No. 22-5734

In the Supreme Court of the United States

TIMOTHY WADE SAUNDERS,
Petitioner,
v.
WARDEN, HOLMAN CORRECTIONAL FACILITY,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov

October 31, 2022

CAPITAL CASE

QUESTION PRESENTED
(Restated)

A judge on the Eleventh Circuit Court of Appeals granted two certificates of appealability. The case was briefed, and a three-judge panel was set to hear oral argument. But prior to argument, the panel *sua sponte* requested briefing as to whether the COAs satisfied the requirements of 28 U.S.C. § 2253(c). The panel found not only that the COAs did not meet the statute's requirements, but that they *could not* meet its requirements—that is, that "because Saunders ha[d] not made a substantial showing that he was denied a constitutional right," the COAs "[could] not be amended to specify a constitutional issue."[1] The panel thus vacated the COAs and dismissed Petitioner's appeal.[2]

The question presented is:

Did the circuit court commit legal error when it exercised its discretion to revisit and vacate a defective COA that did not and could not meet 28 U.S.C. § 2253(c)'s mandatory criteria?

1. Order at 2, *Saunders v. Warden*, No. 20-12427 (11th Cir. June 28, 2022) (hereafter "Order").
2. *Id.*

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INTRODUCTION

In law, as in life, no good deed goes unpunished.

For ten years, pro bono counsel from one of Alabama's top firms represented death row inmate Timothy Saunders in his state and federal postconviction proceedings. Saunders's crimes were heinous, and counsel did what they could for him, to no avail. In December 2019, while waiting for the Eleventh Circuit to render a decision following oral argument in Saunders's 28 U.S.C. § 2254 proceedings, counsel withdrew, and Saunders's current counsel took the case.

In the months that followed, new counsel filed two Rule 60(b) motions, first accusing their predecessors of failing to raise unspecified *Martinez* claims against themselves, then of working under an untenable conflict because they had also represented the Alabama Department of Corrections in a civil suit in which Saunders was eventually made a class member, and for which counsel had *obtained conflict waivers*. New counsel even instigated a 42 U.S.C. § 1983 action *against prior counsel* concerning this supposed conflict.

The district court was unimpressed with Saunders's Rule 60(b) claims, deeming both those motions and the Rule 59(e) motions that followed meritless. Saunders sought certificates of appealability in the Eleventh Circuit, and the State filed an objection in each instance. One judge eventually granted the COAs and consolidated the cases. Briefing concluded in March 2022, and oral argument was set for July. But in June, the Eleventh Circuit *sua sponte* ordered the parties to file supplemental briefing concerning (1) whether the COAs specified constitutional

issues in accordance with 28 U.S.C. § 2253, (2) whether the COAs should be vacated, and (3) whether Saunders's appeals should be dismissed. Following briefing, the panel determined that the COAs were "improvidently granted" and "[could] not be amended" to meet AEDPA's requirements, and the panel dismissed the case.[3]

Saunders now asks the Court to grant certiorari concerning his meritless Rule 59(e) appeals to resolve a supposed circuit split over how circuit courts should exercise their discretion when dealing with defective COAs following *Gonzalez v. Thaler*.[4] Regarding habeas appeals, 28 U.S.C. § 2253 is unequivocal that a COA "*shall* indicate which specific issue or issues satisfy the showing" of "the denial of a constitutional right."[5] In *Gonzalez*, the Court held that this rule, though mandatory, is not jurisdictional.[6] That decision made no rule about how a circuit court must treat a defective COA, however, leaving the matter to the lower courts' sound discretion. Nevertheless, Saunders points to approaches from other circuits (and within the Eleventh Circuit) in which those courts exercised their discretion and proceeded despite initially defective COAs, and argues that different exercises of courts' discretion constitutes a split warranting certiorari.

There are several reasons this Court should deny Saunders's petition. First, the relief Saunders seeks cannot simply be "clarity," as he contends;[7] a fundamental principle of Article III standing requires that Saunders show "the injury" he

3. Order at 2.
4. 565 U.S. 134 (2012).
5. 28 U.S.C. §§ 2253(c)(2), (3) (emphasis added).
6. *Gonzalez*, 565 U.S. at 143.
7. *See* Pet. 19.

complains of "would likely be redressed by judicial relief."[8] And in a similar vein, "a federal court [lacks] the power to render advisory opinions" and may not "decide questions that cannot affect the rights of litigants in the case before them."[9] Mere "clarity" is not "likely" to "redress[]" Saunders's alleged injury[10] and would not "affect the rights of [Saunders]."[11] Rather, if Saunders has standing, and if this Court is to issue a decision beyond an advisory opinion, the relief Saunders seeks must redress his supposedly impinged rights. The only disposition that could do so would be a new rule of federal common law *compelling* courts of appeals to permit defective COAs. A mandatory rule compelling courts to uphold defective COAs would not only abrogate lower courts' long-held discretion over the issue, but would fly in the face of Congress's "mandatory . . . rule" compelling the opposite.[12] Moreover, Saunders fails to demonstrate any division in authority on that question. He does not even try to defend the only position that could provide redress, and he cites no authority supporting it.

Even if "provid[ing] clarity" could redress Saunders's injury,[13] Saunders has failed to identify any circuit split warranting certiorari. Put differently, the Eleventh Circuit's discretionary approach to COAs is not "in conflict with the decision of another United States court of appeals on the same important matter."[14] Exercising

8. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).
9. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (internal quotation omitted).
10. *TransUnion*, 141 S. Ct. at 220.
11. *Newkirk*, 422 U.S. at 401.
12. *Gonzalez*, 565 U.S. at 154.
13. Pet. 19. *But see Newkirk*, 422 U.S. at 401.
14. SUP. CT. R. 10(a) (2019).

discretion in different ways does not implicate an "important matter" of federal law;[15] indeed, Saunders suggests only that these different approaches are in tension, but he fails to explain what federal law or "important matter" those supposed tensions violate. The legal question in *Gonzalez* was whether courts have discretion to decide how to treat defective COAs, and the Court made clear that they do. Far from any "split" or "conflict," the lower courts have consistently followed *Gonzalez*'s holding. To grant review would create myriad cert-worthy issues out of circuit courts' differing discretionary decisions—even where, as here, no party alleges those decisions violate federal law. For the same reasons this Court should not grant certiorari to decide whether the Ninth or Eleventh Circuit's local rules takes the proper approach to requesting or granting filing extensions, it should not remove the circuits' discretion over adjudicating defective COAs.

Finally, even if different outcomes from courts' discretion could constitute a true circuit split meriting certiorari, for the reasons discussed above, Saunders's case would be a uniquely poor vehicle. Again, the Eleventh Circuit did not simply recognize that Saunders's COAs were defective; it further held that Saunders had failed to show that he was denied a constitutional right in connection with either of his Rule 60(b) motions, and thus that the COAs could not be amended to "ma[k]e a substantial showing of the denial of a constitutional right."[16]

For all these reasons, certiorari is unwarranted.

15. *Id.*
16. 28 U.S.C. §2253(c)(2).

STATEMENT OF THE CASE AND FACTS

A. Saunders's capital convictions and direct appeal

A full recitation of the facts of Saunders's underlying capital convictions is unnecessary at this stage. In brief, on July 9, 2004, Saunders beat his septuagenarian neighbor, Melvin Clemons, to death with Melvin's own crowbar. Melvin had gone out that evening in search of Saunders, to whom he had loaned the tool that day. While Agnes Clemons nervously awaited her husband's return, she found Saunders on her back porch, feigning an asthma attack. Agnes let him in and was about to call his mother to help him when Saunders attacked, dragging her around the house, stealing her money, car keys, and pills, and holding her hostage in her own home while he smoked crack and showed her risqué playing cards. Eventually, Saunders dropped his crack pipe, and Agnes was able to grab a shotgun and run him off. Still, she was hospitalized for several days following her assault, having suffered from contused lungs, fractured ribs, and bruising to the head and neck. She lost hearing from a concussion, her eyes nearly swelled shut, and she even went into heart failure. Saunders was found hiding under his brother's trailer.[17]

In August 2005, Saunders was convicted of two counts of capital murder and one count of attempted murder.[18] The jury unanimously recommended the death penalty,[19] and the trial court accepted that recommendation at the final hearing in

17. *Saunders v. State*, 10 So. 3d 53, 62–71 (Ala. Crim. App. 2007).

18. Tab P-41 at 8, 142–45, *Saunders v. State*, 1:10-cv-00439 (S.D. Ala. Nov. 27, 2017), ECF No. 41-46; *see* Tab P-10, ECF No. 41-15. Tab numbers refer to the habeas record, and unless otherwise specified, ECF numbers refer to documents filed in the district court habeas proceedings.

19. Tab P-18 at R. 1338, ECF No. 41-23; Tab P-19, ECF No. 41-24 (verdict form).

October 2005. Saunders had written two letters to the court asking for death, and he also apologized to the family.[20]

The Alabama Court of Criminal Appeals (ACCA) affirmed in 2007,[21] and both the Alabama Supreme Court[22] and this Court[23] denied certiorari.

B. Postconviction: Balch & Bingham and the *Braggs* litigation

After Saunders's convictions and sentence were affirmed, pro bono counsel from Balch & Bingham LLP, one of Alabama's premier law firms, represented him for a decade in state postconviction and federal habeas proceedings.

Balch counsel initiated Rule 32 (state postconviction) proceedings in November 2009.[24] The circuit court summarily dismissed the petition but failed to timely inform Saunders, and out of an abundance of caution, Balch counsel filed a § 2254 petition in the Southern District of Alabama in August 2010[25] while they moved for an out-of-time appeal. The habeas petition was held in abeyance until October 2017.[26]

On June 17, 2014—about four and a half years into Saunders's Rule 32 litigation—the Southern Poverty Law Center and the Alabama Disabilities Advocacy Program filed a federal complaint against the Alabama Department of Corrections (ADOC) on behalf of forty named inmates "and all others similarly situated," seeking relief for ADOC's alleged failure to provide adequate medical and mental health care

20. Tab P-20 at R. 1348–49, 1357–58, 1361, ECF No. 41-25; *see* Tab P-42, Part 2, at C. 230–32.
21. *Saunders*, 10 So. 3d at 117.
22. Tab R-46, ECF No. 47-5.
23. *Saunders v. Alabama*, 129 S. Ct. 2433 (2009) (mem.).
24. Tab P-29, ECF No. 41-34.
25. Petition for Writ of Habeas Corpus, ECF No. 1.
26. Order, ECF No. 39.

and accommodations under the ADA.[27] Balch counsel agreed to represent ADOC in that matter, and then-Attorney General Luther Strange issued deputy attorney general appointment letters in July 2014.[28]

The *Braggs* litigation was split into two phases. Phase 1 concerned the certification of the class of inmates with non–mental health ADA claims, while Phase 2 considered the certification of classes with other claims.[29] Two years into the case, while Saunders's Rule 32 petition was awaiting oral argument in the ACCA,[30] the Phase 1 settlement class was provisionally certified.[31]

While the Federal Defenders for the Middle District of Alabama—Saunders's current counsel—did not represent any class of plaintiffs in *Braggs*, they and the Equal Justice Initiative have been involved in that litigation because of their representation of death row inmates in Alabama. In July 2016, the Federal Defenders filed a response to the proposed Phase 1 settlement on behalf of several inmates,[32] and the district court requested that EJI provide its views as to that filing.[33] The parties submitted a joint response on behalf of EJI and the Federal Defenders that

27. Complaint, *Braggs v. Hamm*, 2:14-cv-00601 (M.D. Ala. June 17, 2014), ECF No. 1.
28. Exhibit, ECF No. 79-1.
29. New Scheduling Order, *Braggs v. Hamm*, 2:14-cv-00601 (M.D. Ala. Sept. 8, 2015), ECF No. 239.
30. *See* Appellant's Motion to Continue Oral Argument at 2–3, *Saunders v. State*, CR-13-1064 (Ala. Crim. App. June 1, 2016).
31. Phase 1 Preliminary Settlement Approval Order, *Braggs v. Hamm*, 2:14-cv-00601 (M.D. Ala. June 13, 2016), ECF No. 532.
32. Response to Proposed Class Action Settlement, *Braggs v. Hamm*, 2:14-cv-00601 (M.D. Ala. July 25, 2016), ECF No. 593.
33. Phase 1 Order on Objection from Federal Public Defender, *Braggs v. Hamm*, 2:14-cv-00601 (M.D. Ala. July 29, 2016), ECF No. 594.

August.[34]

Since Saunders has been treated for various mental illnesses, including major depressive disorder,[35] Balch counsel grew concerned that a conflict could arise as the district court decided whether to certify the Phase 2 settlement class. By this time, they had been working as Saunders's postconviction counsel for nearly seven years. At their request, Angie Setzer, an EJI attorney, met with Saunders at Holman Correctional Facility on August 25, 2016, to explain the situation. Following this meeting, Saunders signed a conflict waiver, which reads as follows:

> My name is Timothy Saunders and I am currently incarcerated on death row at Holman Prison in Atmore, Alabama. I have filed a Rule 32 petition challenging my conviction and death sentence and my lawyers are John Smith and Michael Edwards, attorneys with the law firm of Balch and Bingham LLP.
>
> On Thursday, August 25, 2016, I met with Angie Setzer, an attorney with the Equal Justice Initiative. She told me that Balch and Bingham are the attorneys for the Alabama Department of Corrections in a lawsuit about prisoners in Alabama who are disabled and making sure that the Department of Corrections is providing the appropriate services to these prisoners. Ms. Setzer also told me that the Equal Justice Initiative has been asked to give an opinion about the impact of the lawsuit on death row inmates. After talking with Ms. Setzer, I understand the role of Balch and Bingham in defending the Department of Corrections. Ms. Setzer has explained that there is a potential conflict of interest in this case. To the extent that a conflict of interest exists in this case, I waive this conflict. I want Balch and Bingham to continue to be my lawyers and represent me in my case.[36]

34. Parties' Joint Submission Regarding the Views of the Equal Justice Initiative, *Braggs v. Hamm*, 2:14-cv-00601 (M.D. Ala. Aug. 17, 2016), ECF No. 652.

35. Doc. 41-19 at R. 1182–1235; *see* Doc. 41-48 at C. 202–05; *see, e.g.*, Appellant's Brief at 34, *Saunders v. State*, CR-13-1064 (Ala. Crim. App. Sept. 10, 2014) (claiming trial counsel ineffective for failing to investigate substance abuse and mental illness).

36. Exhibit A, ECF No. 80-1.

The district court certified the class in which Saunders was a member in November 2016.[37] Because he had signed a conflict waiver, Balch counsel continued their representation.

The following month, ACCA affirmed the dismissal of Saunders's Rule 32 petition after a series of appeals.[38] That court denied rehearing in May 2017,[39] and the Alabama Supreme Court denied certiorari that September.[40]

Now returning to his § 2254 proceedings in the Southern District of Alabama, Saunders filed an amended petition in November 2017.[41] The district court denied the petition in February 2019, though it granted a COA as to a single claim.[42] The Eleventh Circuit declined to expand the COA.[43] Balch counsel briefed the case and appeared for oral argument in November 2019. The circuit court affirmed in February 2020,[44] and it denied rehearing and rehearing en banc that April.[45] By then, however, Balch counsel had withdrawn, and Saunders was represented by his current counsel from the Federal Defenders.

37. Phase 2A Class Certification Order, *Braggs v. Hamm*, 2:14-cv-00601 (M.D. Ala. Nov. 25, 2016), ECF No. 1014.
38. *Saunders v. State*, 249 So. 3d 1153 (Ala. Crim. App. 2016).
39. Tab P-38, ECF No. 41-43.
40. Tab P-40, ECF No. 41-45.
41. Amended Petition for Writ of Habeas Corpus, ECF No. 41-1.
42. Order at 100, ECF No. 51.
43. Order, *Saunders v. Warden, Holman Corr. Facility*, No. 19-10817-P (11th Cir. Aug. 26, 2019).
44. *Saunders v. Warden, Holman Corr. Facility*, 803 F. App'x 343, 346 (11th Cir. 2020).
45. Order, *Saunders v. Warden, Holman Corr. Facility*, No. 19-10817-P (11th Cir. Apr. 22, 2020). This Court denied certiorari in November 2020. *Saunders v. Raybon*, 141 S. Ct. 858 (2020) (mem.).

C. Postconviction: Federal Defenders

On December 26, 2019, Balch counsel met with Saunders and explained that the Federal Defenders would be representing him henceforth.[46] Balch counsel ultimately moved to withdraw in February 2020,[47] and the district court granted the motion in March.[48]

i. Rule 60(b)(1) motion

While Saunders's habeas appeal was pending in the Eleventh Circuit, the Federal Defenders initiated proceedings in the district court. On January 31, 2020, Saunders filed a motion to appoint counsel[49] and a Rule 60(b)(1) motion,[50] arguing that Balch counsel were conflicted because they had represented him in Rule 32 and in habeas, and thus, he had been unable to raise meritorious claims for relief under *Martinez v. Ryan*.[51]

On March 12, the district court deemed the motion to appoint counsel moot[52] and denied the Rule 60(b)(1) motion.[53] Noting that Saunders's motion had "hinge[d] . . . on excusable neglect" because he had relied on allegedly conflicted counsel,[54] the court considered the factors listed in *Pioneer Investment Services Co. v.*

46. Exhibit at 7, ECF No. 58-1.
47. Motion to Withdraw as Counsel, ECF No. 60.
48. Order, ECF No. 66.
49. Motion for Appointment of Counsel, ECF No. 58.
50. Petitioner's Motion to Grant Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(1), ECF No. 59.
51. 566 U.S. 1 (2012).
52. Order, ECF No. 67.
53. Order, ECF No. 65.
54. *Id.* at 4.

Brunswick Associates Ltd. Partnership[55] and found Saunders's arguments unpersuasive.[56] Further, the district court agreed with the State that Saunders had no viable *Martinez* claim because he could not show a *Strickland v. Washington*[57] violation as to the underlying claim against trial counsel.[58]

Four weeks later, Saunders filed two Rule 59(e) motions to alter or amend, contending that he was entitled to have counsel appointed for his habeas proceedings[59] and that the district court had erred in denying his Rule 60(b)(1) motion.[60] The State agreed that Saunders was entitled to counsel under 18 U.S.C. § 3599 but argued that the district court had correctly denied the Rule 60(b)(1) motion.[61] On May 27, the district court appointed the Federal Defenders[62] but denied Saunders's other Rule 59(e) motion.[63] The district court also denied a COA.[64]

Saunders filed notice of appeal on June 26,[65] then applied for a COA in the Eleventh Circuit on July 15. The State objected to the application.[66]

55. 507 U.S. 380, 394 (1993); *see Chege v. Ga. Dep't of Juv. Justice*, 787 F. App'x 595, 598–99 (11th Cir. 2019) (discussing *Pioneer*).
56. Order at 5–6, ECF No. 65 (internal citation omitted).
57. 466 U.S. 668 (1984).
58. Order at 6–7, ECF No. 65.
59. Motion to Alter or Amend, ECF No. 68.
60. Motion to Alter or Amend, ECF No. 69.
61. Respondent's Answer to Petitioner's Motions to Alter or Amend, ECF No. 71.
62. Order at 5–8, ECF No. 74.
63. *Id.* at 11–12.
64. *Id.* at 12.
65. Notice of Appeal, ECF No. 75.
66. Appellee's Response to Application for Certificate of Appealability, *Saunders v. Warden*, No. 20-12427-P (11th Cir. July 17, 2020).

ii. Rule 60(b)(6) motion

Meanwhile, back in the district court, Saunders continued to pursue the Rule 60(b) route to relief. On July 8, one week after the appeal from his Rule 60(b)(1) motion was docketed and approximately six months after the Federal Defenders took his case, Saunders filed a Rule 60(b)(6) motion.[67] Therein, he claimed that "[u]nbeknownst to him, [he] was being represented by attorneys who were simultaneously representing the Alabama Department of Corrections in a lawsuit where [he] was a plaintiff."[68] Despite the fact that the Federal Defenders had been involved in the *Braggs* litigation as far back as 2016, Saunders's current counsel claimed they had no knowledge of Balch counsel's alleged "inherent and much deeper conflict of interest" when they filed their Rule 60(b)(1) motion in January 2020—in fact, that they did not learn of the supposed conflict until May 12, 2020.[69] Saunders contended that his Rule 60(b)(6) motion was timely, that the judgment should be reopened, and that he should be permitted to file a new habeas petition.

The district court disagreed. On August 20, after ordering a response from the State, the district court concluded that the motion was untimely and that Saunders failed to demonstrate that Balch counsel had labored under an actual conflict of interest.[70] Saunders filed a Rule 59(e) motion to alter or amend the denial on

67. Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), ECF No. 79.

68. *Id.* at 1.

69. *Id.* at 5–6. Instead of immediately filing a Rule 60(b) motion when he "learned" of this fact in May, Saunders waited a month and a half, then filed a 42 U.S.C. § 1983 complaint against ADOC, the Attorney General, *and Balch counsel* in the Middle District of Alabama on June 30, 2020. Complaint, *Saunders v. Dunn*, 2:20-cv-00456 (M.D. Ala. June 30, 2020), ECF No. 1. That litigation is ongoing.

70. Order at 8–9, ECF No. 84.

September 16,[71] which the court denied in December.[72] His motion for COA[73] was denied,[74] and Saunders filed an application for COA in the Eleventh Circuit in March 2021. The State again objected.[75]

iii. Eleventh Circuit proceedings

In September 2021, Eleventh Circuit Judge Charles Wilson granted both COA applications over the State's objection and consolidated the appeals. The case was fully briefed in March 2022, and oral argument was scheduled for July.

But in June, the circuit court directed the parties to file supplemental briefs concerning (1) whether the COAs specified constitutional issues, (2) if not, whether they should be vacated, and (3) if they were vacated, whether Saunders's appeals should be dismissed. Following briefing, the panel—Chief Judge Pryor, Judge Rosenbaum, and Judge Wilson, who had issued the COAs in the first place—determined that the COAs were defective and improvidently granted, and dismissed the case.[76] The court explained:

> A habeas petitioner's right to appeal a final order, including a ruling on a Rule 59(e) or Rule 60(b) motion, is governed by the certificate of appealability. *Hamilton v. Sec., Fla. Dept. of Corr.*, 793 F.3d 1261, 1265 (11th Cir. 2015) (per curiam). "A certificate of appealability may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *See Spencer* [*v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014)] (quoting 28 U.S.C. § 2253(c)(2)). This rule applies even "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional

71. Petitioner's Motion to Alter or Amend Judgment, ECF No. 85.

72. Order, ECF No. 89.

73. Motion for Certificate of Appealability, ECF No. 90

74. Order, ECF No. 93.

75. Appellee's Response to Application for Certificate of Appealability, *Saunders v. Warden*, No. 21-10795-P (11th Cir. Mar. 29, 2021).

76. Order at 5.

claim." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The prisoner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

Here, the certificates of appealability do not specify a constitutional issue, nor could they be amended to specify one because Saunders has not made a substantial showing that he was denied a constitutional right. *See Spencer*, 773 F.3d at 1137. The first certificate of appealability relates to Saunders's Rule 60(b)(1) motion. The crux of that motion was that Saunders never had the chance to raise a *Martinez* claim because his counsel had a conflict of interest. But the viability of Saunders's *Martinez* claim would have depended on showing that his underlying ineffectiveness claim—based on his trial counsel's failure to prepare him to testify—had at least "some merit." 566 U.S. at 14. Neither Saunders's Rule 60(b)(1) motion, nor his application for a certificate of appealability, nor even his habeas petition make that showing. To be sure, he makes the conclusory allegation that his trial counsel failed to adequately prepare him, but he has never developed or supported that claim. He has thus failed to make a substantial showing that he was denied a constitutional right. *See Spencer*, 773 F.3d at 1137.

Nor has Saunders made a substantial showing that he was denied a constitutional right in connection with his Rule 60(b)(6) motion. To the contrary, Saunders has argued on appeal that he suffered a violation only of a statutory right to conflict-free counsel. Indeed, his application for a certificate of appealability disclaims any argument that the denial of his Rule 60(b)(6) motion implicated his Sixth Amendment right to counsel. And although Saunders's application mentions due process, it does not explain how that right is implicated, or cite any authority in support of a due process violation. We thus cannot say that Saunders has made a substantial showing that he was denied due process. *See Spencer*, 773 F.3d at 1137.

For these reasons, the certificates of appealability were improvidently granted. As a result, we vacate our previous order granting the certificates of appealability, and we dismiss Saunders's appeal.[77]

The circuit court denied reconsideration in August,[78] and the present petition for

77. *Id.* at 3–5.

78. Order, *Saunders v. Warden*, Nos. 20-12427-P & 21-10795-P (11th Cir. Aug. 3, 2022).

certiorari followed.

REASONS THE PETITION SHOULD BE DENIED

Saunders presented the district court with two meritless Rule 60(b) motions and was denied relief. He applied for COAs and received them, but when the circuit court realized that the COAs not only were defective under § 2253(c)(3) but also could not be amended because of Saunders's failure to show the denial of a constitutional right, the court rescinded the COAs and dismissed the appeal as improvidently granted.[79]

Saunders does not—nor can he—plead facts showing that the Eleventh Circuit erred in deeming his motions for COA deficient.[80] Instead, he attempts to manufacture a circuit split by highlighting the discretion exercised by lower courts when confronting COAs that fail to meet Congress's mandatory requirements under § 2253(c)(3). But when it comes to the only position that could redress Saunders's alleged injury—a ruling that federal law *compels* courts of appeals to uphold defective and improvidently granted COAs—he offers no division in authority. Absent any supportive precedent, Saunders asks the Court to abrogate lower courts' discretion over COAs and replace it with a new rule of federal common law that mandates lower courts to uphold COAs that do not and cannot comport with Congress's

79. *See* Order at 2.

80. While Saunders contends that he "has consistently asserted the denial of his Sixth Amendment right to the effective assistance of counsel," Pet. 19 n.42, his Rule 60(b) motions concerned unspecified, insufficiently pleaded *Martinez* claims and the right to counsel under 18 U.S.C. § 3599. Vaguely referring to a right under an inchoate theory of its impingement is not enough; AEDPA requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Saunders could not meet that requirement.

"mandatory . . . rule."[81] The Court should reject this request.

Moreover, differences in exercising discretion do not signal differences in the application of federal law. Again, Saunders cites no case in which a court has read the law to *compel* that defective COAs be upheld; his cases merely highlight the discretion courts have exercised when confronted with a COA that does not meet Congress's commands. As discussed below, while those exercises can indeed look different in different circuits, they are exercises of discretion all the same. That circuit courts exercise their discretion in different ways simply does not create a split or a "conflict . . . on the same important matter" warranting this Court's review.[82]

Finally, even if the Court were inclined to grant certiorari to standardize the different ways lower courts have exercised their discretion over defective COAs, this case would be a poor vehicle for doing so. Saunders's COAs were defective not simply because they did not make "a substantial showing of the denial of a constitutional right,"[83] but rather because they *could not* make that mandatory showing; that is, "Saunders has not made a substantial showing that he was denied a constitutional right," so "the certificates of appealability cannot be amended to specify a constitutional issue" in accordance with §2253(c)(2).[84] As the Fifth Circuit recently explained in *United States v. Castro*, "When we spot a defective COA, on our own initiative or otherwise, it should be vacated. Then we can, in our discretion, consider

81. *Gonzalez*, 565 U.S. at 154.
82. SUP. CT. R. 10(a) (2019).
83. 28 U.S.C. §2253(c)(2).
84. Order at 2.

issuing a valid COA."[85] That is precisely what the Eleventh Circuit did in Saunders's case: it recognized the deficiency in the COAs, then further recognized that the mistake could not be cured and dismissed the appeal. While some exercises of discretion might implicate difficult legal issues, that is not the case here. Certiorari is therefore unwarranted.

I. Only an unsupportable rule of federal common law can redress Saunders's supposed injury.

At bottom, Saunders seeks certiorari because he believes the Eleventh Circuit erred when it *sua sponte* revisited his COAs and found that they did not and could not comply with § 2253(c)(3). To establish a viable case or controversy, Saunders must show that this Court can redress the injury he claims to have suffered based on that supposed legal error.[86]

Saunders therefore must seek a new rule of federal common law declaring that courts may not do what the Eleventh Circuit did here—that is, that courts *may not* revisit improvidently granted, defective COAs and instead *must* hear those COAs even where, as here, the defective COA cannot be rewritten to conform with Congress's "mandatory . . . rule."[87] His petition never requests such a rule, however. Rather, Saunders insists that all he wants is "clarity"[88] as to how circuit courts should proceed when faced with defective COAs. But "clarity" that fails to "affect the rights of [Saunders]" amounts to little more than an impermissible advisory opinion.[89]

85. 30 F.4th 240, 247 (5th Cir. 2022) (citations edited).
86. *See, e.g.*, *TransUnion*, 141 S. Ct. at 2203; *Newkirk*, 422 U.S. at 401.
87. *Gonzalez*, 565 U.S. at 154.
88. Pet. 19.
89. *Newkirk*, 422 U.S. at 401.

Assuming, then, that Saunders asks this Court to adjudicate a case or controversy under Article III, he must be seeking a new common-law rule forcing courts of appeal to hear cases based on COAs that defy AEDPA's plain text. But Saunders offers no authority for the proposition that § 2253(c) should be read in such a way as to compel circuit courts to proceed on any COA issued, no matter how flawed (or, as in his case, no matter how unfixable). What's more, Saunders points to no circuit court as having read § 2253(c) in the way he implicitly suggests, so there is no circuit split on this issue. And this makes good sense; it is passing strange to advocate a mandatory rule requiring courts to uphold COAs that defy Congress's competing "mandatory . . . rule."[90]

If Saunders has standing to sue, and if this Court is to avoid issuing an advisory opinion, the novel rule Saunders advocates is unsupportable. His petition should end here.

II. There is no circuit split.

Looking beyond the standing issue, certiorari should be denied because the "circuit split" Saunders identifies is merely a proper exercise of the circuit courts' discretion.

Following AEDPA, 28 U.S.C. § 2253 provides that in a § 2254 or § 2255 proceeding, a petitioner cannot take an appeal to the circuit court without the issuance of a COA. A COA "may issue . . . only if the applicant has made a substantial

90. *Gonzalez*, 565 U.S. at 154.

showing of the denial of a constitutional right,"[91] and the COA "shall indicate which specific issue or issues satisfy the showing required."[92]

In *Gonzalez v. Thaler*, a Texas inmate's habeas petition was dismissed in district court, and the Fifth Circuit affirmed.[93] The COA granted in the inmate's case did not mention a constitutional claim, nor did the circuit court discuss whether the COA was improperly issued.[94] When the inmate petitioned for certiorari, the State argued for the first time that the Fifth Circuit had lacked jurisdiction over the appeal because of the defect in the COA.[95]

The Court granted certiorari and clarified the power of the various provisions of § 2253. Subpart (a) "is a general grant of jurisdiction" to the circuit courts of appeals arising from habeas proceedings.[96] Subpart (b) "limits jurisdiction over a particular type of final order."[97] Subpart (c)(1) is likewise a jurisdictional rule, as it prevents appeals from being taken without the issuance of a COA.[98] But subparts (c)(2) and (c)(3) are nonjurisdictional, as the Court explained:

> Section 2253(c)(2) speaks only to *when* a COA may issue—upon "a substantial showing of the denial of a constitutional right." It does not contain § 2253(c)(1)'s jurisdictional terms. . . . And it would be passing strange if, after a COA has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing and gauge its "substantial[ity]" to verify its jurisdiction. That inquiry would be largely duplicative of the merits question before the court.[99]

91. 28 U.S.C. § 2253(c)(2).
92. *Id.*
93. 565 U.S. at 138–39.
94. *Id.*
95. *Id.* at 139.
96. *Id.* at 140.
97. *Id.*
98. *Id.* at 142.
99. *Id.* at 143.

"In sum," the Court wrote, "we hold that § 2253(c)(3) is a mandatory but nonjurisdictional rule."[100]

While *Gonzalez* clarified that a defective COA does not divest a circuit court of jurisdiction over a habeas appeal, it did not order that a circuit court *must* proceed on a defective COA. On the contrary, the Court directed that "[i]f a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals panel must address the defect by considering an amendment to the COA or remanding to the district judge for specification of the issues."[101] As the Court noted, "Courts of appeals regularly amend COAs or remand for specification of issues, notwithstanding the supposed potential to 'embarras[s] a colleague.'"[102]

What *Gonzalez* did not do was mandate a procedure that circuit courts must follow should a court notice a defect in a COA—is the court obligated to proceed on the defective COA if the parties remain silent, or can the court raise the issue of the defect sua sponte and correct it? In the absence of a strict rule from the Court, some circuit courts have employed their discretion to amend COAs that fail to comport with § 2253(c)(3), such as the Fifth[103] and the Eleventh.[104]

A. The Eleventh Circuit

The Eleventh Circuit's 2014 decision in *Spencer* is illustrative of this discretion. Heading the discussion, "The Certificate of Appealability Is Defective, But

100. *Id.* at 154.
101. *Id.* at 146.
102. *Id.* at 146 n.7.
103. *Castro*, 30 F.4th at 247.
104. *Spencer*, 773 F.3d at 1138.

We Exercise Our Discretion to Consider the Merits of this En Banc Appeal at this Late Stage,"[105] the court noted that the COA was clearly insufficient, but it declined to vacate the COA because of the late stage of the proceedings; the case had been briefed, and the court had held oral argument twice, including argument from an amicus.[106] Moreover, both parties asked the court "not to vacate the defective certificate that we erroneously issued."[107] But while the court permitted the matter to proceed, it cautioned:

> We will not be so lenient in future appeals when a certificate fails to conform to the gatekeeping requirements imposed by Congress. Going forward, a certificate of appealability, whether issued by this Court or a district court, must specify what constitutional issue jurists of reason would find debatable.[108]

Despite issuing this warning, the Eleventh Circuit has occasionally permitted a defective COA to stand. The following year, in *Spears v. Warden*, the court allowed a case to proceed on a defective COA because the COA "was issued well before the decision in *Spencer*."[109] As the case was briefed and there were no objections, the court explained, "***[W]e exercise our discretion*** to resolve the issue specified in the COA."[110] Likewise, in *Negron v. Secretary, Florida Department of Corrections*, the court admitted that the COA failed to identify a constitutional claim but still allowed the case to proceed, explaining that the parties had briefed the issue in the COA and that the petitioner "states at least one colorable constitutional claim in his

105. *Id.* at 1137 (emphasis added).
106. *Id.*
107. *Id.* at 1138.
108. *Id.*
109. 605 F. App'x 900, 902 n.1 (11th Cir. 2015).
110. *Id.* (emphasis added).

petition."[111] "Therefore," the panel concluded, "***we exercise our discretion*** to consider the merits of the issue in the COA notwithstanding any deficiency in the COA order."[112] More recently, in *Bivens v. United States*, the court acknowledged that the district court's COA was defective but allowed the case to proceed after "*sua sponte* expand[ing] the COA accordingly."[113]

By the same token, the Eleventh Circuit has also exercised its discretion to vacate or amend COAs. In *Bailey v. Warden*, for example, the court remanded the appeal to the district court to identify a constitutional issue in the COA.[114] In *Lambrix v. Secretary, DOC*, the court explained its reasoning for vacating the COA, noting that "the district court did not state that Lambrix had made a substantial showing of a denial of a constitutional right, much less specify the underlying constitutional issue on which he had made such a showing, which are requirements for issuance of a COA."[115]

In Saunders's case, the panel followed the circuit precedent set forth in *Spencer* and exercised its discretion to review the sufficiency of the COAs prior to oral argument. While Saunders's appeal had been briefed, the court reviewed the COAs and determined not only that they were deficient, but that vacating and reissuing the COAs was not an option because they could not be sufficiently amended to satisfy § 2253(c)(3)'s requirements.[116] This was a decision well within the court's discretion.

111. 643 F. App'x 898, 900 (11th Cir. 2016).
112. *Id.* (emphasis added).
113. 747 F. App'x 765, 768 n.2 (11th Cir. 2018).
114. No. 20-11874, 2021 WL 3465662, at *1 n.1 (11th Cir. Aug. 6, 2021).
115. 872 F.3d 1170, 1179 (11th Cir. 2017).
116. Order at 4–5.

B. The Fifth Circuit

The Fifth Circuit, from which *Gonzalez* originated, takes an approach much like that of the Eleventh Circuit. In last March's *United State v. Castro*, that court stated, "Given the plain text of § 2253(c)(2), Supreme Court precedent, and the similarities between the COA requirement and other habeas doctrines, we hold that our court has the discretion to raise a COA's invalidity sua sponte and vacate the COA."[117]

In *Castro*, as in Saunders's case, the parties conceded that the COA was deficient prior to oral argument.[118] "So here," wrote the circuit court, "we're confronted with the choice of either (A) honoring the COA requirement that Congress wrote or (B) ignoring it and plowing ahead in the face of a conceded error and rendering a decision limited to a non-constitutional issue."[119] That court, like the Eleventh Circuit here, chose option (A).

The Fifth Circuit also recognized that the blame for defective COAs may lie with the issuing court, not the appellant, and explained how their discretionary policy does not hurt litigants:

> In some cases, our court and not the movant is to blame for a COA defect. *See Gonzalez*, 565 U.S. at 144 ("A petitioner, having successfully obtained a COA, has no control over how the judge drafts the COA and . . . may have done everything required of him by law."). How, then, do we prevent our mistakes from hurting otherwise-faultless movants?
>
> The answer is simple. When we spot a defective COA, on our own

117. *Castro*, 30 F.4th at 246.

118. *Id.* at 246–27; *see* Respondent–Appellee's Supplemental Brief 1–2, *Saunders v. Warden*, Nos. 20-12427-P & 21-10795-P (11th Cir. June 17, 2022); Appellant's Supplemental Brief at 1–2, *Saunders v. Warden*, Nos. 20-12427-P & 21-10795-P (11th Cir. June 21, 2022)

119. *Castro*, 30 F.4th at 247.

> initiative or otherwise, it should be vacated. Then we can, in our discretion, consider issuing a valid COA. … Of course, we are bound by the well-settled rule that a prisoner cannot ask for a COA here on any ground different from the one(s) submitted to and rejected by the district court. But assuming the prisoner did his part correctly and asked for a valid COA in the district court and then again in ours, the rule we announce today will not hurt him. He'll either get the COA in the first instance or, if we make a mistake and issue an invalid certificate, we can recognize our mistake and fix it with a valid one.[120]

This policy is a proper exercise of the circuit court's discretion.

C. Other circuits' exercise of discretion

In his petition, Saunders identified other circuit courts that have exercised their discretion to proceed on a defective COA in different fashions.

In *Sistrunk v. Rozum*, the government argued that the Third Circuit lacked jurisdiction because the COA did not state a constitutional claim.[121] After pointing to *Gonzalez*, which had been decided only two months prior, the circuit court wrote:

> Even a defective COA does not thwart our jurisdiction. Rather, "[o]nce a judge has made the determination that a COA is warranted"—which has happened here—"the COA has fulfilled [its] gatekeeping function." [*Gonzalez*, 565 U.S. at 145.] No further scrutiny of the COA is necessary. *See id.* at [148] ("[Section] 2253(c)(3) is a nonjurisdictional rule . . . .").[122]

In *Rayner v. Mills*, the State argued that the COA should be vacated as improvidently granted.[123] In a footnote, the Sixth Circuit declined to take up the matter, not because the court was prohibited from doing so, but because the issue arose too late in the proceedings:

> It is not necessary for this Court to consider the State's claim, as it should have raised this issue on a motion to dismiss. *See, e.g.*, *Porterfield*

120. *Id.* (citations omitted).
121. 674 F.3d 181, 186 (3d Cir. 2012).
122. *Id.*
123. 685 F.3d 631, 635 n.1 (6th Cir. 2012).

> *v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001). In *Porterfield*, "considerations of judicial economy" did not discourage review of the COA, particularly as the district court had not considered the issue and the parties had yet to brief the merits of the case. *Id.* Such is not the case here, and as the issues have already been briefed and presented to this Court, we will not review the grant of the COA.[124]

The Fourth Circuit addressed defective COAs in another footnote in *United States v. Foote*.[125] Though the circuit court noted that the COA failed to satisfy § 2253(c)'s requirements, it pointed out that the government had not challenged the COA and decided that "at this late stage, we will not treat this potential defect as jurisdictional."[126]

In *Rosa v. United States*, the Second Circuit weighed in, once again in a footnote.[127] There, the government argued that the petitioner failed to "present a debatable claim of the denial of a constitutional right," and so the COA should be vacated and the appeal dismissed, or else the district court summarily affirmed.[128] The circuit court declined to do so:

> The government, however, cites no case in which a subsequent panel of this court has dismissed an appeal after a previous panel has granted a COA. We need not decide when, if at all, such action might be appropriate. We simply decline to take such action here where the district court's ground for denial—timeliness—was correct. . . . But the Supreme Court has further instructed that the requirement that a COA indicate the issue on which the movant has made the substantial showing of the denial of a constitutional right is not jurisdictional. *See Gonzalez v. Thaler*, [565 U.S. 134, 141] (2012) (holding that court of appeals had power to adjudicate appeal even where COA only "identified a debatable procedural ruling, but did not 'indicate' the [merits] issue on which [the petitioner] had made a substantial showing of the denial of a

124. *Id.*
125. 784 F.3d 931 (4th Cir. 2015).
126. *Id.* at 935 n.4.
127. 785 F.3d 856 (2d Cir. 2015).
128. *Id.* at 858 n.3.

> constitutional right"). Thus, even if the COA here might be considered defective because it did not identify a debatable merits issue, we may nevertheless consider the appeal as to the procedural ruling.[129]

These decisions, like those of the Fifth and Eleventh Circuits, were within the circuit courts' discretion. As *Gonzalez* made clear, § 2253(c)(3) is a mandatory rule but not jurisdictional, and these courts declined to vacate their defective COAs for a variety of reasons, just as the Eleventh Circuit has done in certain cases.

One additional illustrative case is *United States v. Mulay* from the Tenth Circuit.[130] There, the circuit court recognized the limits of its discretion when the district court granted a defective COA and the government objected.[131] The court acknowledged that it could not allow the matter to go unresolved:

> Given the government's challenge to the COA because it does not raise a constitutional issue, the Supreme Court instructs that "the court of appeals panel must address the defect by considering an amendment to the COA or remanding to the district judge for specification of the issues." *Gonzalez*, [565 U.S. at 146]. We therefore **PARTIALLY REMAND** this case to the district court for reconsideration and specification of any issue or issues of constitutional import. We retain jurisdiction.[132]

***

In sum, then, the "lack of standards and vagueness that has plagued the circuits since *Gonzalez*"[133] to which Saunders directs the Court is simply a case of different circuits—even different panels within circuits—exercising their discretion in different ways. Some courts proceed on defective COAs if the problem is noted late

129. *Id.*
130. 805 F.3d 1263 (10th Cir. 2015).
131. *Id.* at 1265.
132. *Id.* at 1265–66.
133. Pet. 18.

in the case. Others prefer to bring their COAs in line with the statutory requirements before proceeding, no matter when the issue arises or who raises it. Either course is correct after *Gonzalez*.

Saunders has not identified a circuit split. Rule 10(a) provides that certiorari may be warranted where there is a *conflict* between the decisions of two courts of appeal or between a court of appeals and a state court of law resort. But as a general matter, different exercises of discretionary authority—like the procedures the circuits have adopted following *Gonzalez*—do not constitute true conflicts. A difference in opinion as to whether § 2253(c) were a jurisdictional or mandatory rule could constitute an "important matter"[134] signifying a circuit split (and, of course, it did[135]). A difference in the exercise of courts' discretion does not.

Finally, while Saunders suggests that the issue he presents is one of federal importance because of the alleged lack of clarity for litigants,[136] this is simply not the case. As *Castro* shows, if the error in the COA is the result of the court's mistake, it can be corrected with no prejudice to the appellant.[137] So Saunders's argument apparently reduces to the proposition that litigants in those circuits that more laxly follow § 2253(c)'s requirements will be able to draft sloppier motions, knowing that they can proceed on a defective COA, whereas those in circuits like the Fifth and

134. SUP. CT. R. 10(a) (2019).

135. *See Gonzalez*, 565 U.S. at 134.

136. Pet.7, 20–21.

137. *See Castro*, 30 F.4th at 247 ("But assuming the prisoner did his part correctly and asked for a valid COA in the district court and then again in ours, the rule we announce today will not hurt him. He'll either get the COA in the first instance or, if we make a mistake and issue an invalid certificate, we can recognize our mistake and fix it with a valid one.").

Eleventh will be compelled to get it right the first time. While laxer standards might make for more carefree briefing, this does not constitute grounds for certiorari.

III. This case is a poor vehicle for the question presented because Saunders cannot show the denial of a constitutional right.

Even if different approaches to discretion warranted this Court's review, Saunders's case would be a poor vehicle for its consideration because, as noted above, this is *not* a case where a court mistakenly drafted a defective COA despite a litigant having presented meritorious claims that comply with AEDPA. Rather, this is a case where no reformulation of Saunders's claims could satisfy §2253(c), for Saunders's claims do not implicate "denial of a constitutional right"[138]

Saunders objects to the Eleventh Circuit's treatment of his case because the court deemed his COAs defective and vacated them. Saunders's narrative notwithstanding, the panel's dismissal was not a draconian measure designed to punish Saunders for the court's own mistakes. In its order calling for supplemental briefing, the court asked the parties whether the COAs were defective and should be vacated, and it also asked whether new COAs should be issued. In other words, the circuit court appeared willing to vacate and reissue corrected COAs if only Saunders could make the requisite showing of the denial of a constitutional right. The problem for Saunders is that he cannot make that showing.

As discussed above, Saunders filed two Rule 60(b) motions, one alleging that Balch counsel could not make meritorious *Martinez* claims against themselves and

138. *Id.*; *see* Order at 2.

the other alleging that Balch counsel's representation of ADOC in *Braggs* infringed upon his right to counsel under 18 U.S.C. § 3599. As the Eleventh Circuit pointed out, Saunders failed to make a substantial showing of the denial of a constitutional right as to either claim. A brief review of Saunders's allegations shows the propriety of the circuit court's judgment.

A. Rule 60(b)(1) motion

In his January 2020 Rule 60(b)(1) motion, Saunders contended that he could show excusable neglect sufficient to reopen his habeas proceedings because of Balch counsel's conflict of interest. He claimed that one of his ineffective-assistance-of-trial-counsel claims raised in habeas was deemed procedurally barred for failure to exhaust in state postconviction. Ordinarily, habeas counsel could raise a *Martinez* claim asking the district court to consider an ineffective assistance claim despite state postconviction counsel's failings, but here, as Balch counsel represented Saunders in Rule 32 and in habeas, that inherent conflict prevented them from bringing a meritorious *Martinez* claim against themselves.[139]

The problem for Saunders was that he failed to allege facts showing that the *Strickland* claim underlying the *Martinez* claim had at least "some merit."[140] The defaulted claim was that trial counsel failed to adequately prepare Saunders to testify.[141] Saunders took the stand during the guilt phase of his trial, and during his testimony, he apologized for his actions, admitted unfavorable facts that he could not

139. *See* Petitioner's Motion to Grant Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(1), ECF No. 59.

140. *Martinez*, 566 U.S. at 14.

141. *See* Order at 25, ECF No. 51.

easily deny, and discussed how high on cocaine he supposedly was during the night of the murder.[142] This played into the theory of defense: while Saunders acknowledged he had done a terrible thing, he was not fully culpable for his actions.[143] To win under *Strickland*, Saunders would need to show that counsel rendered deficient performance in their preparation of him for this testimony and that he was thereby prejudiced such that the trial would have had a different outcome. Unfortunately for Saunders, the evidence against him was strong—indeed, the district court held that ACCA was not unreasonable in finding that trial counsel were not ineffective ***for conceding partial guilt*** because, "due to the overwhelming evidence of Saunders's guilt, Saunders would have suffered no prejudice as a result of trial counsel questioning."[144] As ACCA had explained:

> [T]he trial record clearly shows that Saunders made a detailed confession to police in which he gave a minute-by-minute account of the murder, that his confession was admitted into evidence over counsel's vigorous objections, and that the direct evidence connecting Saunders to the murder was overwhelming. Although it is true that counsel did concede that Saunders committed the act that resulted in Clemons's death, counsel did not concede that Saunders had any intent to kill. Counsel's entire defense was that Saunders was under the influence of crack cocaine at the time of the murder, that he was incapable of forming the specific intent to kill Clemons, and that he was guilty, at most, of manslaughter. In fact, enough evidence was presented on this defense to warrant a jury instruction on voluntary intoxication.
>
> More importantly, this Court on direct appeal found that trial counsel was not ineffective for conceding Saunders's guilt and for questioning Saunders in the manner that he did.[145]

142. Tab P-5 at R. 908–85, ECF No. 41-10.

143. *See* Tab P-7 at R. 1018–20, ECF No. 41-12.

144. Order at 27, ECF No. 51 (citing *Saunders*, 249 So. 3d at 1165).

145. *Saunders*, 249 So. 3d at 1165 (footnote omitted).

Saunders's *Martinez* claim was defective because he never alleged facts showing what his trial counsel should have done differently in preparing him to testify that would have resulted in an acquittal of capital murder. As the district court noted in denying the motion, "[I]t is not premature to expect Saunders to make some showing of merit to the claim he wishes to use to seek the extraordinary action of relief from the judgment."[146] The Eleventh Circuit agreed with the lower court:

> Neither Saunders's Rule 60(b)(1) motion, nor his application for a certificate of appealability, nor even his habeas petition make that showing [of "some merit"]. To be sure, he makes the conclusory allegation that his trial counsel failed to adequately prepare him, but he has never developed or supported that claim. He has thus failed to make a substantial showing that he was denied a constitutional right. *See Spencer*, 773 F.3d at 1137.[147]

Thus, the Eleventh Circuit correctly dismissed Saunders's appeal.

B. Rule 60(b)(6) motion

In his July 2020 Rule 60(b)(6) motion, Saunders alleged that Balch counsel were impermissibly conflicted because they defended ADOC in *Braggs*, a case in which he was a plaintiff class member, while concurrently representing him in state postconviction and habeas against the State and ADOC agents. Arguing that he was entitled to conflict-free counsel under 18 U.S.C. § 3599, Saunders moved the district court to reopen the judgment and allow the Federal Defenders to file a second amended habeas petition because of Balch counsel's allegedly divided loyalties.[148]

The district court deemed the motion untimely,[149] but it also held that

146. Order at 7, ECF No. 65.
147. Order at 4.
148. *See* Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60(b)(6), ECF No. 79.
149. Order at 9, ECF No. 84.

Saunders failed to demonstrate an actual conflict of interest. At the outset, Saunders signed a conflict waiver in August 2016 indicating that he knew Balch counsel were defending ADOC but still wanted them to represent him.[150] He also failed to plead facts showing that Balch counsel made choices that affected their performance in his litigation due to their representation of ADOC in *Braggs*—"that the conflict was actual as opposed to potential or hypothetical."[151] The Eleventh Circuit then recognized a fundamental problem with Saunders's application for COA: the error he alleged was not a constitutional violation.

> Saunders has argued on appeal that he suffered a violation only of a statutory right to conflict-free counsel. Indeed, his application for a certificate of appealability disclaims any argument that the denial of his Rule 60(b)(6) motion implicated his Sixth Amendment right to counsel. And although Saunders's application mentions due process, it does not explain how that right is implicated, or cite any authority in support of a due process violation. We thus cannot say that Saunders has made a substantial showing that he was denied due process. *See Spencer*, 773 F.3d at 1137.[152]

The Eleventh Circuit correctly dismissed this appeal as well.

***

Here, the circuit court reviewed its own work, realized it had issued COAs that failed to meet the statutory requirements of § 2253(c)(3), and asked the parties for their positions on how to proceed. The order calling for supplemental briefs indicated that the court was willing to issue new COAs if Saunders could only make the showing required under § 2253(c)(2).[153] He could not. Therefore, the court properly

150. *Id.* at 7, 9.
151. *Id.* at 9.
152. Order at 4.
153. Order, *Saunders v. Warden*, Nos. 20-12427-P & 21-10795-P (11th Cir. June 6, 2022).

exercised its discretion to vacate its defective COAs, and it also properly exercised that discretion to dismiss the appeal rather than proceed where Saunders could not carry his statutory burden of showing the denial of a constitutional right.

Were the Court inclined to revisit the procedure circuit courts must follow after *Gonzalez* and limit the courts' discretion, this case would be a poor vehicle for doing so. The defects here lie both with the circuit court and the applicant, and, as explained above, Saunders offers no authority for the proposition that courts of appeals *must* uphold defective COAs, which is the only ruling that could redress the injury he claims to have suffered.

CONCLUSION

The Court should deny certiorari.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General

/s/ Lauren A. Simpson
Lauren A. Simpson
Assistant Attorney General
*Counsel of Record

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Lauren.Simpson@AlabamaAG.gov