No. 20-7589

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD DALLAS,
Petitioner,

v.

TERRY RAYBON, WARDEN,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

CAPITAL CASE – NO EXECUTION DATE PENDING

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INTRODUCTION

The Eleventh Circuit's decision directly conflicts with the decisions of this Court and other circuits as to the proper *de novo Strickland v. Washington*[1] prejudice analysis of post-conviction mitigation evidence. Respondent's opposition mischaracterizes the question and distorts the issue.[2] Further, in finding the state court's decision was reasonable, the Eleventh Circuit relied on later decided precedent from this Court: a clear misapplication given that the law did not exist at the time of the state court decision. Mr. Dallas's Petition is the proper vehicle to clarify the process federal habeas courts must use to determine § 2254(d)(1) reasonableness.

ARGUMENT

I. Review is necessary to resolve a circuit split and to ensure that circuit courts properly consider mitigation evidence on federal habeas review.

The question of how federal courts conducting a *Strickland* prejudice analysis should treat post-conviction evidence thematically similar to trial evidence is an important one. The answer of the Fifth, Sixth, Eighth, and Eleventh Circuits is to assign the evidence zero prejudicial value. This failure to provide meaningful consideration to new mitigation evidence—as the Eleventh Circuit did in Mr. Dallas's case— contravenes both the precedent of this Court and the alternate approach adopted by the Third, Seventh, and Ninth Circuits.

A. There is 4-3 circuit split that must be resolved.

[1] *Strickland v. Washington*, 466 U.S. 688 (1984).

[2] The circuits are split on *what* constitutes cumulative; not *whether* obvious cumulative evidence precludes a finding of *Strickland* prejudice.

Respondent maintains that the circuit split Mr. Dallas identified is "illusory" because the Third, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have all "recognized that a petitioner cannot establish prejudice where the new mitigation evidence. . . is cumulative to that presented at trial."[3] Indeed, Courts on one side of the split—namely the Fifth, Sixth, Eighth, and Eleventh Circuits— have all excluded cumulative evidence from their reweighing analysis under the rationale that cumulative evidence is incapable of establishing *Strickland* prejudice.[4] Yet, Respondent attempts to negate this fact by citing cases in which he claims courts from these circuits have found prejudice where post-conviction evidence was cumulative. None of these cases, however, deal with thematically similar evidence and are therefore irrelevant here.

For instance, Respondent claims, in *Escamilla v. Stephens,* the Fifth Circuit "granted a certificate of appealability based on its finding that. . . new evidence depicting [the petitioner's] disadvantaged childhood was of greater quality and quantity than the evidence presented at trial."[5] Yet, the court found "the defense. . . never presented the jury with information regarding the disadvantages. . . [the petitioner] actually experienced as a child."[6] Post-conviction evidence of a petitioner's disadvantaged childhood cannot be cumulative when no evidence related to this theme was previously presented.

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[3] BIO, pp. 20-21.
[4] Pet., at 17-21.
[5] BIO, p. 21.
[6] *Escamilla v. Stephens*, 749 F.3d 380, 393 (5th Cir. 2014).

Similarly, Respondent argues, in *Morales v. Mitchell*, the Sixth Circuit "held that a petitioner established [prejudice]. . . where 'the volume and compelling nature' of the new evidence regarding his dysfunctional family and troubled life was much greater than the evidence that was presented regarding that subject at trial."[7] But the court never characterizes the post-conviction evidence as more voluminous and compelling with respect to the particular themes Respondent identifies. In fact, the court explicitly states that the petitioner's "dysfunctional family environment" was a theme that "should have been, but [was] *not*, raised by trial counsel."[8]

Respondent also claims the Eighth Circuit, in *Simmons v. Luebbers*, "held that a petitioner established that he was prejudiced. . . where the new mitigation evidence painted a much more 'vivid' picture of his abusive, traumatic, and poverty-stricken childhood."[9] But, in the court's own words, "It eludes us how the [lower c]ourt could have concluded that evidence of Simmons's traumatic childhood was introduced [at] Simmons's. . . trial."[10]

Finally, Respondent's reference to *Johnson v. Sec'y, Dep't of Corr.*, is equally misleading. The post-conviction evidence from which the Eleventh Circuit found prejudice was not cumulative, but completely different from the trial evidence.[11]

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[7] BIO, pp. 21-22 (quoting *Morales v. Mitchell*, 507 F.3d 916, 933, 935–36 (6th Cir. 2007)).
[8] *Morales*, 507 F.3d at 931 (emphasis added).
[9] BIO, p. 22 (citing *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002)).
[10] *Simmons*, 299 F.3d at 937.
[11] As just one example, trial counsel presented evidence that, "Johnson was placed in an orphanage because [his parents] were separated, and that Johnson was sent to live with his grandparents because his father had moved to Florida for employment purposes. That was not true.. . .[Instead,] Johnson was placed in the orphanage [because] his father had deserted his family to go on a three month 'binge' in Detroit, and []the reason Johnson was later sent to live with his grandparents was because the father had abandoned his family again." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 936 (11th Cir. 2011).

Respondent's discussion of cases on the other half of the split is likewise unpersuasive. In an attempt to show the split is illusory, Respondent unsuccessfully argues the cases Mr. Dallas cited from the Third, Seventh, and Ninth Circuits involve evidence that was not cumulative, but substantially different from what was presented at trial.[12] In each case, however, Respondent mischaracterizes the facts.

For instance, Respondent asserts that the Third Circuit's finding of prejudice in *Abdul-Salaam* is based on post-conviction evidence that "was 'of a totally different quality' than the evidence presented at his trial depicting his abuse 'as an uncommon, instead of dominant, feature of [his] childhood.'"[13] Indeed, the court found the mitigation presentation at trial "generally showed that Abdul-Salaam grew up in an abusive home."[14] And the post-conviction evidence "highlighted the regularity with which Abdul-Salaam faced severe mental and physical abuse"[15] and "filled in the [mitigation] story with details of extreme violence."[16] As such, the post-conviction evidence in *Abdul-Salaam* fits the very definition of cumulative evidence the Eleventh Circuit employed in Mr. Dallas's case.[17] That is, the evidence "provide[d] more or better examples or amplifie[d] the theme[of childhood abuse] presented to the jury."[18] And yet, the Third Circuit explicitly held that the post-conviction evidence would not "have "merely been cumulative," and found prejudice

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[12] BIO, pp. 23-25.
[13] BIO, p. 24 (citing *Abdul-Salaam v. Sec'y of Pennsylvania Dep't of Corr.*, 895 F.3d 254, 270-72 (3d Cir. 2018)).
[14] *Abdul-Salaam*, 895 F.3d at 270.
[15] *Id.*
[16] *Id.* at 271.
[17] *Abdul-Salaam*, 895 F.3d at 266.
[18] App. A at A-45.

under *Strickland*.[19] In this way, *Abdul-Salaam*, illustrates the nature of the circuit split Mr. Dallas articulated in his petition: evidence that is considered essentially cumulative, assigned zero mitigating value, and therefore disregarded in the Fifth, Sixth, Eighth, and Eleventh Circuits can serve as the very basis for a finding of prejudice in the Third, Seventh, and Ninth Circuits. The same logic holds true for all the other cases in the Third, Seventh and Ninth Circuits that Respondent addresses from Mr. Dallas's petition.[20]

Respondent also cites additional cases which he claims demonstrate that the Third, Seventh, and Ninth Circuits have held cumulative evidence cannot establish prejudice. Reliance on each of these cases is also misplaced. First, *Shelton v. Carroll*[21] and *Eddmonds v. Peters*,[22] involve AEDPA-deference, which is not relevant in the context of *de novo* review. Second, the courts in *Eddmonds v. Peters*[23] and *Williams v. Beard*[24] found no prejudice, not because post-conviction evidence was cumulative, but because it lacked independent mitigation value. Third, in *Woods v. McBride*,[25] the court concluded that additional mitigation evidence was in essence cumulative of the mitigation evidence elicited during the

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[19] *Abdul-Salaam*, 895 F.3d at 266.
[20] *See* Pet., at 21 (citing *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008)); Pet., at 22 (citing *Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015)); Pet., at 22 (citing *Stevens v. McBride*, 489 F.3d 883, 888 (7th Cir. 2007)); Pet., at 22 (citing *Griffin v. Pierce*, 622 F.3d 831 (7th Cir. 2010)); Pet., at 23 (citing *Stankewitz v. Woodford*, 365 F.3d 706, 725 (9th Cir. 2004)).
[21] *Shelton v. Carroll*, 464 F.3d 423, 440 (3d Cir. 2006).
[22] *Eddmonds v. Peters*, 93 F.3d 1307, 1321 (7th Cir. 1996).
[23] *Id.* (finding no prejudice because the post-conviction evidence of "[p]ast violence and sexual dysfunction are not mitigating factors, and the evidence of past mental problems" would only have produced "conflicting opinions of competing psychiatrists").
[24] *Williams v. Beard*, 637 F.3d 195, 234 (3d Cir. 2011) (finding no prejudice because the post-conviction evidence is not unequivocally mitigating, and "[s]ome of the evidence is even contradictory").
[25] 430 F.3d 813, 825–26 (7th Cir. 2005).

penalty phase only *after* concluding that counsel's penalty phase performance was not deficient.[26] Finally, the Ninth Circuit in both *Leavitt v. Arave* [27] and *Miles v. Ryan* [28] assigned cumulative evidence some prejudicial weight in reweighing the totality of the evidence. Given this differential treatment of "essentially cumulative" evidence amongst circuits, this Court should grant certiorari in Mr. Dallas's case.[29]

B. This Court has never held that post-conviction evidence thematically similar to trial evidence is incapable of establishing *Strickland* prejudice.

Respondent asserts that this Court has "repeatedly held that new mitigation evidence that is *essentially cumulative* of evidence that was presented at trial is not sufficient to meet *Strickland's* high bar for establishing prejudice."[30] This is not so. Indeed, this Court has found *Strickland* prejudice where trial evidence failed to describe the "nature and extent" of, for example, childhood abuse suffered by a petitioner. If such evidence is capable of establishing prejudice, it cannot reasonably be dismissed as "essentially cumulative" of trial testimony that merely mentions the petitioner was beaten. In *Wiggins v. Smith*, it was precisely the "*nature* and *extent* of the abuse [the] petitioner suffered" that formed the basis for this Court's

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[26] *Id.* at 826. (finding that trial counsel made far more "than a half-hearted attempt," investigated "Wood's background thoroughly", and did not "stop their inquiries after having acquired only 'rudimentary knowledge' of Woods's history from a narrow set of sources.")
[27] *Leavitt v. Arave*, 646 F.3d 605, 615 (9th Cir. 2011) (assigning "cumulative evidence less weight"—not none—during *Strickland* prejudice analysis).
[28] *Miles v. Ryan*, 713 F.3d 477, 492 (9th Cir. 2013) (assigning "largely cumulative evidence . . . marginal" mitigating value—not none—during *Strickland* prejudice analysis).
[29] BIO, p. 10.
[30] *Id.* (emphasis added). Respondent cites just two cases— *Cullen v. Pinholster*, 563 U.S. 170 (2011) and *Wong v. Belmontes,* 558 U.S. 15 (2009) — to support its position, neither of which provide guidance on the issue at hand. BIO, pp. 10-11. First, *Pinholster* implicates AEDPA deference, a much more stringent bar for relief than *de novo* review. *Pinholster*, 563 U.S. at 202-03. Second, the post-conviction evidence at issue in *Wong* is not similar to evidence presented at trial – it is exactly the same, and no one disputes that post-conviction evidence exactly duplicative of evidence presented at trial cannot establish prejudice. *Wong*, 558 U.S. at 22–23.

prejudice finding.[31] Similarly, in *Williams v. Taylor*, this Court found prejudice where post-conviction evidence included a "*graphic description* of [the petitioner's] childhood"[32] including "documents ... that *dramatically described* mistreatment, abuse, and neglect during his early childhood."[33] "In each of these cases, it was not the omission of an acknowledgment of abuse that this Court found prejudicial, but the omission of testimony that described this abuse in sufficient detail for the jury to understand what actually occurred."[34]

C. The Eleventh Circuit failed to meaningfully consider the post-conviction evidence it labeled cumulative in Mr. Dallas's case.

Citing this Court's precedent, Respondent concedes that courts charged with determining whether a petitioner has established *Strickland* prejudice "must 'evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidenced adduced in the habeas proceedings in reweighing it against the evidence in aggravation."[35] Respondent asserts, however, that in conducting a *Strickland* prejudice analysis in Mr. Dallas's case, the Eleventh Circuit "certainly did not exclude any of the mitigation evidence."[36] This is wrong.

Though the court acknowledged its duty to "examine all of the good and all of the bad [evidence], what was presented during the trial and what was offered collaterally later," its actual analysis reveals a different approach— one in which it

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[31] *Wiggins v. Smith*, 539 U.S. 535, 535–37 (2003) (emphasis added).
[32] *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (emphasis added).
[33] *Id.* at 370 (emphasis added).
[34] *Holsey v. Warden, Georgia Diagnostic Prison,* 694 F.3d 1230, 1280 (11th Cir. 2012) (Barkett, J., dissenting).
[35] BIO, p. 10 (citing *Williams*, 529 U.S. at 397-98).
[36] BIO, p. 7.

ignored evidence it deemed essentially cumulative.[37] Before reweighing the aggravating circumstances against the totality of the mitigating evidence, the court first "consider[ed] the cumulative nature of the evidence."[38] In doing so, the court separated all the post-conviction evidence into two categories: allegedly new but cumulative evidence, and actually new evidence. Using an extremely broad definition of cumulative, the court placed all evidence that ""substantiate[d], support[ed], or explain[ed]" any evidence presented at trial, or "provide[d] more or better examples or amplifie[d] the themes presented to the jury" into the first category, and placed the remaining evidence into the second.[39] Then, applying Eleventh Circuit precedent stating that "no prejudice can result from the exclusion of cumulative evidence," the court assigned all the evidence it labeled cumulative zero prejudicial value.[40] Only then did the court conduct its reweighing analysis and evaluate the totality of the evidence as a whole. As a result, all the evidence deemed cumulative was assigned no weight and disregarded in the reweighing process.

This approach is clearly outlined in the Eleventh Circuit's opinion in Mr. Dallas's case. First, the court discussed the post-conviction evidence that touched— no matter how tangentially— on the themes presented at trial and labeled them cumulative.[41] Afterwards, the court assigned this evidence zero prejudicial value, stating "[t]he long and short of it is, as we've said before, that 'no prejudice can

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[37] App. A at A-42.
[38] App. A at A-44.
[39] App. A at A-44-45.
[40] App. A at A-49 (quoting *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 649–50 (11th Cir. 2016)).
[41] App. A at A-46-49.

result from the exclusion of cumulative evidence,' and Dallas did not suffer prejudice from the failure to present the cumulative evidence."[42] Next, the court discussed the remaining post-conviction evidence. Of all the post-conviction evidence presented, the court characterized just two pieces as actually new: some of the testimony of Dr. Benedict and the sexual abuse.[43] Nonetheless, the court assigned the expert testimony no prejudicial value based on the mistaken premise that the jury already heard all the information Dr. Benedict provided.[44] Indeed, the court summarized its evaluation of this evidence by stating, "[q]uite simply, Benedict's testimony would not have changed the characteristics and difficulties the jury heard and considered before it recommended that Dallas be sentenced to die, particularly since the jury already knew that Dallas's substance abuse and difficulties in school began at so young an age."[45]

Thus, the only evidence the court did not treat as cumulative—and therefore the only new evidence it truly considered and gave any weight— was the evidence of sexual abuse. The very language the court employed to describe its reweighing analysis illustrates that the sexual abuse was the only post-conviction evidence which it gave meaningful consideration. According to the court, "although Paul's new allegation [of sexual abuse] paints a darker picture of Dallas's childhood, it does not standing alone raise a reasonable probability that the jury would not have

[42] App. A at A-49 (citation omitted).
[43] *Id.*
[44] App. A at A-50.
[45] *Id.*

recommended that Dallas be sentenced to death."[46] Similarly, in its only discussion of the aggravating factors in this case, the court stated:

> Ultimately, and most critically, however, the aggravating factors were overwhelming, and adding the allegation of sexual abuse would not have sufficiently changed the balance of those factors or given rise to a reasonable probability that the outcome would have changed. As we have already discussed, the jury heard many details of the abusive and poverty-stricken conditions of Dallas's childhood. [47]

In doing so, the court did not engage in any reweighing that meaningfully considered the new evidence it deemed cumulative. For these reasons, Mr. Dallas's case is an ideal vehicle to resolve this circuit split.

II. This case is a proper vehicle to resolve the question of whether a state court decision can be reasonable under 28 U.S.C § 2254(d)(1) based on later-decided precedent from this Court.

Notably, Respondent does not contest that a proper § 2254(d)(1) analysis cannot apply this Court's later-decided precedent to the state court decision. Instead, Respondent makes the only argument it can: that Mr. Dallas's case is a "poor vehicle" for resolving this important matter.[48] But Respondent's poor vehicle argument, is based on the incorrect assertion that the Eleventh Circuit did not apply *Mickens v. Taylor* in Mr. Dallas's case.[49] This is a disingenuous reading of the Eleventh Circuit's opinion.

To be sure, Mr. Dallas and Respondent agree that "the Eleventh Circuit had no reason to consider, much less apply, *Mickens* in resolving Dallas's claim[.]"[50]

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[46] App. A at A-52.
[47] App. A at A-53.
[48] BIO, p. 27.
[49] *Mickens v. Taylor*, 535 U.S. 162 (2002).
[50] BIO, p. 29.

Respondent contends, however, that the Eleventh Circuit "relied solely on its own interpretation of *Holloway*[51] and *Sullivan*[52] in determining that the CCA's denial of [Dallas's] claim was reasonable," and only "briefly mentioned *Mickens*. . . [just to] summarize[] the Court's earlier holdings in *Holloway* and *Sullivan*."[53] However, the plain language of both *Holloway* and *Sullivan* and the Eleventh Circuit's opinion in Mr. Dallas's case, clearly demonstrates that the court could not reach its reasonableness finding without reliance on *Mickens*.

The Eleventh Circuit relied on *Mickens*, not for mere drafting efficiency, but to "explain[] the key differences between *Holloway* and *Sullivan*."[54] The court's opinion was unequivocal:

> [T]he clarity we find in *Mickens* is. . . *Holloway* "creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection."[55]

This language limiting *Holloway's* automatic reversal rule to cases involving codefendants comes from *Mickens*—not *Holloway* or *Sullivan*. Respondent repeatedly asserts that, "in announcing the automatic reversal rule, the [*Holloway*] Court was careful to confine its reach only to cases involving the joint representation of codefendants who have conflicting interests."[56] According to Respondent, "the very language that this Court employed. . . in *Holloway* limited the application of that rule to cases where a trial court improperly requires the joint

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[51] *Holloway v. Arkansas*, 435 U.S. 475 (1978).
[52] *Cuyler v. Sullivan*, 446 U.S. 335 (1980).
[53] BIO, p. 29.
[54] App. A. at A-35.
[55] App. A. at A-36 (emphasis in original) (citing *Mickens*, 535 U.S. at 168).
[56] BIO, p. 32 (citing *Holloway*, 435 U.S. at 488-489).

representation of codefendants."[57] There is no support for this contention.[58] In fact, the very language of *Holloway* implies just the opposite. In contrast to what Respondent—and *Mickens*— claim *Holloway* says, the actual holding in *Holloway* unambiguously states that "whenever a trial court improperly requires *joint representation* over timely objection reversal is automatic."[59] Similarly, *Sullivan* summarized *Holloway* by stating that "*Holloway* requires state trial courts to investigate timely objections to *multiple representation*."[60] The language of neither *Holloway* nor *Sullivan* expressly limit *Holloway's* holding to codefendant contexts.

Both *Holloway* and *Sullivan* involve codefendant conflicts of interest. It is therefore impossible to develop, as Respondent suggests, a rule from "independent analysis of *Holloway* and *Sullivan*" alone that distinguishes the two cases based on whether concurrent representation of codefendants exists.[61] A close examination of *Holloway* and *Sullivan* reveals the only significant difference between the two cases is whether an objection to the conflict of interest was made. In order to develop a rule applying *Sullivan* instead of *Holloway* in cases not involving codefendants, the Eleventh Circuit necessarily had to both consider and rely on *Mickens*.

Though Respondent repeatedly paraphrases this Court's line of conflict cases as discussing "joint representation of codefendants," the actual language of these cases cannot be ignored. Indeed, during oral argument in Mr. Dallas's case, the

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[57] BIO, p. 35.
[58] *Id.*
[59] *Holloway*, 435 U.S. at 488 (emphasis added).
[60] *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980) (emphasis added).
[61] BIO, p. 28.

Eleventh Circuit stressed the importance of this Court's use of the word "codefendants" in *Mickens*:

> They could have said the *Holloway* rule creates an automatic reversal where the defense counsel is forced to represent two parties who have opposing or conflicting interests over a timely objection, but that's not how they put it.[62]

This Court's use of the word "codefendants" in *Mickens* is just as telling as the lack thereof in *Holloway* and *Sullivan*.

Because the trial court did not hold a hearing, and therefore "improperly required joint representation over [defense counsel's] timely objection," Mr. Dallas should have been entitled to automatic reversal under *Holloway*. Respondent further attempts to distort the facts by haphazardly labeling the CCA's statement that a hearing was never held "a scrivener's error or a simple oversight."[63] A fact as crucial as whether the trial court adequately discharged its duty to inquire into a potential conflict of interest cannot be erased by casually labeling it an error. Moreover, even if there was an error, the Eleventh Circuit is bound by the same facts before the CCA. The CCA's opinion expressly stated there was no hearing, and the CCA did not have any hearing transcript. Based on these facts, the CCA should have applied *Holloway*, not *Sullivan*, to Mr. Dallas's case.

III. This Court has jurisdiction.

Finally, Respondent claims this Court lacks jurisdiction to consider and decide the merits of Mr. Dallas's case on the ground that his petition for certiorari

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[62] Oral Argument at 4:13, *Dallas v. Warden*, 964 F. 3d 1285 (11th Cir. 2020) (No. 17-14570), https://www.ca11.uscourts.gov/oral-argument-recordings.
[63] BIO, p. 36.

was not timely filed under Rule 29.2 of the Rules of this Court.[64] This argument fails because it ignores the "jurisdictional distinction between court-promulgated rules and limits enacted by Congress."[65]

Respondent does not dispute that Mr. Dallas electronically filed his petition for certiorari within the statute of limitations prescribed by 28 U.S.C § 2101(c). Instead, Respondent argues that because paper copies were not submitted until one day after the deadline—a requirement found not in any statute, but in the Rules of this Court— Mr. Dallas's petition is not timely filed for purposes of 28 U.S.C § 2101(c). While 28 U.S.C § 2101(c) provides "a mandatory and jurisdictional" time period for when applications for writs of certiorari should be made, it falls short of establishing the manner in which applications should be submitted.[66] That information is found instead in "claim-processing rule[s]" promulgated by this Court.[67] Such rules "serve to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[68] As this Court has expressly declared many times over, "[t]he procedural rules adopted by the Court for the orderly transaction of its business are *not jurisdictional* and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require."[69] Thus, the decision as to whether to enforce the paper filing requirement

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[64] BIO, p. 38.
[65] *Bowles v. Russell*, 551 U.S. 205, 211–12 (2007).
[66] *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).
[67] *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017).
[68] *Id.*
[69] *Schacht v. United States*, 398 U.S. 58, 64 (1970) (emphasis added). *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 453-54 (2004); *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1969); *Heflin v. United States*, 358 U.S. 415, 418, n. 7 (1959).

of Rule 29.2 is entirely within this Court's province as a claim processing rule, as opposed to a mandate prescribed by statute.

Moreover, Respondent took *no position* on Mr. Dallas's motion to direct the clerk to file his petition. This Court considered the motion during conference on March 26, 2021. Thereafter, this Court directed the clerk to docket Mr. Dallas's petition on March 29, 2021. Now—for the first time— Respondent contests the timeliness of Mr. Dallas's petition. Respondent should not be permitted to thwart review when this Court has already resolved the issue and no new facts have arisen warranting a reconsideration of that decision.

CONCLUSION

For the forgoing reasons, and those outlined in his initial petition, Mr. Dallas's petition for writ of certiorari should be granted.

Respectfully submitted,

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