July 31, 2018)	Short	28 USC 2253(c)(2)	has not met this standard	S. Marcus	P			

Pe it v. State, No. 18-10802-A, 2018 WL 4205668, at *1 (11th Cir. July 31, 2018)	Short	28 USC 2253(c)(2)	has not met this standard	S. Marcus	C			
Freeman v. United States, No. 16-17185-J, 2018 WL 6318358, at *1 (11th Cir. July 31, 2018), cert. denied, 139 S. Ct. 1352, 203 L. Ed. 2d 589 (2019)	Long	28 USC 2253(c)(2); Slack	The government's failure to disclose such evidence does not amount to a Brady violation, given hat the photos would not exculpate Freeman; Accordingly, these claims have no merit.	J. Carnes	P			
Edmondson v. Sec'y, Fla. Dep't of Corr., No. 17-13029-H, 2018 WL 6983477, at *1 (11th Cir. July 31, 2018)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2).	Here, the state court's denial of Edmondson's ineffective-assistance claim was not contrary to, or an unreasonable application of, Strickland, or based on an unreasonable determination of the facts.	J. Carnes	P			
Riggs v. United States, No. 18-12111-F, 2018 WL 4030641, at *1 (11th Cir. July 20, 2018)	Short	28 USC 2253(c)(2); Slack	not shown that reasonable jurists would find the denial of his § 2255 motion debatable	C. Wilson	P			
Johnson v. Fla. Dep't of Corr., No. 18-11743-F, 2018 WL 5503155, at *1 (11 h Cir. July 20, 2018)	Short	28 USC 2253(c)(2)	failed to make the requisite showing	C. Wilson	P			
Washington v. Crews, No. 18-10670-J, 2018 WL 7499807, at *1 (11th Cir. July 19, 2018)	Long	28 USC 2253(c)(2); Slack	Even if it were not procedurally defaulted, however, Mr. Washington's four h claim is not cognizable in a federal habeas corpus proceeding because it involves an issue of purely state law	J. Pryor	C			
Crump v. United States, No. 18-10480-G, 2018 WL 3869607, at *1 (11th Cir. July 17, 2018)	Long	28 USC 2253(c)(2); Slack	Mr. Crump also cannot succeed on his conclusory claims of ineffective assistance of trial and appellate counsel because he cannot make the requisite showings of prejudice	J. Pryor	P			
Monsegue v. United States, No. 17-13054-C, 2018 WL 6979305, at *1 (11th Cir. July 17, 2018), cert. denied, 139 S. Ct. 1360, 203 L. Ed. 2d 595 (2019), reh'g denied, 139 S. Ct. 2048, 204 L. Ed. 2d 251 (2019)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate the district court's finding that Monsegue voluntarily entered a guilty plea because all three of the core concerns of Rule 11 were addressed in the plea colloquy. Monsegue's claim that the summons for his bank records violated his privacy rights would have failed as a matter of law, and, thus, counsel was not ineffective for failing to raise that objection,	J. Carnes	P			
Oden v. United States, No. 18-10187-E, 2018 WL 7131991, at *1 (11th Cir. July 6, 2018), cert. denied, 139 S. Ct. 491, 202 L. Ed. 2d 385 (2018)	Long	28 USC 2253(c)(2); Slack; [N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law. 793 F.3d 1261	his argument hat his Georgia burglary convictions do not constitute violent felonies is foreclosed by binding precedent.	J. Pryor	C			

Horvatt v. Sec'y, Dep't of Corr., No. 18-11246-F, 2018 WL 4678821 (11th Cir. July 6, 2018), cert. denied sub nom. Horvatt v. Jones, 139 S. Ct. 1343, 203 L. Ed. 2d 584 (2019)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2).	Reasonable jurists would not debate whether Claim 3(a) was procedurally defaulted.;Reasonable jurists would not debate whether the state court's denial of Claim 3(b) was based on an unreasonable application of Strickland, as the state court correctly noted that the court inquired whether any members of the jury pool had heard anything about he case, and none of the jurors who indicated that they had heard about the case were selected for he jury; Reasonable jurists would not debate whether the state court unreasonably applied Strickland in denying Claim 4.	A. Jordan	P			
Galeana-Gonzalez v. Warden, No. 18-11485-E, 2018 WL 4904758, at *1 (11th Cir. July 2, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			
Pearson v. Sec'y, Dep't of Corr., No. 17-10357-B, 2018 WL 3636456, at *1 (11th Cir. June 29, 2018)	Long	28 USC 2253(c)(2); Slack	because he failed to appeal the denial of his claims, he has failed to exhaust his state court remedies.Although he asserts that these documents were forged, he points to no facts to support his claim other than the alterations made on the face of the documents. T	B. Martin	P			
West v. Sec'y, Fla. Dep't of Corr., No. 18-10561-E, 2018 WL 3933730, at *1 (11th Cir. June 21, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	W. Pryor	P			
Dixon v. United States, No. 18-11493-C, 2018 WL 3545909, at *1 (11th Cir. June 20, 2018), cert. denied, No. 18-9760, 2019 WL 4922380 (U.S. Oct. 7, 2019)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			
Ferrell v. Sec'y, Fla. Dep't of Corr., No. 18-11550-G, 2018 WL 3491719, at *1 (11th Cir. June 15, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	C. Wilson	C			
Rood v. Fla. Dep't of Corr., No. 18-11453-B, 2018 WL 3374920, at *1 (11 h Cir. June 13, 2018)	Long	28 USC 2253(c)(2); Slack	did not demonstrate that the alleged governmental action actually prevented him from exercising his right of access to courts to attack his convictions, as required under § 2244(d)(1)(B); has not shown that the absence of transcripts or recordings of the trial proceedings prevented him from timely filing his § 2254 petition prior to February 8, 2016	K. Newsom	P			
Danielsgale v. United States, No. 18-10054-J, 2018 WL 3381323, at *1 (11th Cir. June 13, 2018)	Long	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	S. Marcus	P			
Ferry v. Sec'y, Dep't of Corr., No. 17-13714-C, 2018 WL 4042893, at *1 (11 h Cir. June 12, 2018)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2).; § 2254(e)(1)	reasonable jurists would not debate the district court's denial of the ineffective-assistance sub-claim. The record supports the state post-conviction court's denial of this sub-claim on the basis hat counsel did not err in declining to investigate further as to the prospective jurors' discussions because counsel had no reason to move for a mistrial	J. Pryor	P			
Bailem v. Fla., No. 17-13550-E, 2018 WL 3814298, at *1 (11th Cir. June 7, 2018)	Short	28 USC 2253(c)(2)	failed to make the requisite showing	S. Marcus	P			

Walker v. United States, No. 18-10942-F, 2018 WL 4334057, at *1 (11th Cir. June 6, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	S. Marcus	P			
Tiszai v. Sec'y, Dep't of Corr., No. 18-10233-A, 2018 WL 7135530, at *1 (11 h Cir. June 6, 2018), cert. denied sub nom. Tiszai v. Inch, 139 S. Ct. 2030, 204 L. Ed. 2d 231 (2019)	Short	28 USC 2253(c)(2)	failed to make the requisite showing	S. Marcus	P			
Anderson v. United States, No. 17-12670-K, 2018 WL 6621884, at *1 (11th Cir. June 5, 2018)	Long	28 USC 2253(c)(2); Slack; Hamilton	The Supreme Court made clear in Johnson that its decision about the ACCA's residual clause did “not call into ques ion application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony.”	B. Martin	P			
Edwards v. United States, No. 17-10322-D, 2018 WL 3586866, at *1 (11th Cir. June 4, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not find debatable the district court's denial of this claim, as in his plea agreement, Edwards acknowledged that, if he had 3 previous convictions for a violent felony	A. Jordan	P			
Harris v. Sec'y, Fla. Dep't of Corr., No. 17-14953-J, 2018 WL 6016873, at *1 (11th Cir. June 4, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	S. Marcus	P			
Shilstone v. Sec'y, Fla. Dep't of Corr., No. 18-10215-G, 2018 WL 3545907, at *1 (11th Cir. June 1, 2018)	Long	28 USC 2253(c)(2); Slack	The state court reasonably denied his claim as the record demonstrates that he acknowledged hat it was his decision alone to testify.	A. Jordan	P			
Wallace v. Sec'y, Fla. Dep't of Corr., No. 17-14368-G, 2018 WL 4847017, at *1 (11th Cir. June 1, 2018)	Long	28 USC 2253(c)(2); Slack	has not demonstrated that his claims fit wi hin the exceptions articulated in Lackawanna County; no new evidence that he was actually innocent	B. Martin	P			
Cummings v. Sec'y, Dep't of Corr., No. 17-12798-A, 2018 WL 3105714, at *1 (11th Cir. May 25, 2018)	Long	28 USC 2253(c)(2); Slack	We see no way for reasonable jurists to disagree that the Florida court's determinations were reasonable on this point; Nothing Cummings said before the district court explained how the post-conviction trial court's determination was erroneous, nor does he present any elaboration to us of how reasonable jurists might agree with him on this point.	A. Jordan	P			
Warren v. Sec'y, Fla. Dep't of Corr., No. 18-10219-C, 2018 WL 3633725, at *1 (11th Cir. May 23, 2018)	Long	28 USC 2253(c)(2); Slack	Here, reasonable jurists would not debate the district court's denial of Warren's § 2254 petition because his only claim raised in his petition was procedurally defaulted.	A. Jordan	P			
Watts v. Comm'r, Alabama Dep't of Corr., No. 18-10248-G, 2018 WL 7135528, at *1 (11th Cir. May 22, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate the district court's denial of Watts' § 2254 petition as time-barred.	A. Jordan	P			

Rawls v. Sec'y, Fla. Dep't of Corr., No. 18-11056-G, 2018 WL 3090815, at *1 (11th Cir. May 22, 2018)	Long	28 USC 2253(c)(2); Slack	Rawls has not demonstrated hat reasonable jurists would debate the district court's conclusion that his § 2254 petition is time-barred; Rawls also did not show that reasonable jurists would debate the district court's conclusion hat he was not entitled to equitable tolling, because his assertion that he was without his legal documents for twenty days did not rise to the level of extraordinary circumstances	R. Rosenbaum	P			
Puente v. Attorney Gen., Fla., No. 17-13834-B, 2018 WL 7458651, at *1 (11th Cir. May 21, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	G. Tjoflat	P			
Woodson v. Sec'y, Fla. Dep't of Corr., No. 17-15557-H, 2018 WL 3036468, at *1 (11th Cir. May 16, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate hat the state courts' rejections of these two claims were not contrary to federal law or based on unreasonable factual determinations. See 28 U.S.C. § 2254(d) (providing he circumstances in which a federal court should grant a § 2254 petition after a state court's adjudication of a claim's merits). Reasonable jurists would not debate that the state courts' rejec ions of these two claims were not contrary to federal law or based on unreasonable factual determinations.	R. Rosenbaum	P			
Smith v. United States, No. 17-15686-G, 2018 WL 3199346, at *1 (11th Cir. May 16, 2018), cert. denied, 139 S. Ct. 1258, 203 L. Ed. 2d 281 (2019)	Long	28 USC 2253(c)(2); Slack	Although Vail–Bailon concerned whether Florida felony battery qualified as a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii), the decision utilized the definition of “physical force” and analysis from United States v. Johnson, 559 U.S. 133, 140 (2010) (“Curtis Johnson”), which was an ACCA cas	A. Jordan	P			
Lingebach v. Sec'y, Dep't of Corr., No. 18-10236-B, 2018 WL 3548701, at *1 (11th Cir. May 15, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate hat the Florida First District Court of Appeal's rejection of this claim was not contrary to federal law or based on unreasonable factual determinations.	R. Rosenbaum	P			
Palumbo v. Sec'y, Fla. Dep't of Corr., No. 18-10186-C, 2018 WL 3633867, at *1 (11th Cir. May 11, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate hat the state courts' rejection of this claim was not contrary to federal law or based on unreasonable factual determinations.	R. Rosenbaum	C			
Fails v. Sec'y, Fla. Dep't of Corr., No. 18-10675-G, 2018 WL 7495335, at *1 (11th Cir. May 11, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			
Swindle v. United States, No. 17-15234-E, 2018 WL 6324758, at *1 (11th Cir. May 10, 2018)	Long	28 USC 2253(c)(2); Slack	The record demonstrates that a factual basis supported his pleas, as the stipula ion, which Swindle ini ialed and signed, stated that a computer forensic examination of his laptop revealed 75 videos of child pornography,	A. Jordan	P			
Davis v. Sec'y, Fla. Dep't of Corr., No. 17-15163-G, 2018 WL 2717252, at *1 (11th Cir. May 10, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make requisite showing	S. Marcus	P			
Thomas v. United States, No. 17-14497-G, 2018 WL 6318054, at *1 (11th Cir. May 10, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	S. Marcus	P			

Ortega v. Attorney Gen., Fla., No. 17-15676-G, 2018 WL 3198903, at *1 (11th Cir. May 9, 2018), cert. denied sub nom. Ortega v. Bondi, 139 S. Ct. 924, 202 L. Ed. 2d 652 (2019)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	P			
O'Quinn v. Sec'y, Fla. Dep't of Corr., No. 17-13497-H, 2018 WL 3816780, at *1 (11th Cir. May 3, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	G. Tjoflat	P			
Jordan v. United States, No. 18-10615-K, 2018 WL 2328179, at *1 (11th Cir. Apr. 19, 2018)	Long	28 USC 2253(c)(2); Slack	any claim by Jordan that his plea was not voluntary or knowing was rebutted by the record because he testified at the plea hearing that he understood he was likely to receive a career-offender enhancement and that he faced up to a statutory term of life imprisonment;	K. Newsom	C			
Ashley v. Sec'y, Dep't of Corr., No. 17-15504-F, 2018 WL 3032977, at *1 (11th Cir. Apr. 18, 2018), cert. denied sub nom. Ashley v. Jones, 139 S. Ct. 1215, 203 L. Ed. 2d 236 (2019)	Long	28 USC 2253(c)(2); Slack	Because the state post-conviction court did not unreasonably apply Strickland v. Washington, 466 U.S. 668 (1984), no COA is warranted for this claim.	K. Newsom	P			
McGee v. United States, No. 18-10531-J, 2018 WL 2246597, at *1 (11th Cir. Apr. 17, 2018), cert. denied, 139 S. Ct. 414, 202 L. Ed. 2d 320 (2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	C			
Sailor v. United States, No. 18-10656-K, 2018 WL 2338410, at *1 (11th Cir. Apr. 16, 2018), cert. denied, 139 S. Ct. 414, 202 L. Ed. 2d 320 (2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	C			
Candler v. Sec'y, Dep't of Corr., No. 17-15633-H, 2018 WL 3199190, at *1 (11th Cir. Apr. 11, 2018)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2).	Therefore, the state's denial of Candler's argument hat the evidence should have been suppressed was not contrary to or an unreasonable application of federal law or an unreasonable determination of fact, and the district court did not err in denying the claim	R. Rosenbaum	P			
Harris v. Deal, No. 17-15088-J, 2018 WL 2317545, at *1 (11th Cir. Apr. 11, 2018), cert. denied, 139 S. Ct. 1301, 203 L. Ed. 2d 422 (2019)	Long	28 USC 2253(c)(2); Slack	The district court correctly determined that Harris's § 2254 petition was time-barred, his rebuttal motion was meritless.	R. Rosenbaum	P			

Morris v. State, No. 18-10087-D, 2018 WL 3390245, at *1 (11th Cir. Apr. 9, 2018), cert. denied sub nom. Morris v. Jones, 139 S. Ct. 388, 202 L. Ed. 2d 296 (2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			
Welch v. Sec'y, Fla. Dep't of Corr., No. 17-13891-H, 2018 WL 4205419, at *1 (11th Cir. Apr. 4, 2018), cert. denied sub nom. Welch v. Jones, 139 S. Ct. 386, 202 L. Ed. 2d 295 (2018)	Long	Slack	Reasonable jurists would not debate he district court's determination that this claim lacked merit, as Welch's score sheet reflected an extensive criminal history, and Welch failed to show that the trial court improperly relied on any false statements. reasonable jurists would not debate the district court's determination hat the state court's denial of Welch's various ineffective-assistance claims was not contrary to, nor did it involve an unreasonable applica ion of, Strickland.	K. Newsom	P			
Bradley v. Sec'y, Fla. Dep't of Corr., No. 17-12926-K, 2018 WL 3238836, at *1 (11th Cir. Apr. 2, 2018)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2)	For an ineffective-assistance claim raised in a § 2254 peti ion, the inquiry turns upon whether he relevant state court decision was contrary to, or an unreasonable application of, Strickland; the district court properly determined that the state court's adjudication of Ground 1 was not contrary to, or an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts in light of he evidence presented	J. Pryor	P			
Tirado v. Sec'y, Dep't of Corr., No. 17-14791-D, 2018 WL 5778983, at *1 (11th Cir. Apr. 2, 2018)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate he district court's determination that the petition was time-barred	K. Newsom	C			
United States v. Faurisma, 716 F. App'x 932 (11th Cir.), cert. denied, 139 S. Ct. 578, 202 L. Ed. 2d 412 (2018)	Long	28 USC 2253(c)(2); Slack	this Court recen ly held hat “Johnson’s void-for-vagueness ruling does not apply to or invalidate the ‘risk-of-force’ clause in § 924(c)(3)(B). [u]nder the prior precedent rule, we are bound to follow a prior binding precedent ‘unless and until it is overruled by this court en banc or by the Supreme Court.’	G. Tjoflat, K. Nev	C			
McLeod v. Sec'y, Dep't of Corr., No. 17-15509-D, 2018 WL 3000485, at *1 (11th Cir. Mar. 28, 2018)	Long	28 USC 2253(c)(2); Slack	The state habeas court did not unreasonably apply federal law or make an unreasonable determina ion of the facts by determining that, based on the totality of the circumstances, Deputy Johnson had a valid reason for conducting a protective sweep of the apartment.	R. Rosenbaum	P			
Greeson v. Sec'y, Fla. Dep't of Corr., No. 17-13450-E, 2018 WL 3689659, at *1 (11th Cir. Mar. 26, 2018)	Long	28 USC 2253(c)(2); Slack	In this case, reasonable jurists would not debate the District Court's conclusion that Mr. Greeson's § 2254 motion was untimely.	B. Martin	P			
Blackburn v. United States, No. 17-13268-D, 2018 WL 3617814, at *1 (11th Cir. Mar. 23, 2018), cert. denied, 139 S. Ct. 1393, 203 L. Ed. 2d 624 (2019)	Long	28 USC 2253(c)(2); Slack	Again, the Magistrate Judge's credibility determinations are not inconsistent or improbable and are given substantial deference. See Rivers, 777 F 3d at 1316-17. Because Ms. Blackburn cannot show that she was prejudiced, reasonable jurists would not debate the District Court's rejection of her claim that Mr. Haas provided ineffec ive assistance	B. Martin	P			
Milling v. Sec'y, Dep't of Corr., No. 17-15095-B, 2018 WL 2254674, at *1 (11th Cir. Mar. 21, 2018)	Long	28 USC 2253(c)(2); Slack	Because Milling has not established that the state court either unreasonably applied federal law or made an unreasonable determina ion of the facts, his motion for a COA is DENIED	R. Rosenbaum	P			

Brand v. United States, No. 17-12227-E, 2018 WL 2338817 (11th Cir. Mar. 21, 2018), cert. denied, 139 S. Ct. 577, 202 L. Ed. 2d 411 (2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the district court's denial of this claim	R. Rosenbaum	P			
Williams v. Morales, No. 17-15345-K, 2018 WL 6428203, at *1 (11th Cir. Mar. 21, 2018)	Long	28 USC 2253(c)(2); Slack	procedural default, The state court did not unreasonably apply clearly established federal law or make an unreasonable determination of the facts in denying this claim.	R. Rosenbaum	P			
Whitehead v. Warden, No. 17-14715-E, 2018 WL 1915540, at *1 (11th Cir. Mar. 16, 2018)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2)	this Court reviews the district court's decision de novo, but reviews the state habeas court's decision with deference; has not demonstrated that jurists of reason would debate the district court's denial of Claim 3	J. Pryor	C			
Paulcin v. Warden, No. 17-14985-J, 2018 WL 2214057, at *1 (11th Cir. Mar. 16, 2018)	Short	28 USC 2253(c)(2)	has failed to make a substantial showing of the denial of a constitutional right	C. Wilson	P			
Bell v. Sec'y, Dep't of Corr., No. 17-15461-A, 2018 WL 2973145, at *1 (11 h Cir. Mar. 16, 2018)	Long	28 USC 2253(c)(2); Slack	did not establish that he was entitled to equitable tolling; reasonable jurists would not debate whether Bell's § 2254 petition was time-barred	a. Jordan	P			
Keel v. Attorney Gen., Fla., No. 17-14782-B, 2018 WL 2041513, at *1 (11 h Cir. Mar. 15, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	P			
Jones v. Hetzel, No. 17-15096-F, 2018 WL 2246586, at *1 (11th Cir. Mar. 14, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	C. Wilson	P			
Arnold v. Sec'y, Fla. Dep't of Corr., No. 17-14717-K, 2018 WL 1916185, at *1 (11th Cir. Mar. 14, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			
Slocum v. Sec'y, Fla. Dep't of Corr., No. 17-15055-C, 2018 WL 2317546, at *1 (11th Cir. Mar. 14, 2018)	Short	28 USC 2253(c)(2); Slack	petition plainly is barred by § 2254's one-year statute of limitations, he has failed to satisfy the second prong of Slack's test.	W. Pryor	P			
Clark v. Warden, Johnson State Prison, No. 17-15227-D, 2018 WL 6264810, at *1 (11th Cir. Mar. 14, 2018), cert. denied sub nom. Clark v. Berry, 139 S. Ct. 294, 202 L. Ed. 2d 193 (2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	P			
Redford v. Warden, No. 17-14592-D, 2018 WL 1863465, at *1 (11th Cir. Mar. 13, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			

Toyer v. United States, No. 17-12760-G, 2018 WL 3199209, at *1 (11th Cir. Mar. 12, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	G. Tjoflat	P			
McMillian v. Peters, No. 17-14166-B, 2018 WL 4599653, at *1 (11th Cir. Mar. 7, 2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate the district court's conclusion that Mr. McMillian's habeas petition was untimely filed; has not shown that he is entitled to equitable tolling; time barred		P			
Stoddart v. Sec'y, Dep't of Corr., No. 17-11954-D, 2018 WL 2065588, at *1 (11th Cir. Mar. 7, 2018)	Short	28 USC 2253(c)(2); Slack	has not shown that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise	G. Tjoflat	P			
Faulkner v. Warden , Georgia Dep't of Corr., No. 17-14974-A, 2018 WL 2121539, at *1 (11th Cir. Feb. 27, 2018)	Short	28 USC 2253(c)(2)	has not met this standard,	S. Marcus	P			
Anthony v. Warden, 724 F. App'x 903, 904 (11th Cir. 2018), cert. denied sub nom. Anthony v. Boyd, 139 S. Ct. 1328, 203 L. Ed. 2d 574 (2019), reh'g denied, 140 S. Ct. 11, 204 L. Ed. 2d 1165 (2019)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not debate that his petition does not state a valid claim of the denial of a cons itutional righ	K. Newsom	P			
Brown v. United States, No. 17-14215-C, 2018 WL 1474898, at *1 (11th Cir. Feb. 21, 2018), cert. denied, 139 S. Ct. 226, 202 L. Ed. 2d 153 (2018), reh'g denied, 139 S. Ct. 624, 202 L. Ed. 2d 450 (2018)	Long	28 USC 2253(c)(2)	as not made a substantial showing of the denial of a constitutional right	K. Newsom	P			
Burke v. United States, No. 17-12071-A, 2018 WL 2181152, at *1 (11th Cir. Feb. 21, 2018)	Long	28 USC 2253(c)(2)	Burke cannot show hat there is a reasonable probability that he would not have pled guilty had trial counsel provided such advice	K. Newsom	P			
Ford v. United States, No. 17-14239-K, 2018 WL 7018045, at *1 (11th Cir. Feb. 21, 2018), cert. denied, 139 S. Ct. 1228, 203 L. Ed. 2d 243 (2019)	Long	28 USC 2253(c)(2); Slack	Reasonable jurists would not debate hat the district court acted within its discretion by declining to consider the ineffective-assistance-of-counsel claims as a result	K. Newsom	P			
Riascos v. United States, No. 17-15073-D, 2018 WL 935602, at *1 (11 h Cir. Feb. 13, 2018), cert. denied, 139 S. Ct. 205, 202 L. Ed. 2d 141 (2018)	Short	28 USC 2253(c)(2)	has failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			

Defreitas v. United States, No. 17-14590-A, 2018 WL 1863316, at *1 (11th Cir. Feb. 13, 2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	W. Pryor	P			
Johnson v. United States, No. 17-14760-K, 2018 WL 1990217, at *1 (11th Cir. Feb. 13, 2018)	Long	28 USC 2253(c)(2); Slack	has not made he requisite showing under Slack	R. Rosenbaum	P			
Mitchell v. Sec'y, Fla. Dep't of Corr., No. 17-15139-A, 2018 WL 2324212, at *1 (11th Cir. Feb. 9, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	S. Marcus	P			
Johnson v. State, No. 17-12485-B, 2018 WL 2734864, at *1 (11th Cir. Feb. 6, 2018), cert. denied sub nom. Johnson v. Fla., 139 S. Ct. 195, 202 L. Ed. 2d 121 (2018)	Short	28 USC 2253(c)(2); Slack	appellant has failed to satisfy Slack's test	W. Pryor	P			
Gomez v. Sec'y, Dep't of Corr., No. 17-14000-H, 2018 WL 1277071, at *1 (11th Cir. Jan. 31, 2018)	Long	28 USC 2253(c)(2); Slack	The state court reasonably concluded that Gomez failed to demonstrate ineffective assistance of counsel; Gomez failed to demonstrate that the state court's adjudica ion of this claim was based upon an unreasonable determination of the facts or that it was contrary to or an unreasonable application of, Strickland. Gomez v. Sec'y, Dep't of Corr., No. 17-14000-H, 2018 WL 1277071, at *1 (11th Cir. Jan. 31, 2018)	R. Rosenbaum	P			
Tibbs v. United States, No. 17-14060-F, 2018 WL 1282415, at *1 (11th Cir. Jan. 30, 2018)	Long	28 USC 2253(c)(2); Slack	procedural default; This claim is too conclusory to warrant habeas relief. T	R. Rosenbaum	P			
DePriest v. Att'y Gen., Fla., No. 17-13504-A, 2018 WL 705645, at *1 (11th Cir. Jan. 30, 2018), cert. denied sub nom. DePriest v. Bondi, 139 S. Ct. 296, 202 L. Ed. 2d 195 (2018)	Long	28 USC 2253(c)(2)	reasonable jurists would not find debatable whether the district court correctly denied DePriest's § 2254 mo ion	A. Jordan	P			
Gubanic v. United States, No. 17-14430-K, 2018 WL 1635999, at *1 (11th Cir. Jan. 30, 2018), cert. denied, 139 S. Ct. 77, 202 L. Ed. 2d 52 (2018)	Long	28 USC 2253(c)(2); Slack	reasonable jurists would not find debatable whether the district court correctly denied his § 2255 motion.	R. Rosenbaum	C			
Johnson v. Calhoun SP Warden, No. 17-11805-B, 2018 WL 1974963, at *1 (11th Cir. Jan. 26, 2018)	Long	28 USC 2253(c)(2); Slack; 28 U.S.C. § 2254(d)(1), (2); 28 U.S.C. § 2254(e)(1)	The state court reasonably denied his claim	B. Martin	C			

King v. United States, No. 17-11506-J, 2018 WL 1725604, at *1 (11th Cir. Jan. 9, 2018), cert. denied, 139 S. Ct. 60, 202 L. Ed. 2d 43 (2018)	Short	28 USC 2253(c)(2)	failed to make the requisite showing	W. Pryor	C			
Bonner v. Warden, No. 17-14428-J, 2018 WL 1638734, at *1 (11th Cir. Jan. 9, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	S. Marcus	P			
Pelto v. Sec'y, Dep't of Corr., No. 17-12735-E, 2018 WL 3064558, at *1 (11 h Cir. Jan. 5, 2018), cert. denied sub nom. Pelto v. Jones, 139 S. Ct. 279, 202 L. Ed. 2d 184 (2018)	Short	28 USC 2253(c)(2)	failed to make a substantial showing of the denial of a constitutional right	S. Marcus	C			
Mackey v. Sec'y, Dep't of Corr., No. 17-14624-F, 2018 WL 1863469, at *1 (11th Cir. Jan. 4, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	P			
McCray v. United States, No. 17-13548-F, 2018 WL 732390, at *1 (11 h Cir. Jan. 4, 2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	C. Wilson	P			
Atkins v. Sec'y, Dep't of Corr., No. 17-14362-F, 2018 WL 1627816, at *1 (11 h Cir. Jan. 3, 2018), cert. denied sub nom. Atkins v. Jones, 139 S. Ct. 269, 202 L. Ed. 2d 179 (2018)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	G. Tjoflat	P			
Taylor v. Sec'y, Fla. Dep't of Corr., No. 17-12685-H, 2018 WL 3199210, at *1 (11th Cir. Jan. 2, 2018), cert. denied sub nom. Taylor v. Jones, 139 S. Ct. 104, 202 L. Ed. 2d 66 (2018), reh'g denied, 139 S. Ct. 866, 202 L. Ed. 2d 633 (2019)	Short	28 USC 2253(c)(2); Slack	failed to make the requisite showing	G. Tjoflat	P			

11th Circuit Excluded Cases

Case Name	Reason for Excluding
Adams v. United States	date range
Weeks v. United States, 930 F.3d 1263 (11th Cir. 2019)	previous grant
United States v. Palmer, 773 F. App'x 576 (11th Cir. 2019)	COA not required

Thomas v. United States, 760 F. App'x 722, 723 (11th Cir. 2019)	lacked jurisdiction						
United States v. St. Hubert, 918 F 3d 1174 (11th Cir. 2019)	en banc request						
United States v. Florence, 766 F. App'x 864 (11th Cir. 2019)	COA not required						
Baine v. Mitchum, 745 F. App'x 143, 144 (11th Cir. 2018)	previous denial						
Pena v. United States, 749 F. App'x 958 (11th Cir. 2018)	previous grant						
Bivins v. United States, 747 F. App'x 765, 768 (11th Cir. 2018), cert. denied, 139 S. Ct. 856, 202 L. Ed. 2d 620 (2019)	district court grant						
Wilson v. Warden, Georgia Diagnostic Prison, 898 F.3d 1314, 1324 (11th Cir. 2018), cert. denied sub nom. Wilson v. Ford, 139 S. Ct. 2639, 204 L. Ed. 2d 287 (2019)	district court grant						
In re Williams, 898 F.3d 1098, 1099 (11th Cir. 2018)	date range						
United States v. Kelly, 735 F. App'x 1022, 1028 (11th Cir. 2018)	remanded caseas 2255 petition						
Bush v. Sec'y, Fla. Dep't of Corr., 888 F.3d 1188, 1190 (11th Cir. 2018), cert. denied sub nom. Bush v. Inch, 139 S. Ct. 1625, 203 L. Ed. 2d 906 (2019)	date range						
Hutto v. Lawrence Cty., Alabama, 717 F. App'x 960 (11th Cir. 2018)	no COA required						
Robinson v. Sec'y, Fla. Dep't of Corr., No. 17-13462-G, 2018 WL 3854024, at *1 (11th Cir. Mar. 29, 2018)	not sec ion 2254/5						
Cole v. Sec'y, Fla. Dep't of Corr., No. 17-12632-JJ, 2018 WL 3000484, at *1 (11th Cir. May 9, 2018)	not sec ion 2254/5						

Ford v. Sec'y, Fla. Dep't of Corr., 725 F. App'x 785, 786 (11th Cir. 2018), cert. denied sub nom. Ford v. Jones, 139 S. Ct. 1225, 203 L. Ed. 2d 241 (2019), reh'g denied, 140 S. Ct. 11, 204 L. Ed. 2d 1165 (2019)	date range							
Jenkins v. Comm'r, Alabama Dep't of Corr., No. 17-12524, 2019 WL 4123501, at *1 (11th Cir. Aug. 30, 2019)	date range							
Fifth Ciruit COA Orders								
All COA orders available on Westlaw in the Fifth Circuit from January 2018 to September 2019. **Note all highlighted case names are death penalty cases.**								
Case Citation	**Granted, by what court?**	**Short/Long**	**Decision Language**	**Cases/Standard cited**	**Judge(s)**	**Counsel v. Pro Se**		
Clark v. Davis, No. 19-20214, 2019 WL 4877642 (5th Cir. Sept. 24, 2019)	Denied	Short	Clark has not met this standard	Slack; Miller-El; § 2253(c)(2)	Elrod	Pro se		
United States v. Summons, No. 19-50306, 2019 WL 5067291, at *1 (5th Cir. Sept. 17, 2019)	Denied	Short	failed to make the required showing	Slack; § 2253(c)(2)	Engelhardt	Pro se		
Lowery v. Davis, No. 19-10330, 2019 WL 4668571, at *1 (5th Cir. Sept. 5, 2019)	Denied	Short	failed to make the requisite showing	Slack; Miller-el; § 2253(c)(2)	Costa	Pro se		
Green v. Errington, No. 19-60219, 2019 WL 4876449, at *1 (5th Cir. Aug. 30, 2019)	Denied	Short	has not shown that reasonable jurists would debate he district court's determination hat his § 2254 petition was time barred	Slack; § 2253(c)(2)	Higginson	Pro se		
JESS LEE GREEN, Petitioner-Appellant v. JOE ERRINGTON, Superintendent, Respondent-Appellee, No. 18-60846, 2019 WL 7187334, at *1 (5th Cir. Aug. 30, 2019)	Denied	Short	time barred	Slack; § 2253(c)(2)	Higginson	Pro se		
LeBlanc v. Davis, No. 19-40244, 2019 WL 4467094, at *1 (5th Cir. Aug. 30, 2019)	Denied	Short	instant § 2254 petition was therefore an unauthorized successive petition	Miller-el; § 2253(c)(2)	Haynes	Pro se		
Hardin v. Davis, No. 19-10342, 2019 WL 4668570, at *1 (5th Cir. Aug. 26, 2019)	Denied	Short	has not made he requisite showing	Slack; § 2253(c)(2)	Jones	Pro se		

Copeland v. Davis, 774 F. App'x 215 (5th Cir. 2019)	Denied	Short	failed to make this showing	Slack; § 2253(c)(2)	Higginbotham, Southwick, Willett	Pro se		
Moseley v. Davis, No. 19-10139, 2019 WL 3568650, at *1 (5th Cir. July 31, 2019)	Denied	Short	jurists of reason would find it debatable whether the district court was correct in its procedural ruling	Slack; § 2253(c)(2)	Ho	Pro se		
Houston v. Davis, No. 19-40046, 2019 WL 3297465, at *1 (5th Cir. July 22, 2019)	Denied	Short	fails to address the threshold timeliness issue	Slack; § 2253(c)(2)	Costa	Pro se		
United States v. Smadi, No. 18-11523, 2019 WL 5152771, at *1 (5th Cir. July 2, 2019), cert. denied, No. 19-5778, 2019 WL 5150659 (U. S. Oct. 15, 2019)	Denied	Short	reasonable jurists would not debate the district court's dismissal of the motion	Slack	Jones	Pro se		
Hill v. Davis, 772 F. App'x 148 (5th Cir. 2019)	Denied	Short	denied b/c COA unnecessary	§ 2253(c)(1)(A)	Jones, Elrod, Engelhardt	Pro se		
Tutson v. Davis, No. 18-11587, 2019 WL 2462691, at *1 (5th Cir. June 4, 2019)	Denied	Short	does not show that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling (time-barred)	Slack; § 2253(c)(2)	Smith	Pro se		
United States v. Martinez, 768 F. App'x 285 (5th Cir. 2019)	Denied	Short	fails to make the showing required for a COA	Slack; Miller-el, § 2253(c)(2)	Southwick, Haynes, Ho	Pro se		
Tellez v. Davis, No. 18-50240, 2019 WL 2588399, at *1 (5th Cir. Feb. 28, 2019), cert. denied, 139 S. Ct. 2751, 204 L. Ed. 2d 1141 (2019)	Denied	Short	failed to make the requisite showing	Slack; § 2253(c)(2)	Higginson	Pro se		
United States v. Strecker, No. 18-10261, 2018 WL 8519721, at *1 (5th Cir. Dec. 20, 2018), cert. denied, 139 S. Ct. 2704, 204 L. Ed. 2d 1099 (2019)	Denied	Short	has not made the requisite showing.	Slack; § 2253(c)(2)	Owen	Pro se		
Mason v. Vannoy, No. 18-30351, 2018 WL 8018339, at *1 (5th Cir. Dec. 3, 2018), cert. denied, 139 S. Ct. 1552, 203 L. Ed. 2d 720 (2019)	Denied	Short	has not made the requisite showing	Slack; Miller-el, § 2253(c)(2)	Ho	Pro se		
Sinceno v. Vannoy, No. 17-30799, 2018 WL 9815257, at *1 (5th Cir. Nov. 1, 2018)	Denied	Short	fails to make the requisite showing	Slack; § 2253(c)(2)	Owen	Pro se		

Johnson v. Vannoy, No. 17-30933, 2018 WL 7020134, at *1 (5th Cir. Oct. 31, 2018), cert. denied, 139 S. Ct. 1226, 203 L. Ed. 2d 241 (2019)	Denied	Short	has not made he requisite showing	Miller-el, § 2253 (c)(2)	Elrod	Pro se		
Canales v. Davis, 740 F. App'x 432 (5th Cir. 2018)	Granted	Short	Canales has made a sufficient showing that jurists of reason could debate the district court's conclusion that Canales failed to show prejudice to overcome a default of his Wiggins claim and his entitlement to relief	Buck; § 2253(c) (2)	Higginbotham, Southwick, Haynes	C		
George v. Kent, No. 17-30973, 2018 WL 7458660, at *1 (5th Cir. Sept. 25, 2018), cert. denied, 139 S. Ct. 1276, 203 L. Ed. 2d 289 (2019)	Denied	Short	has not made he requisite showing	Slack; § 2253(c) (2)	Costa	Pro se		
Woodruff v. Davis, No. 18-10133, 2018 WL 9815191, at *1 (5th Cir. Sept. 20, 2018), cert. denied, 140 S. Ct. 108, 205 L. Ed. 2d 31 (2019)	Denied	Short	has not made he requisite showing	Miller-el, § 2253 (c)(2); § 2254(d) (	Smith	C		
United States v. Rojas-Cisneros, No. 17-40316, 2018 WL 6977485, at *1 (5th Cir. Sept. 17, 2018), cert. denied, 139 S. Ct. 1217, 203 L. Ed. 2d 237 (2019)	Denied	Short	new motion was timely only if it relied on new evidence or a right recently recognized by the Supreme Court	Slack; § 2253(c) (2)	Dennis, Graves, Costa	Pro se		
Jones v. LeBlanc, No. 17-30894, 2018 WL 7347668, at *1 (5th Cir. Sept. 4, 2018), cert. denied, 139 S. Ct. 1388, 203 L. Ed. 2d 621 (2019)	Denied	Short	has not made he requisite showing	Miller-el, § 2253 (c)(2)	Graves	Pro se		
Watts v. Davis, No. 18-10332, 2018 WL 4388387, at *1 (5th Cir. Aug. 29, 2018)	Denied	Short	has not met this standard	Slack; § 2253(c) (2)	Jones	Pro se		
United States v. Ramirez, 736 F. App'x 76 (5th Cir. 2018)	Grant	Short	reasonable jurists would debate whether the district court erred in dismissing his § 2255 motion without prejudice as premature based on a finding that he had a pending direct appeal. Reasonable jurists would also debate whether he states a valid claim of the denial of a constitutional right concerning whether his trial counsel was ineffective	Slack; Miller-el, § 2253(c)(2)	Jones, Haynes, Engelhardt	Pro se		
United States v. Looman, No. 17-11424, 2018 WL 7347669, at *1 (5th Cir. Aug. 20, 2018), cert. denied, 139 S. Ct. 1364, 203 L. Ed. 2d 598 (2019)	Denied	Short	Looman has abandoned his claims, however, by not adequately briefing them	Slack; Miller-el, § 2253(c)(2)	Willett	Pro se		

United States v. Garcia Licon, No. 17-10679, 2018 WL 6524002, at *1 (5th Cir. July 24, 2018), cert. denied sub nom. Licon v. United States, 139 S. Ct. 856, 202 L. Ed. 2d 620 (2019)	Denied	Short	jurists of reason could not debate the propriety of the district court's dismissal for lack of jurisdiction	Slack; § 2253(c)(2)	Haynes	C		
Porter v. Texas, 729 F. App'x 358 (5th Cir. 2018), cert. denied, 140 S. Ct. 107, 205 L. Ed. 2d 31 (2019)	Denied	Short	Even if the district court had made he determination in he first instance, we would still deny a COA because Porter has not made he required showing	Slack; Miller-el, § 2253(c)(2)	Dennis, Southwick, Higginson	Pro se		
Chambers v. Davis, No. 17-11175, 2018 WL 7017745, at *1 (5th Cir. June 28, 2018), cert. denied, 139 S. Ct. 1335, 203 L. Ed. 2d 579 (2019)	Denied	Short	failed to demonstrate that jurists of reason would debate the correctness of the district court's denial of his § 2254 petition	Slack; § 2253(c)(2)	Ho	Pro se		
Weisner v. Davis, No. 17-10722, 2018 WL 3868960, at *1 (5th Cir. June 4, 2018), cert. denied, 139 S. Ct. 380, 202 L. Ed. 2d 291 (2018), reh'g denied, 139 S. Ct. 952, 203 L. Ed. 2d 142 (2019)	Denied	Short	has not made he requisite showing; time barred	Slack; § 2253(c)(2)	Higginbotham	Pro se		
Barton v. Davis, No. 17-20534, 2018 WL 8018340, at *1 (5th Cir. May 15, 2018), cert. denied, 139 S. Ct. 1553, 203 L. Ed. 2d 721 (2019)	Denied	Short	has not made he showing required to obtain a COA	Slack; Miller-el, § 2253(c)(2)	Davis	Pro se		
Milton v. Davis, 721 F. App'x 386 (5th Cir. 2018)	Denied	Short	failed to make such a showing	Slack; § 2253(c)(2)	Higginbotham, Jones, Costa	Pro se		
Lomax v. Vannoy, No. 17-30706, 2018 WL 3726986, at *1 (5th Cir. May 3, 2018), cert. denied, 139 S. Ct. 328, 202 L. Ed. 2d 230 (2018)	Denied	Short	fail to make the required showing	Slack; Miller-el, § 2253(c)(2)	Haynes	Pro se		
Robinson v. Shaw, No. 17-60323, 2018 WL 6016876, at *1 (5th Cir. Mar. 28, 2018), cert. denied, 139 S. Ct. 217, 202 L. Ed. 2d 147 (2018)	Denied	Short	fails to make “a substantial showing of the denial of a constitutional right.	Slack; Miller-el, § 2253(c)(2)	Ho	Pro se		

Jackson v. Davis, No. 17-10445, 2018 WL 4898568, at *1 (5th Cir. Mar. 23, 2018), cert. denied, 139 S. Ct. 333, 202 L. Ed. 2d 233 (2018)	Denied	Short	has not made he required showing	Slack; Miller-el, § 2253(c)(2)	Higginbotham	Pro se		
Damond v. Vannoy, No. 16-31058, 2018 WL 3243994, at *1 (5th Cir. Mar. 12, 2018)	Denied	Short	has not met this standard	Slack; § 2253(c)(2)	Southwick	Pro se		
Barnes v. Landry, No. 17-30542, 2018 WL 3868747, at *1 (5th Cir. Feb. 28, 2018), cert. denied, 139 S. Ct. 280, 202 L. Ed. 2d 185 (2018)	Denied	Short	Slack; § 2253(c)(2)	Slack; § 2253(c)(2)	Elrod	Pro se		
Bruton v. Davis, No. 17-40472, 2018 WL 4959780, at *1 (5th Cir. Feb. 28, 2018), cert. denied, 139 S. Ct. 379, 202 L. Ed. 2d 291 (2018)	Denied	Short	has not made he required showing	Miller-el, § 2253(c)(2)	Owen	Pro se		
Lewis v. Hedgemon, No. 17-30372, 2018 WL 3702482, at *1 (5th Cir. Feb. 21, 2018), cert. denied, 139 S. Ct. 327, 202 L. Ed. 2d 229 (2018), reh'g denied, 139 S. Ct. 869, 202 L. Ed. 2d 636 (2019)	Denied	Short	has failed to make a substantial showing of the denial of a constitutional right	Miller-el, § 2253(c)(2)	Higginbotham	Pro se		
United States v. Boutte, No. 17-40415, 2018 WL 3014635, at *1 (5th Cir. Feb. 12, 2018), cert. denied, 138 S. Ct. 2667, 201 L. Ed. 2d 1053 (2018)	Denied	Short	has not made he required showing on his claims	Slack; Miller-el, § 2253(c)(2)		C		
Mitchell v. Davis, No. 17-40262, 2018 WL 5920409, at *1 (5th Cir. Feb. 1, 2018), cert. denied, 139 S. Ct. 162, 202 L. Ed. 2d 100 (2018), reh'g denied, 139 S. Ct. 1242, 203 L. Ed. 2d 262 (2019)	Denied	Short	has not made he required showing	Slack; Miller-el, § 2253(c)(2)	Costa	Pro se		
Mejia v. Davis, No. 17-40400, 2018 WL 3825701, at *1 (5th Cir. Jan. 25, 2018), cert. denied, 139 S. Ct. 235, 202 L. Ed. 2d 159 (2018)	Denied	Short	has not made he required showing concerning the above claims	Slack; Miller-el, § 2253(c)(2)	Costa	Pro se		

Brown v. Davis, No. 16-50481, 2018 WL 732389, at *1 (5th Cir. Jan. 23, 2018)	Denied	Short	has not made he requisite showing	Slack; § 2253(c)(2)	Prado	Pro se		
United States v. Howard, No. 16-41661, 2018 WL 7458661, at *1 (5th Cir. Jan. 18, 2018), cert. denied, 139 S. Ct. 1280, 203 L. Ed. 2d 291 (2019)	Denied	Short	has not made he required showing	Slack; § 2253(c)(2)	Haynes	Pro se		
Perry v. Davis , Texas Dep't of Criminal Justice, Corr. Institu ions Div., No. 16-11581, 2018 WL 692821, at *1 (5th Cir. Jan. 16, 2018)	Denied	Short	failed to show that reasonable jurists would debate whether the district court erred in its procedural ruling that his petition was time barred.	Slack; Miller-el, § 2253(c)(2)	Prado	Pro se		
Gonzales v. Davis, No. 18-70024, 2019 WL 4455078 (5th Cir. Sept. 17, 2019)	Granted in part	Long	district court erred in determining that Gonzales's Rule 60(b) motion was a successive petition	Buck (relief under Rule 60 (b)(6) is available only in extraordinary circumstances)	Higginbotham, Dennis, Graves	C		
United States v. Mungia, 776 F. App'x 256 (5th Cir. 2019)	Denied	Long	has not made he requisite showing for a COA	Miller-el	Dennis, Haynes, Duncan	Pro se		
Crutsinger v. Davis, 936 F.3d 265 (5th Cir.), cert. denied, 140 S. Ct. 2, 204 L. Ed. 2d 1188 (2019)	Denied	Long	reasonable jurists would not debate whe her the district court abused its discretion in denying his Rule 60(b) motion	§ 2253(c)(2); Buck;	Smith, Owen, Graves (dissenting)	C		
In re Johnson, 935 F. 3d 284 (5th Cir. 2019), as revised (Aug. 15, 2019)	Denied	Long	Jurists of reason would not conclude that the district court abused its discretion	Buck (relief under Rule 60 (b)(6) is available only in extraordinary circumstances)	Southwick, Graves, Higginson	C		
United States v. Castaneda Palacio, No. 19-50224, 2019 WL 4318498, at *1 (5th Cir. Aug. 13, 2019)	Denied	Long	as not made the requisite showing	Slack; § 2253(c)(2)	Elrod	Pro se		
Gamboa v. Davis, 782 F. App'x 297, 298 (5th Cir. 2019)	Denied	Long	reasonable jurists would not debate the district court's holding that his Rule 60 (b) mo ion was an unauthorized successive habeas petition	Buck (relief under Rule 60 (b)(6) is available only in extraordinary circumstances)	Jones, Smith, Dennis	Pro se		
United States v. Gallardo, 773 F. App'x 798, 799 (5th Cir. 2019)	Denied	Long	cannot show that the district court's dismissal of his § 2255 motion as successive and unauthorized was debatable or incorrect	Slack	Jones, Higginson, Oldham	Pro se		
United States v. Tolliver, 772 F. App'x 144, 145 (5th Cir. 2019)	Denied	Long	reasonable jurists could not debate the district court's procedural ruling	Slack; § 2253(c)(2)	Oldham	Pro se		

Gardner v. Davis, 779 F. App'x 187 (5th Cir. 2019)	Denied	Long	Reasonable jurists would not debate he propriety of granting a COA on this issue	Buck; § 2253(c)(2)	Dennis, Southwick, Higginson	Pro se		
United States v. Parker, 927 F.3d 374, 376 (5th Cir. 2019)	Denied	Long	Reasonable jurists would all agree that the district court lacked jurisdiction because Parker had not received authorization to file a successive § 2255 motion.	Buck; § 2253(c)(1)	Haynes, Graves, Ho	C		
Willoughby v. Davis, 772 F. App'x 128 (5th Cir. 2019)	Denied	Long	has not made he requisite showing	Miller-el; § 2253(c)(2)	Smith, Higginson, Duncan	Pro se		
Gonzales v. Davis, 924 F.3d 236, 239 (5th Cir. 2019)	Denied	Long	Gonzales's claims are procedurally defaulted. Alternatively, the claims lack merit	Miller-el; § 2253(c)(1)	Jones, Southwick, Willet	C		
United States v. Sauzo, 768 F. App'x 284 (5th Cir. 2019)	Granted	Long	failing to require a Government response or hold an evidentiary hearing before dismissing his § 2255 mo ion; Reasonable jurists would debate the correctness of the district court's denial of relief on Sauzo's claims of ineffective assistance of counsel in connection with the decision to plead guilty without a response from his trial attorney and an evidentiary hearing.	Miller-el; § 2253(c)(2)	Southwick, Haynes, Ho	Pro se		
Robertson v. Davis, 763 F. App'x 378, 380 (5th Cir. 2019), cert. denied, No. 19-6181, 2019 WL 6689751 (U. S. Dec. 9, 2019)	Denied	Long	no jurist of reason would disagree with the district court's conclusion hat Robertson's amended petition represents a successive filing	§ 2253(c)	Smith, Clement, Higginson	C		
Thompson v. Davis, 916 F.3d 444 (5th Cir. 2019)	Granted in part	Long	district court thus found that the state habeas court was not unreasonable to reject this claim. We agree that jurists of reason could not debate this conclusion; We GRANT a COA as to whether Thompson has established a Brady violation in the State's non-disclosure of a past relationship with Rhodes,	28 U.S.C. § 2254(d)(1)–(2)	Higginbotham	C		
Hopes v. Davis, 761 F. App'x 307 (5th Cir. 2019)	Denied	Long	But reasonable jurists still could not question the district court's procedural ruling dismissing the petition for failure to exhaust	Slack; § 2253(c)(2)	Owen, Willett, Oldham	Pro se		
Northup v. Davis, No. 18-40633, 2018 WL 6877736, at *1 (5th Cir. Dec. 31, 2018)	Denied	Long	has not met this standard	Slack; § 2253(c)(2)	Southwick	Pro se		
Halprin v. Davis, 911 F. 3d 247 (5th Cir. 2018), cert. denied, 140 S. Ct. 167, 205 L. Ed. 2d 104 (2019)	Denied	Long	Jurists of reason could not disagree with the district court's conclusion	Miller-el; § 2253(c)(2); § 2254(d)(1)–(2)	Smith, Dennis, Haynes	Pro se		
Jackson v. Davis, 756 F. App'x 418 (5th Cir. 2018), cert. denied, No. 19-5430, 2019 WL 5686522 (U.S. Nov. 4, 2019)	Denied	Long	Jackson has not shown any reasonable probability of a different result at sentencing	Slack; § 2253(c)(2); § 2254(d)(1)–(2)	Clement, Owen, Graves	C		
Sparks v. Davis, 756 F. App'x 397 (5th Cir. 2018), cert. denied, 140 S. Ct. 6, 204 L. Ed. 2d 1192 (2019)	Denied	Long	reasonable jurists could not debate the district court's refusal to grant Sparks a cause-and-prejudice exception to surmount the procedural bar,	Slack; Miller-el, § 2253(c)(2); § 2254(d)(1)–(2)	Higginbotham, Jones, Costa	C		
Hummel v. Davis, 908 F.3d 987 (5th Cir. 2018), cert. denied, 140 S. Ct. 160, 205 L. Ed. 2d 51 (2019)	Denied	Long	has not shown that jurists of reason could debate whether the district court erred in denying his petition; Reasonable jurists cannot debate the reasonableness of the district court's conclusion that Hummel failed to clear this high bar	Buck; § 2253(c)(2); § 2254(d)(1)–(2)	Higginbotham, Jones, Costa	C		

Beatty v. Davis, 755 F. App'x 343 (5th Cir. 2018), cert. denied, 140 S. Ct. 54, 205 L. Ed. 2d 49 (2019)	Denied	Long	Reasonable jurists would not debate he conclusion that the district court did not abuse its discretion in concluding that this motion is untimely	Slack	Owen, Elrod, Haynes	C?		
Raby v. Davis, 907 F. 3d 880 (5th Cir. 2018), cert. denied, 139 S. Ct. 2693, 204 L. Ed. 2d 1093 (2019), reh'g denied, 140 S. Ct. 19, 204 L. Ed. 2d 1175 (2019)	Denied	Long	Because there are no extraordinary circumstances meriting Rule 60(b)(6) relief, Raby's application for a COA is DENIED.	Miller-el, § 2253 (c)(2)	Smith, Clement, Duncan	C		
Hernandez v. Davis, 750 F. App'x 378 (5th Cir. 2018), cert. denied, 140 S. Ct. 136, 205 L. Ed. 2d 49 (2019)	Denied	Long	we conclude that no reasonable jurist could debate the district court's determination hat the TCCA did not unreasonably apply Strickland to this claim	Slack; § 2253(c) (2); § 2254(d) (1)–(2)	Clement, Graves, Higginson	C		
Wardlow v. Davis, 750 F. App'x 374 (5th Cir. 2018), cert. denied, No. 18-9273, 2019 WL 5150494 (U.S. Oct. 15, 2019)	Denied	Long	district court's procedural dismissal is not debatable;Because the Court of Criminal Appeals' procedural dismissal of Wardlow's application did not cast any doubt on the trial court's factual findings, we must accept them unless Wardlow can rebut them by "clear and convincing evidence.	Slack; 2254(e) (1)	Higginbotham, Jones, Costa	C		
United States v. Mungia, 740 F. App'x 407, 408 (5th Cir. 2018)	Denied	Long	has not made he requisite showing for a COA	Miller-el	Smith, Higginson, Duncan	Pro se		
Ochoa v. Davis, 750 F. App'x 365 (5th Cir. 2018), cert. denied, 140 S. Ct. 161, 205 L. Ed. 2d 52 (2019)	Denied	Long	no reasonable jurist would debate whether this claim is unexhausted and procedurally defaulted; no reasonable jurist would disagree that Ochoa cannot overcome the procedural default	Miller-el; Bucks, § 2253(c)(2)	Elrod, Graves, Willett	C		
United States v. Fisher, 740 F. App'x 77 (5th Cir. 2018), cert. denied, 139 S. Ct. 2653, 204 L. Ed. 2d 295 (2019), reh'g denied, 140 S. Ct. 22, 204 L. Ed. 2d 1178 (2019)	Denied	Long	jurists of reason would not debate the district court's denial of those claims.	Slack; § 2253(c) (2)	Smith, Higginson, Duncan			
United States v. Delgado, No. 17-40448, 2018 WL 9801771, at *1 (5th Cir. Oct. 3, 2018), cert. denied, 140 S. Ct. 277, 205 L. Ed. 2d 192 (2019)	Denied	Long	has not met these standards	Slack; Miller-el, § 2253(c)(2)	Jones	Pro se		
McCreary v. Davis, 738 F. App'x 334 (5th Cir. 2018), cert. denied, 139 S. Ct. 2015, 204 L. Ed. 2d 222 (2019)	Denied	Long	we DISMISS this appeal for lack of jurisdiction. To the extent a COA is required, we also DENY the COA motion.	Slack; § 2253(c) (2)	Smith, Higginson, Duncan	Pro se		
Soliz v. Davis, 750 F. App'x 282 (5th Cir. 2018), cert. denied, 139 S. Ct. 1447, 203 L. Ed. 2d 685 (2019)	Denied	Long	reasonable jurists would not debate the district court's conclusion	Slack; § 2253(c) (2); § 2254(d)	Dennis, Southwick, Higginson	C		

United States v. Vialva, 904 F.3d 356 (5th Cir. 2018)	Denied	Long	the question here is whether reasonable jurists could disagree with the district court's determination that Bernard's and Vialva's Rule 60(b) motions were successive habeas petitions under Section 2255. We conclude that the issue is not reasonably debatable	Buck	Higginbotham, Jones, Dennis	C		
Runnels v. Davis, 746 F. App'x 308 (5th Cir. 2018), cert. denied, 139 S. Ct. 2747, 204 L. Ed. 2d 1148 (2019)	Denied	Long	it is beyond debate that Runnels's Rule 60(b) motion is a second-or-successive habeas petition	Buck; Miller-el, § 2253(c)(2)	Graves, Higginson, Costa	C		
Freeney v. Davis, 737 F. App'x 198 (5th Cir. 2018), cert. denied, 139 S. Ct. 2632, 204 L. Ed. 2d 268 (2019)	Denied	Long	no reasonable jurist could debate the merits of this claim, no reasonable jurist could debate that the state habeas court's disposition of Freeney's Strickland claim was based on an unreasonable finding of fact	Buck; § 2253(c)(2)	Higginbotham, Smith, Owen	C		
United States v. Williams, 897 F 3d 660, 662 (5th Cir.), cert. denied, 139 S. Ct. 655, 202 L. Ed. 2d 502 (2018)	Denied	Long	jurists of reason would not find it debatable that the district court was correct in its procedural ruling	Buck; Miller-el, § 2253(c)(2)	Elrod, Graves, Ho	Pro se		
Kott v. Vannoy, No. 17-30824, 2018 WL 7458659, at *1 (5th Cir. July 12, 2018), cert. denied, 139 S. Ct. 1275, 203 L. Ed. 2d 288 (2019)	Denied	Long	By failing to brief any challenge to the reasons for the district court's denial of habeas relief, Kott has abandoned the only grounds for appeal	Slack; Miller-el, § 2253(c)(2)	Southwick	Pro se		
Schaefer v. Davis, No. 17-50839, 2018 WL 6267659, at *1 (5th Cir. July 11, 2018), cert. denied, 139 S. Ct. 944, 203 L. Ed. 2d 135 (2019)	Denied	Long	failed to make the required showing to obtain a COA	Slack; Miller-el, § 2253(c)(2)	Graves	Pro se		
Batiste v. Davis, 747 F. App'x 189, 192 (5th Cir. 2018), cert. denied, 139 S. Ct. 1601, 203 L. Ed. 2d 757 (2019)	Denied	Long	The district court found the state court habeas resolution of this issue to be reasonable, and we agree without reaching the issue of prejudice	Buck; Miller-el, § 2253(c)(2); § 2254(d)	Dennis, Southwick, Higginson	C		
United States v. Drew, 728 F. App'x 366 (5th Cir. 2018)	Denied	Long	has not made he requisite showing	Miller-el, Gonzalez	Dennis, Southwick, Higginson	Pro se		
Ibarra v. Davis, 738 F. App'x 814 (5th Cir. 2018), cert. denied, 139 S. Ct. 939, 203 L. Ed. 2d 133 (2019)	Granted	Long	At this stage, we only consider whether Ibarra's claim is debatable. See id. at 774. We find that it is. Dissent	Miller-El; Buck	Jones, Haynes, Graves	C		
Murphy v. Davis, 737 F. App'x 693 (5th Cir.), cert. denied, 139 S. Ct. 568, 202 L. Ed. 2d 407 (2018)	Denied	Long	We ultimately conclude that all three are undebatably procedurally barred	Buck; § 2253(c)(2)	King, Elrod, Higginson	C		
Milam v. Davis, 733 F. App'x 781 (5th Cir.), cert. denied, 139 S. Ct. 335, 202 L. Ed. 2d 234 (2018)	Denied	Long	We agree with the district court that Milam has failed to show that his ineffective-assistance-of-trial-counsel claim has any merit sufficient to overcome the Martinez hurdle, and thus, he has failed to make the showing of debatability required for issuance of a COA	Buck; Miller-el, § 2253(c)(2);§ 2254(d)	Elrod, Graves, Higginson	C		

Fratta v. Davis, 889 F. 3d 225 (5th Cir. 2018), cert. denied, 139 S. Ct. 803, 202 L. Ed. 2d 590 (2019), reh'g denied, 139 S. Ct. 1288, 203 L. Ed. 2d 299 (2019)	Denied	Long	claims are procedurally defaulted; does not show that reasonable jurists would disagree with the district court's ruling that his claims are procedurally defaulted; No reasonable jurist would disagree that Fratta fails to prove actual innocence	Slack; § 2253(c)(2)	Smith, Dennis, Clement	C		
Sanchez v. Davis, 888 F.3d 746 (5 h Cir. 2018)	Granted	Long	COA is therefore GRANTED as to the Strickland claim focused on counsel's failure to object when a witness was asked whether Sanchez was here "illegally."	Miller-el, § 2253(c)(2);§ 2254(d)	Costa	Pro se		
Murphy v. Davis, 732 F. App'x 249 (5th Cir. 2018)	Granted	Long	Reasonable jurists could debate whether it was reasonable for counsel not to intervene and whether such intervention had a reasonable probability of causing a different outcome	Buck; § 2253(c)(2)	King, Dennis, Costa	C		
United States v. Alipizar, 718 F. App'x 305, 306 (5th Cir. 2018)	Denied	Long	has not met that standard	Miller-el, § 2253(c)(2)	Smith, Haynes, Willet	Pro se		
United States v. Woods, 714 F. App'x 455, 456 (5th Cir. 2018)	Denied	Long	We deny that request on its merits	§ 2253(c)	Wiener, Dennis, Southwick	Pro se		
Slater v. Davis, 717 F. App'x 432 (5th Cir.), cert. denied, 139 S. Ct. 99, 202 L. Ed. 2d 63 (2018)	Denied	Long	Slater has not presented clear and convincing evidence that would rebut the state court's finding that Freeman's affidavit was reliable and Slater's was not credible. See 28 U.S.C. § 2254(d)(1). Nor has he shown that the district court's finding under Washington is debatable among jurists of reason.	§ 2253(c)(2)	Jones, Smith, Dennis	C		
Devoe v. Davis, 717 F. App'x 419 (5th Cir. 2018)	Denied	Long	Brady claim is unexhausted, Jurists of reason could not disagree with the district court's determination that Devoe is not entitled to a certificate of appealability on the issue of whether he was prejudiced	Slack; Miller-el, Slack, § 2253(c)(2)	Owen, Elrod, Costa	C		

5th Circuit Orders Excluded cases

Case Name	Reason for Excluding							
Webb v. Davis, 940 F. 3d 892, 895 (5th Cir. 2019)	Lower Court							
Smith v. Davis, 927 F. 3d 313, 340 (5th Cir. 2019)	No COA needed for state							
Cardona v. Davis, 770 F. App'x 179 (5th Cir. 2019)	previous ct app grant							
Schillereff v. Davis, 766 F. App'x 146, 150 (5th Cir. 2019)	previous ct app grant							
Parker v. Davis, 914 F. 3d 996, 998 (5th Cir. 2019)	previous ct app grant							
United States v. Rodriguez, 747 F. App'x 972 (5th Cir. 2019)	No COA needed							

Holmes v. Davis, 745 F. App'x 244, 245 (5th Cir. 2018)	dismissed for lack of jurisdiction							
Blackman v. Davis, 909 F.3d 772 (5th Cir. 2018), as revised (Dec. 26, 2018), cert. denied, 139 S. Ct. 1215, 203 L. Ed. 2d 236 (2019)	lower Court							
Black v. Davis, 902 F. 3d 541, 548 (5th Cir. 2018)	lack of jurisdiction							
Trimble v. Vannoy, 736 F. App'x 482, 484 (5th Cir. 2018), cert. denied, 139 S. Ct. 836, 202 L. Ed. 2d 607 (2019)	previous ct app grant							
United States v. Fleming, 734 F. App'x 298 (5th Cir. 2018)	unnecessar y							
United States v. Hill, 733 F. App'x 201, 202 (5th Cir. 2018)	no jurisdiction							
United States v. Wiese, 896 F.3d 720, 722 (5th Cir. 2018), as revised (Aug. 14, 2018), cert. denied, 139 S. Ct. 1328, 203 L. Ed. 2d 574 (2019)	previous ct app grant							
Horttor v. Livingston, 729 F. App'x 363, 364 (5th Cir. 2018)	COA not applicable to s1983 claim							
Taylor v. Vannoy, 715 F. App'x 418, 419 (5th Cir.), cert. denied, 139 S. Ct. 271, 202 L. Ed. 2d 180 (2018)	lower Court							
Runnels v. Bordelon, 715 F. App'x 409 (5th Cir.), cert. denied, 139 S. Ct. 222, 202 L. Ed. 2d 151 (2018), reh'g denied, 139 S. Ct. 869, 202 L. Ed. 2d 636 (2019)	lower court did not make COA determinatio n							
United States v. Brumfield, 713 F. App'x 395 (5th Cir. 2018)	lower court							
United States v. Randall, 712 F. App'x 443 (5th Cir. 2018)	lower court							
Watson v. Goodwin, 709 F. App'x 311, 312 (5th Cir. 2018)	no final order in D court							

United States v. Denman, 709 F. App'x 282, 283 (5th Cir. 2018)	no final order in D court							
Johnson v. Davis, 707 F. App'x 829 (5th Cir. 2018)	lower court							
Luna v. Davis, No. 19-70002, 2019 WL 5468851 (5th Cir. Oct. 24, 2019)	Date range							
Ramey v. Davis, 942 F. 3d 241 (5th Cir. 2019)	date range							
United States v. Byrd, 781 F. App'x 364 (5th Cir. 2019)	date range							

Fifth Circuit Docket Capital Cases

the search term—(c.o.a. (cert! /2 appeal!) /7 deny! denied denial grant!) /20 2018 2019—was entered into Westlaw's docket search function to identify all cases involving a certificate of appealability

Case Name, Case Number	Capital or Non-Capital	COA result (granted/denied)	COA result date (entered, not filed)	Judge(s) initials				
BILLY CRUTSINGER V.	Capital	Denied	08/26/2019	JES, PRO, JEG				
CHARLES RABY V. LOI	Capital	Denied	10/31/2018	JES, EBC, SKD				
CHARLES THOMPSON	Capital	Granting in part	02/18/2019	PEH, CH, JEG				
DEXTER JOHNSON V.	Capital	Denied	08/24/2018	LHS, JEG, SAH				
IN RE: JOSEPH GARCI	Capital	Denied	12/04/2018	JLD, JWE, SAH				
JOHN RAMIREZ V. LOI	Capital	Denied	06/26/2019	CDK, JLD, PRO				
MARK ROBERTSON V.	Capital	Denied	04/03/2019	JES, EBC, SAH				
MARK SOLIZ V. LORIE	Capital	Denied	09/18/2019	JLD, LHS, SAH				
MELISSA LUCIO V. LOI	Capital	Granting in part	10/17/2018	PEH, CH, JEG				
PAUL DEVOE, III V. LO	Capital	Denied	01/09/2018	PRO, JWE, GJC				
RAY FREENEY V. LOR	Capital	Denied	08/03/2018	PEH, JES, PRO				
ROBERT SPARKS V. L(	Capital	Denied	12/04/2018	PEH, EHJ, GJC				
STEVEN BUTLER V. LC	Capital	Denied	08/14/2018	PRO, CH, GJC				
TRAVIS RUNNELS V. L	Capital	Denied	08/14/2018	JEG, SAH, GJC				
BILLY WARDLOW V. LC	Capital	Denied	10/22/2018	PEH, EHJ, GJC				