

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DAVID MILLER, JR.,  
*Petitioner,*

v.

RICKY DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.  
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### CAPITAL CASE

Petitioner, David Miller, Jr. (“Miller”) filed his initial 28 U.S.C. § 2254 petition for writ of habeas corpus with the district court nearly thirteen years after it was due under 28 U.S.C. § 2224(d) of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). Miller was represented by four different attorneys from the time the petition was due to the time it was filed and suffered and continues to suffer from severe mental illness. Miller asserted at the district court that he was entitled to the equitable tolling of his statute of limitations due to his severe mental illness that affected his ability to file, and also due to the abandonment and misconduct by each of his attorneys. The district court ordered the parties to address equitable tolling on a piecemeal basis beginning with the conduct of his first attorney, but denied attempts by both parties to expand the scope of the inquiry to include the conduct of additional attorneys and evidence of Miller’s mental status affecting his ability to file. Following a limited evidentiary hearing on the first attorney’s conduct, the petition was dismissed as untimely based upon the district court finding that Miller was not entitled to tolling during his first attorney’s representation and not entitled to tolling due to mental illness.

Miller sought a certificate of appealability from the Eleventh Circuit Court of Appeals on the ground that jurists of reason could debate whether the district court improperly denied Miller an opportunity to develop the factual record supporting his claim of equitable tolling due to his severe mental illness, and also on the ground that

jurists of reason could debate the district court's ruling that Miller was not entitled to equitable tolling during his first attorneys' representation. The Eleventh Circuit denied a certificate of appealability. The Eleventh Circuit assumed that Miller had established that jurists of reason could debate his entitlement to equitable tolling during his first attorney's representation, but denied the certificate on the alternative ground that Miller had not established his entitlement to tolling during subsequent periods of representation by the other three attorneys. Further, the Eleventh Circuit failed to address Miller's argument that jurists of reason could debate whether the district court's denied Miller an opportunity to develop a factual record regarding his entitlement to tolling based on his severe mental illness that affected his ability to timely file a petition.

In light of the foregoing proceedings, the questions presented are:

1. Did the Eleventh Circuit depart from the accepted and usual course of judicial proceedings and deny Miller his due process rights under the Fifth and Fourteenth Amendments when it denied a certificate of appealability on alternative procedural grounds not considered by the district court when the district court prevented Miller from developing a factual record regarding the alternative grounds?
2. Did the Eleventh Circuit depart from the accepted and usual course of judicial proceedings and deny Miller his due process rights under the Fifth and Fourteenth Amendments when it did not address Miller's claim in his request for a certificate of appealability that the district court erred when it refused to conduct an evidentiary hearing on Miller's allegations that he suffered from severe mental illness during the period his 28 U.S.C. § 2254 petition was due to be filed and that that mental illness prevented him from effectively communicating with counsel and from timely filing his petition?

## **ADDITIONAL RELATED PROCEEDINGS**

### **CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA**

#### **TRIAL AND POST-CONVICTION**

*STATE V. MILLER*, 1997-CF-006680 (FLA. 4<sup>TH</sup> CIR.)

Judgment Entered: July 24, 1998

#### **FLORIDA SUPREME COURT**

##### **DIRECT APPEAL**

*Miller v. State*, 770 So. 2d 1144 (Fla. 2000); SC60-93792

Judgment Entered: August 31, 2000

##### **POST-CONVICTION APPEAL**

*Miller v. State*, 926 So. 2d 1243 (Fla. 2006); SC05-472

Judgment Entered: March 23, 2006

##### **STATE HABEAS CORPUS**

*Miller v. Jones*, 237 So. 3d 921 (Fla. 2018); SC17-1211

Judgment Entered: January 31, 2018

### **UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA**

*David Miller, Jr. v. Secretary, Florida Department of Corrections*

Case No. 3:17-CV-00932

Judgment Entered: November 18, 2021

### **UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT**

*David Miller, Jr. v. Secretary, Florida Department of Corrections*

Case No. 22-10657

Judgment Entered: May 10, 2022, reconsideration denied August 9, 2022

## **LIST OF PARTIES**

Miller, David Miller, Jr., was the Petitioner in the district court and the appellant in the court of appeals. Respondents, Ricky Dixon, Secretary, Florida Department of Corrections, and Ashley Moody, Attorney General of the State of Florida were the respondents in the district court and the appellee in the court of appeals.

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## **PETITION FOR A WRIT OF CERTIORARI**

David Miller, Jr., respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for certificate of appealability and its denial of his motion for reconsideration.

### **OPINION AND ORDER BELOW**

The Eleventh Circuit's denial of Miller's application for certificate of appealability is provided in Appendix A-1. The Eleventh Circuit's denial of Mr. Miller's motion for reconsideration is provided in Appendix A-2. The district court order dismissing Mr. Miller's petition for writ of habeas corpus is provided in Appendix A-3.

### **STATEMENT OF JURISDICTION**

The judgment of the Eleventh Circuit was entered on May 10, 2022. A petition for rehearing was denied on August 9, 2022. On September 22, 2022, Justice Thomas granted Miller's application for extension of time to file this Petition until December 7, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

#### **United States Constitution**

##### **The Fifth Amendment to the United States Constitution States,**

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.

## **Section 1 of the Fourteenth Amendment to the United States**

### **Constitution States:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **STATUTES**

#### **United States Code**

##### **28 U.S.C. § 2244(d) states:**

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

## STATEMENT OF THE CASE

### Introduction

David Miller, Jr. is a severely mentally ill indigent death-sentenced individual incarcerated by the State of Florida. His 28 U.S.C. § 2254 petition for habeas corpus was filed nearly thirteen years after the one-year statute of limitations under 28 U.S.C. § 2244(d) had elapsed. Between January 22, 2001, when his conviction became final, and January 30, 2019, when his petition was finally filed, Miller was represented by at least three<sup>2</sup> different state appointed postconviction attorneys: Robert Norgard, Frank Tassone, and Christopher Anderson. Each of these three lawyers had an obligation to represent Miller in his federal habeas proceedings under state law<sup>3</sup>. None of them did. None of them even sought appointment in federal court.

At the same time Miller was being abandoned by his three successive court appointed attorneys, he was also suffering from severe mental illness and continues to. A board-certified psychologist who evaluated Miller in early 2002 opined that “Mr. Miller has poor ties with reality and difficulty developing accurate abstractions especially when emotional material is involved. He is unable to perceive the world as other people do, leading to multiple misunderstandings with others.... Mr. Miller is

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<sup>2</sup> A fourth postconviction lawyer, Heidi Brewer, withdrew from the case shortly after the initial postconviction motion was denied, but while an appeal was pending and while the federal habeas statute of limitations was tolled.

<sup>3</sup> See Section 27.711, Florida Statutes (“After appointment by the trial court under s. 27.710, the attorney must immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant throughout all postconviction capital collateral proceedings, including federal habeas proceedings...”).

someone who does not live in a reality based (sic) world but in one that is fantasy oriented.” Pet. App. A-5, A106-108. Each of the three lawyers who failed to file a federal habeas petition on Miller’s behalf were in possession of extensive records indicating Miller’s longstanding struggles with severe mental illness. None of these lawyers took any steps to assert Miller’s federal habeas rights.

Recognizing that Miller had been abandoned by his state counsel for more than a decade, the Capital Habeas Unit for the Federal Public Defender’s Office for the Northern District of Florida (“CHU-N”) sought appointment as Miller’s federal habeas counsel and were appointed on August 24, 2017, in order to “ascertain the status of Petitioner’s federal habeas rights and pursue federal remedies that may be available to Petitioner.” Pet. App. A-6, A241. However, due to their own misconduct, CHU-N waited until January 30, 2019, to actually file a petition. The petition alleged that Miller was entitled to tolling due to his mental illness and “serious deficiencies in the state postconviction representation. Both abandonment and attorney conduct qualify as a basis for equitable tolling.” Pet. App. A-8, A264. “This impediment was compounded by the egregious failures of Miller’s post-conviction counsel... counsel inexplicably failed to file a habeas petition or do any further work on Miller’s case after state post-conviction relief was denied by the Florida Supreme Court.” Pet. App. A-10, A411-412.

Recognizing that CHU-N’s own conduct in waiting nearly a year and a half after appointment to file a petition created a conflict of interests, the district court appointed the Capital Habeas Unit for the Middle District of Florida (“CHU-M”) as

substitute conflict-free counsel on April 16, 2021, with explicit orders to begin preparing separately to file a brief on tolling during CHU-N's representation, and for a limited evidentiary hearing on tolling during Norgard's representation. Pet. App. A-14, A645-646.

The district court ordered the parties to address the equitable tolling question in a piecemeal fashion, beginning with the conduct of the lawyer, Norgard, who represented Miller when his petition was due. Pet. App. A-14, A643-645. A limited evidentiary hearing to address Norgard's conduct was scheduled and held on October 21, 2021. The district court set a separate deadline of December 30, 2021 for Miller to brief CHU-N's conduct. Pet. App. A-16, A651. On November 18, 2021, the district court dismissed the petition, finding that Miller had not established that he was entitled to tolling during Norgard's representation. Pet. App. A-3, A079. The dismissal occurred before Miller's brief regarding CHU-N's conduct was due, and before Miller was given an opportunity to address tolling during Tassone and Anderson's representation.

The dismissal also occurred without Miller being given an opportunity to present expert evidence of his severe mental illness during the time his petition was due, and its effects on his ability to timely file a petition. In addition to extensive contemporaneous evidence of Miller's long standing mental health issues, Miller was prepared to present expert testimony that he has been diagnosed with Schizoaffective Disorder, Major Depressive Disorder, and Schizotypal Personality Disorder. Such expert testimony would have established that "[t]hroughout his trial and appeals



process, Mr. Miller has been by reason of mental infirmity, disease or defects unable to act reasonably with his defense...and was in a psychotic state that prevented him from making rational decisions with regard to his legal defense.” Pet. App. A-23, A880. Petitioner was never given the opportunity to present this evidence to the district court. The district court also denied a certificate of appealability. Pet. App. A-3, A086.

Miller moved the United States Court of Appeals for the Eleventh Circuit for a certificate of appealability (“COA”). Pet. App. A-24, A882. The application for a COA alleged that jurists of reason could debate whether Miller had established that he was entitled to tolling during Norgard’s representation and that jurists of reason could debate the district court’s denial of Miller’s request for an evidentiary hearing on tolling due to Miller’s severe mental illness where Miller had sufficiently alleged both that he suffered from severe mental illness and that there was a nexus between his mental illness and his failure to timely file a petition. Pet. App. A-24, A906-918. The Eleventh Circuit denied the COA. Pet. App. A-1, A003. The Eleventh Circuit’s denial did not address Miller’s claim that jurists of reason could debate the district court’s denial of an evidentiary hearing on tolling due to severe mental illness. With regards to tolling during Norgard’s representation, the Eleventh Circuit assumed for purposes of the COA that jurists of reason could debate the district court’s finding regarding tolling during Norgard’s representation. Pet. App. A-1, A006. However, the Eleventh Circuit denied the COA on the alternative ground, that was not addressed by the district court, that Miller had failed to establish his entitlement to

tolling during the subsequent period of representation. Pet. App. A-1, A005-007.

The Eleventh Circuit denying the COA on a ground that the district court prevented Petitioner from developing was a departure from the accepted and usual course of judicial proceedings and denied Miller his due process rights under the Fifth and Fourteenth Amendments. The facts of this case clearly established that the district specifically prohibited Miller from establishing his entitlement to tolling during subsequent periods of representation. It was manifestly unjust for the Eleventh Circuit to deny Miller's application for a COA based upon a lack of evidence that was created by the district court. The facts also clearly established that Miller sufficiently alleged that he suffered from severe mental illness during the time period his petition was due, that that mental illness prevented him from timely filing a petition, and that Miller should have been afforded an opportunity to develop a factual record of his mental illness during the relevant period.

### **Factual Background**

Miller was sentenced to death by the State of Florida on July 24, 1998. *Miller v. State*, 770 So. 2d 1144 (Fla. 2000). His conviction became final when his time for seeking certiorari from this Court expired on January 22, 2001. Pet. App. A-14, A640. Miller filed a state postconviction motion which tolled the statute of limitations under AEDPA for filing his initial § 2254 petition for writ of habeas corpus. Pet. App. A-14, A640. Tolling ended on April 13, 2006, when the Florida Supreme Court issued the mandate on the denial of his appeal of the denial of his initial state postconviction motion. Pet. App. A-14, A641. As calculated by the

district court, Miller's initial § 2254 petition was due to be filed by August 3, 2006. Pet. App. A-14, A641.

Beginning on September 30, 2003, Miller was represented by attorney Robert Norgard. Pet. App. A-22, A719. Norgard represented Miller until his withdrawal on August 27, 2013. Pet. App. A-22, A721. This period included the August 3, 2006, due date for Miller's initial § 2254 petition. Norgard never filed a § 2254 petition and never sought appointment as Miller's federal counsel. Upon Norgard's withdrawal, attorney Frank Tassone was appointed to represent Miller in state court on September 25, 2013. Pet. App. A-25, A956. Tassone never filed any pleadings on Miller's behalf in either state or federal court, besides a motion to withdraw. Pet. App. A-25, A956. Tassone's motion to withdraw was granted by the state postconviction court on December 9, 2014. Pet. App. A-25, A957. Following Tassone's withdrawal, attorney Christopher Anderson was appointed to represent Miller in state court. Pet. App. A-25, A957. Between December 9, 2014, and June 27, 2017, Anderson did not file any substantive pleadings on Miller's behalf. Pet. App. A-25, A957. Anderson never sought appointment in federal court.

On August 15, 2017, CHU-N sought appointment as Miller's federal counsel to "ascertain the status of Miller's federal habeas rights and pursue federal remedies that may be available to Miller." Pet. App. A-6, A241. CHU-N was appointed as federal counsel on August 24, 2017. Pet. App. A-7, A251. CHU-N ultimately filed an initial § 2254 petition on January 30, 2019, which asserted that Miller was entitled to equitable tolling of the AEDPA statute of limitations. Pet. App. A-8, A253. The

petition alleged that Miller was entitled to tolling due to his severe mental illness and “serious deficiencies in the state postconviction representation. Both abandonment and attorney conduct qualify as a basis for equitable tolling.” Pet. App. A-8, A264. “This impediment was compounded by the egregious failures of Miller’s post-conviction counsel. . . . counsel inexplicably failed to file a habeas petition or do any further work on Miller’s case after state post-conviction relief was denied by the Florida Supreme Court.” Pet. App. A-10, A411-412. Miller’s allegations and mental illness and attorney abandonment were not specific to one attorney, but rather applied equally to each of the postconviction attorneys that failed to advance his federal habeas rights.

Respondents immediately filed a motion on February 1, 2019, asserting that CHU-N should be substituted as counsel with CHU-M because CHU-N was laboring under a conflict of interest. Pet. App. A-9, A389. The basis of the alleged conflict of interests was that CHU-N would necessarily be required to assert Miller’s entitlement to equitable tolling during the period between CHU-N’s appointment of August 24, 2017, and the date the petition was filed on January 30, 2019. Respondents’ renewed motion to substitute counsel due to conflict was granted on April 16, 2021, and CHU-M was appointed as substitute federal habeas counsel due to CHU-N’s conflict of interests. Pet. App. A-14, A645. Respondents also alleged in their response to the petition that equitable tolling should be denied because Norgard intentionally missed the federal habeas deadline as part of an intentional scheme to keep Miller from appearing on a death warrant eligible list. Pet. App. A-

12, A506 (“Respondents believe that Miller’s original state post-conviction counsel, Mr. Robert Norgard, Esq., intentionally missed the federal habeas deadline in this case and others in order to avoid his clients’ inclusion on the list of defendants eligible for a death warrant”)<sup>4</sup>.

In reply to the Respondents’ Response Brief (Pet. App. A-12, A481), Miller again reiterated that its allegations of misconduct applied to each of Miller’s lawyers. Miller also indicated that his investigation of each lawyers’ individual conduct was ongoing and requested more time to complete its investigation and briefing on each attorneys’ conduct. Miller’s Reply stated:

Although Miller was represented by multiple attorneys over the following decade, no federal habeas petition was ever filed. Miller’s abysmal representation history (he is one of only three Florida capital inmates in this position) prompted current counsel’s appointment “to ascertain the status of Miller’s federal habeas rights” and “pursue federal remedies that might be available”).

Counsel appointed to a case in such posture needs time to research substantive claims and “explore[] the contents of prior counsel’s files [and] formulat[e] an explanation for [prior counsel’s] delay satisfactory to the district judge.” (internal citations omitted)

Pet. App. A-13, A582.

In the same order that appointed CHU-M as conflict-free substitute federal habeas counsel, the district court ordered that a limited evidentiary hearing would

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<sup>4</sup> It should be noted that the district court, after the limited evidentiary hearing, found that Respondents’ allegation that counsel intentionally missed the habeas deadline to keep Miller from becoming warrant eligible was “non-sensical” given that the Florida Parole Commission’s own rules mandated that a person that fails to timely file a federal habeas corpus petition must immediately be considered warrant eligible and begin the executive clemency process. Pet. App. A-3, A048 n. 10.

be scheduled to determine whether Miller was entitled to equitable tolling during Norgard's representation. Pet. App. A-14, A645-646. This was in response to Respondents' allegations of an intentional strategy employed by Norgard, not at the request of Miller. Pet. App. A-14, A643. ("Numerous questions are raised by Respondents' contention that Mr. Norgard intentionally missed the federal habeas deadline...Whether Miller is entitled to equitable tolling of the period when Miller was represented by Mr. Norgard is a primary issue in this case."). That same order instructed CHU-M to file a separate pleading addressing tolling during CHU-N's representation by June 11, 2021, a mere 56 days after CHU-M was appointed as substitute counsel. Pet. App. A-14, A645-646.

CHU-M filed on Miller's behalf a motion for extension of time to file its brief regarding CHU-N's conduct. Pet. App. A-16, A650. Miller advised the district court that while it was prioritizing records related to CHU-N in an effort to comply with the district court's order, gathering and reviewing records in a 24-year-old first-degree murder cases would take months, and it would be impossible to file a brief regarding CHU-N's conduct within 56 days. Pet. App. A-16, A951. In an order requesting a response to Miller's motion for extension, the district court stated:

In the Motion, Miller states that "CHU-M has chosen to prioritize obtaining, indexing, and reviewing CHU-N's file over those of Mr. Miller's earlier counsel." Motion at 5. As expressed in the Court's Order (Doc. 35), Miller should prioritize preparing for an evidentiary hearing concerning Mr. Robert Norgard's conduct and his representation of Miller.

Pet. App. A-15, A648-649. The district court expressly ordered Miller's new counsel to begin its equitable tolling analysis by focusing on Norgard's conduct.

Ultimately, Miller’s motion for extension was granted, and CHU-M was given until December 30, 2021, to file a memorandum addressing tolling during CHU-N’s representation. Pet. App. A-16, A651. A limited evidentiary hearing regarding tolling during Norgard’s representation was scheduled for October 21, 2021. Pet. App. A-19, A665. By setting separate deadlines, the district court acknowledged that the court intended to address the equitable tolling analysis in a piecemeal fashion beginning with Norgard.

Both parties attempted to expand the scope of the limited evidentiary hearing to include testimony regarding tolling during representation during subsequent attorneys’ representation and Miller moved to continue the hearing so that he could present evidence of Miller’s mental status during the relevant period. Pet. App. A-17, A-20, A653, A668. On July 26, 2021, Respondents moved the district court to expand the scope of the evidentiary hearing to include the testimony of Anderson, Tassone, and CHU-N. Pet. App. A-17, A657. The district court denied the motion stating, “As the Court stated in previous orders, the Court is going to schedule a **limited evidentiary hearing** addressing the conduct of attorney Norgard and the related conduct of Miller.” Pet. App. A-18, A662-663. The district court followed this up with an order setting the limited evidentiary hearing which stated, “At the hearing the Court will address the conduct of Mr. Robert Norgard, Esquire, and the related conduct of Miller.” Pet. App. A-19, A665. Next, on September 22, 2021, Miller filed a motion to continue the evidentiary hearing, arguing that “counsel for Miller believes it is prudent to advise the Court that it is highly unlikely, given the evidence

reviewed, that the issue of equitable tolling will turn on the existence of an intentional strategy, much less Miller's acquiescence to such... Additionally, Miller expects that the mental status evidence he intends to present is relevant to tolling not just during Mr. Norgard's representation, but also to the that of all subsequent attorneys...conducting the evidentiary hearing in the absence of mental status testimony will deprive the Court of the necessary context within which to analyze Mr. Norgard and Petitioner's conduct." Pet. App. A-20, A673-680. The district court denied the motion to continue, stating, "As previously stated, the Court is conducting a limited evidentiary hearing addressing the conduct of Mr. Norgard and the related conduct of Miller." Pet. App. A-21, A685.

A limited evidentiary hearing was conducted on October 21, 2021, at which Miller presented substantial evidence that he was abandoned by Norgard. This included evidence that Norgard only spoke with Miller on three occasions during his decade long representation of Miller. Pet. App. A-5, A144-146, A-22, A749. Once at the state court evidentiary hearing where he met Miller for the first time, then once by phone in 2011, five years after the AEDPA statute of limitations had run, and then once in person at the prison in 2012, six years after the statute of limitations had run and shortly before Norgard withdrew. Pet. App. A-5, A144-146, A-22, A749. It also included Norgard's billing records, which indicated that he did not bill for any work on Miller's case after the Florida Supreme Court denied the appeal of the denial of Miller's state postconviction motion. Pet. App. A-5, A187. This evidence clearly showed that no work was done by Norgard during the time that the statute of



limitations was running to file the habeas petition. Pet. App. A-5, A187. There was also evidence presented that Norgard had a history of failing to timely file federal habeas petitions. Pet. App. A-22, A801. Miller presented evidence that Norgard failed to file a timely federal habeas petition in each of the first three cases where he was responsible for timely filing a petition, and would not successfully file a timely federal habeas petition in any case until 2013, six years after Miller's petition was due. Pet. App. A-22, A801-804.

At the conclusion of the limited evidentiary hearing, Miller renewed his request that he be given an opportunity to present evidence of his severe mental health issues and its affect on his ability to file. Pet. App. A-22, A821-822 ("I think that we are also entitled to establish, through mental health experts, as I argued before the hearing, that Mr. Miller's mental health is an extraordinary circumstance and affects his diligence in filing the federal habeas petition. So our position would be that we need to be given the opportunity to present that testimony through the testimony of a mental health expert.").

On November 18, 2021, the district court dismissed the petition as untimely, finding that Miller was not abandoned by Norgard, and that he was not entitled to tolling due to mental illness. Pet. App. A-3, A020. The district court also denied a certificate of appealability. Pet. App. A-3, A086. Miller was not given an opportunity to address tolling during Tassone and Anderson's representation, and the petition was dismissed nearly six weeks before Miller's memorandum on tolling during CHU-N's representation was due to be filed. Thus, the district court denied

Miller the ability to present evidence supporting that he was entitled to tolling during CHU-N's representation and during the representation of Tassone and Anderson. Miller was also never given the chance, despite repeated requests, to present expert testimony regarding Miller's severe mental illness and its effects on Miller's ability to timely file a petition.

On March 16, 2022, Miller moved the United States Circuit Court of Appeals for the Eleventh Circuit for a certificate of appealability on the ground that jurists of reason could debate whether the district court's finding that Miller was not entitled to tolling during Norgard's representation, and on the ground that jurists of reason could debate whether the district court erred in prohibiting Miller from presenting testimony regarding his severe mental illness. Pet. App. A-24, A906, A918. The application for COA also argued that Miller's petition presented several claims of the denial of constitutional rights that jurists of reason could find debatable. Pet. App. A-24, A932-941.

On May 10, 2022, the Eleventh Circuit denied Miller's application for a certificate of appealability. Pet. App. A-1, A004-007. The Eleventh Circuit's order denying the COA assumed that Miller had presented evidence that jurists of reason could debate the district court's finding that Miller was not entitled to tolling during Norgard's representation. Pet. App. A-1, A006. However, the Eleventh Circuit found that "Miller does not offer any reason why he is entitled to equitable tolling for the period after the withdrawal of [Norgard] in 2013. During that period, Miller was represented by multiple attorneys, including [CHU-N], which was appointed on

August 24, 2017.” Pet. App. A-1, A006. The Eleventh Circuit did not address Miller’s contention that jurists of reason could debate the district court’s failure to grant an evidentiary hearing on the issue of tolling due to severe mental illness.

Miller filed a motion for reconsideration on May 31, 2022. Pet. App. A-25, A944. The motion for reconsideration pointed out that the Eleventh Circuit overlooked the fact that Miller’s memorandum on tolling during CHU-N’s representation, which was the specific focus of the Eleventh Circuit’s order denying the COA, was due after the district court dismissed the petition as untimely. The motion for reconsideration further pointed out that the district court directed the parties not to address equitable tolling during the periods Miller was represented by Tassone and Anderson, and repeatedly instructed the parties to only address Norgard’s conduct at the evidentiary hearing. Pet. App. A-25, A951-954.

The motion for reconsideration also argued that had Miller not been denied the opportunity by the district court to present evidence regarding tolling during subsequent representation, Miller would have presented evidence that Tassone was acting under an actual conflict of interest during his representation of Miller because he was the sole law partner with Miller’s trial lawyer during Miller’s trial. Pet. App. A-25, A956-957. The motion for reconsideration also pointed out that Miller would have presented evidence that he was abandoned by Anderson and that there was evidence to suggest that Anderson engaged in fraudulent billing in the state courts during his representation of Miller to cover up his own abandonment of Miller. Pet. App. A-25, A957-960. Miller also argued that he was abandoned by attorney Billy

Nolas of CHU-N, who was acting under the conflict of interests found by the district court. Pet. App. A-25, A960-963. Due to the district court specifically limiting the evidence Miller could present regarding tolling, and the district court's reliance on attorney Norgard's conduct in denying equitable tolling, this was the first opportunity Miller had to present evidence entitling him to tolling during Tassone, Anderson, and CHU-N's representations.

The motion for reconsideration was denied on August 9, 2022. Pet. App. A-2, A009. In a concurring opinion, Eleventh Circuit Judge Aldaberto Jordan acknowledged that it was improper for the Eleventh Circuit to deny tolling based on Miller's failure to present evidence regarding tolling during CHU-N's representation when the district court had set a briefing deadline on tolling during CHU-N's representation that was after the district court dismissed the petition. Pet. App. A-2, A012-018. However, neither the order denying the COA nor the order denying rehearing addressed Miller's claim that the district court specifically denied Miller the ability to develop a factual record on tolling during representation subsequent to attorney Norgard. The order denying the COA also failed to address Miller's claim that he was independently entitled to tolling due to his severe mental illness which prevented him from timely filing a petition, and that jurists of reason would debate the district court denying an evidentiary hearing on this issue.

## REASONS FOR GRANTING THE WRIT

### **I. DID THE ELEVENTH CIRCUIT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND DENY MILLER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT DENIED A CERTIFICATE OF APPEALABILITY ON ALTERNATIVE PROCEDURAL GROUNDS NOT CONSIDERED BY THE DISTRICT COURT WHEN THE DISTRICT COURT PREVENTED MILLER FROM DEVELOPING A FACTUAL RECORD REGARDING THE ALTERNATIVE GROUNDS?**

The United States Court of Appeals for the Eleventh Circuit departed from the accepted and usual course of judicial proceedings and denied Miller his due process rights under the Fifth and Fourteenth Amendments when it denied a certificate of appealability on alternative procedural grounds not considered by the district court when the district court prevented Miller from developing a factual record regarding the alternative grounds. Miller argued in his petition and memorandum of law that he was entitled to equitable tolling due to abandonment by his attorneys and due to his severe mental illness, which prevented him from timely filing his petition. The district court ordered the parties to address equitable tolling in a piecemeal fashion, beginning with the attorney, Robert Norgard, that represented Miller during the time his petition was due. The district court then denied that petition as untimely after only analyzing the conduct of Norgard, and its order dismissing the petition did not address Miller's entitlement to tolling during subsequent representation. In fact, the district court specifically limited Miller's ability to present evidence regarding tolling during subsequent representation. It was therefore a departure from the usual course of judicial proceeding for the Eleventh Circuit to deny a COA due to a lack of evidence entitling Miller to tolling during subsequent representation, when

the district court was directly responsible for the lack of evidence entitling Miller to tolling during subsequent representation.

The district court's mandate that the issue of equitable tolling be handled in a piecemeal fashion beginning with the lawyer that represented Miller when his petition was due, is clear from the record. First, Miller's allegations in his Petition and memorandum of law were not specific to any one lawyer. This evinces that it was the district court's choice, not Miller's, to first address the period of Norgard's representation. Miller's petition alleged that he was entitled to tolling due to his mental illness and "serious deficiencies in the state postconviction representation. Both abandonment and attorney conduct qualify as a basis for equitable tolling." Pet. App. A-8, A264. "This impediment was compounded by the egregious failures of Miller's post-conviction counsel. . . counsel inexplicably failed to file a habeas petition or do any further work on Miller's case after state post-conviction relief was denied by the Florida Supreme Court." Pet. App. A-10, A411. Norgard's name was never mentioned.

It is clear that Miller's allegations entitling him to equitable tolling were not specific to attorney Norgard, but rather applied to all of his state postconviction counsel. It was not until Respondents alleged in their Response Brief that Norgard intentionally missed the habeas deadline that the district court homed in on the conduct of Norgard. In response to the Respondents' allegations, the district court found, "[n]umerous questions are raised by **Respondents'** contention that Mr. Norgard intentionally missed the federal habeas deadline. . . Whether Miller is

entitled to equitable tolling of the period when Miller was represented by Mr. Norgard is a primary issue in this case.” Pet. App. A-14, A644 (emphasis added).

The fact that the district court ordered a limited evidentiary hearing on Norgard’s conduct only after Respondents raised as a defense that Norgard intentionally missed the deadline is important for several reasons. First, the same district court order that set the limited evidentiary hearing on Norgard’s conduct also discharged CHU-N due to a conflict of interests and set a separate deadline for substitute counsel to address tolling during CHU-N’s representation. Thus, the district court made it clear that it was addressing tolling by separate attorneys in a piecemeal fashion and that CHU-N’s own conduct was an issue that warranted further briefing.

Second, there would have been no logical reason to set an evidentiary hearing on Norgard’s conduct if the district court did not believe that Miller had sufficiently alleged entitlement to tolling against each of his attorneys to warrant fact finding. The district court would have dismissed the petition at that point due to a lack of evidence regarding Tassone, Anderson, and CHU-N if it believed Miller had only alleged entitlement to tolling during Norgard’s representation. Tassone represented Miller for over a year without filing a petition, Anderson represented Miller for almost five years without filing a petition, and CHU-N waited approximately 18 months to file a petition after appointment. Thus, Miller could not have possibly established entitlement to tolling by only establishing tolling during Norgard’s representation. The district court acknowledged this very fact in its order that set separate deadlines

for addressing Norgard and CHU-N's representations. By setting separate deadlines to address the conduct of Norgard and CHU-N, the district court acknowledged that Miller had made sufficient allegations against all of his attorneys to allow the equitable tolling analysis to proceed. But it was Respondents, not Miller, who asked the district court to begin by first focusing on Norgard's conduct.

Next, the district court thwarted efforts by both parties to expand the scope of the limited evidentiary hearing. First, Respondents moved the district court to expand the scope of the evidentiary hearing to include the testimony of Anderson, Tassone, and CHU-N. Pet. App. A-17, A653. The district court denied the motion stating, "As the Court stated in previous orders, the Court is going to schedule a **limited evidentiary hearing** addressing the conduct of attorney Norgard and the related conduct of Petitioner." Pet. App. A-18, A662. The district court followed this up with an order setting the limited evidentiary hearing which stated, "At the hearing the Court will address the conduct of Mr. Robert Norgard, Esquire, and the related conduct of Petitioner." Pet. App. A-19, A665. Miller then asked to continue the hearing, advising the Court that a review of the evidence indicated that equitable tolling would not turn solely on Norgard's conduct and would require information regarding Miller's severe mental illness and the conduct of his other attorneys. The district court denied the motion to continue, stating, "As previously stated, the Court is conducting a limited evidentiary hearing addressing the conduct of Mr. Norgard and the related conduct of Petitioner." Pet. App. A-21, A685.

Finally, the district court's order dismissing the petition as untimely made no



mention of tolling during periods of representations by Tassone, Anderson, and CHU-N. Instead, it relied entirely on the district court's finding that Miller was not entitled to tolling during Norgard's representation. "Miller has failed to show Mr. Norgard engaged in any serious attorney misconduct qualifying as an extraordinary circumstance." Pet. App. A-3, A079. The district court entered this order dismissing the petition knowing that Miller's deadline to address tolling during CHU-N's representation had not yet passed. The only logical explanation is that the district court believed there was no need to allow factual development on the conduct of Tassone, Anderson, and CHU-N because it had found that Miller was not entitled to tolling during Norgard's representation, which accounted for far more than the one-year AEDPA statute of limitations.

In sum, it is abundantly clear from the record that the district court chose to address equitable tolling in a piecemeal fashion, and actively prevented Miller from developing a factual basis entitling him to tolling during Tassone, Anderson, and CHU-N's representations, going so far as to dismiss the petition before Miller's memorandum on tolling due to CHU-N's conduct was even due. Because the district court relied only upon evidence of tolling during Norgard's representation, and specifically ordered the parties to limit evidence and briefing to Norgard's conduct, the only proper question before the Eleventh Circuit on application for a COA was whether jurists of reason could debate the district court's ruling pertaining to Norgard's representation. The Eleventh Circuit assumed for purposes of the application for COA that jurists of reason could debate this procedural ruling. This

presumption was warranted given the evidence presented at the evidentiary hearing. Norgard never sought appointment in federal court and never filed a federal habeas corpus petition in the decade he represented Miller. Norgard had a documented track record of failing to timely file federal habeas petitions, had never timely filed a habeas petition, and had failed to timely file a federal habeas petition in each of the first three cases he was responsible for doing so. FDOC records indicated that Norgard only spoke to Miller on two occasions in ten years of representation, none of which were after the mandate was issued by the Florida Supreme Court that restarted the federal habeas clock. Evidence of Norgard's billing records showed that he had no communication with Miller and did not work on Miller's case after the Florida Supreme Court had denied the appeal of his state postconviction motion. This should have ended the district court's analysis, and a COA should have been issued.

The Eleventh Circuit's order denying the COA relied upon the notion that "[W]e can deny a certificate of appealability on any ground supported by the record." Order at 3 (citing *Szuchon v. Lehman*, 273 F. 3d 299, 318 (3d Cir. 2001)). But that is not what the Eleventh Circuit did. The Eleventh Circuit did not rely on grounds supported by the record, but rather it focused upon the lack of a record regarding Tassone, Anderson, and CHU-N, a situation that was created by the district court's denial of Miller an opportunity to develop and present a comprehensive factual record. Essentially, the district court prevented Miller from creating a record, and

the Eleventh Circuit then relied on that judicially created lack of a record to deny the COA.

Although appellate courts have discretion to affirm on any ground adequately supported by the record, the exercise of that discretion is guided by three considerations: (1) was the alternate ground “fully briefed and argued here and below”; (2) did the parties have “a fair opportunity to develop the factual record”; and (3) “whether, in light of factual findings to which we defer or uncontested facts, our decision would involve only questions of law.” *Elkins v. Comfort*, 392 F. 3d 1159, 1162 (10th Cir. 2004); *United States v. Brown*, 640 F. App’x 752, 755 (10th Cir. 2016). The Eleventh Circuit did not conduct such an analysis. Had the Eleventh Circuit made the proper inquiry, it would have been clear that it was improper to rely upon the fact that Miller had not sufficiently alleged entitlement to tolling during Tassone, Anderson, and CHU-N’s representations.

First, it is clear that the alternate ground was not “fully briefed and argued [at the Eleventh Circuit] and below.” *Elkins*, 392 F.3d at 1162. There was no briefing on the issue at the Eleventh Circuit, and given the district court’s insistence on focusing solely on Norgard, Miller had no reason to believe the conduct of Tassone, Anderson, and CHU-N would be implicated until the Eleventh Circuit issued its order denying the COA. The issue was also not briefed and argued below. The district court specifically limited its analysis in its order dismissing the petition to Norgard’s conduct, and limited Miller’s presentation of evidence to Norgard’s conduct.

Second, the parties did not have “a fair opportunity to develop the factual record.” *Id.* Both parties were denied requests to expand the scope of the limited evidentiary hearing, and Miller’s briefing on tolling during CHU-N’s representation was due after the petition was dismissed. Finally, the Eleventh Circuit’s decision clearly did not “involve only questions of law.” *Id.* Whether Miller was entitled to tolling during Tassone, Anderson, and CHU-N’s representations was a question of fact.

The district court clearly ordered that the equitable tolling analysis would be handled in a piecemeal fashion beginning with the attorney that represented Miller when his petition was due, Norgard. Miller made allegations that each of his attorneys engaged in misconduct and abandoned him. His allegations were not limited to Norgard. If the district court believed that these allegations were insufficient to warrant factual development, then it would have dismissed the petition at that stage. Instead, the district court ordered an evidentiary hearing on Norgard’s conduct, and set a separate deadline for addressing CHU-N’s conduct. It then denied attempts to expand the scope of the inquiry, clearly evincing its intent to handle each attorneys conduct one at a time. The district court then dismissed the petition before allowing Miller to present evidence regarding Tassone, Anderson, and CHU-N’s conduct, and relied only upon Norgard’s conduct in dismissing the petition.

This Court has recognized,

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign

to courts the role of neutral arbiter of matters the parties present.

*Greenlaw v. United States*, 554 U.S. 237, 243, (2008). Miller framed the issues that he wanted to present: that he was entitled to equitable tolling due to his severe mental illness and due to abandonment by his several attorneys. He asked to present evidence of his severe mental illness, he asked to present evidence entitling him to tolling during representation subsequent to Norgard. But the district court denied Miller the opportunity to frame the issues for decision and substituted its own judgment. Instead of addressing tolling due to severe mental illness and tolling during each attorney's representation, Miller would be limited to only presenting evidence regarding Norgard's representation.

Because the district court limited Miller's ability to present evidence regarding tolling during Tassone, Anderson, and CHU-N representations, the Eleventh Circuit relying on the lack of a record on these matters to deny a COA was a departure from the accepted and usual course of judicial proceedings. In *United States v. Nixon*, 418 U.S. 683, 709 (1974), this Court recognized,

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

In the present case, the only issue that was subjected to adversarial testing was whether Miller was entitled to equitable tolling during the period of Norgard's

representation. It was the district court, not the parties, that chose to limit the adversarial testing in such a fashion.

As such, where Miller sought to expand the adversarial testing to include whether he was entitled to equitable tolling during subsequent representation, but was denied the opportunity by the district court, the appellate court must be limited to deciding the issues on the facts that were subjected to our adversarial system. Relying instead, like the Eleventh Circuit did in this case, on alternative grounds whose factual basis was not subjected to adversarial testing below, takes this case outside of the adversarial system which is the foundation of our criminal justice system. By so removing Miller's case from our adversarial system of justice, the Eleventh Circuit departed from the accepted and usual course of judicial proceedings. This Court must reverse the order of the Eleventh Circuit denying a COA, and remand with instructions to limit the COA analysis to only those facts for which Miller was allowed to create a factual record. Because the district court only allowed Miller to present evidence regarding tolling during Norgard's representation, the Eleventh Circuit must be limited to deciding whether jurists of reason could debate the district court dismissing the Petition on these grounds. Allowing the Eleventh Circuit to deny a COA on grounds that the district court specifically limited Miller from establishing is a departure from the accepted and usual course of judicial proceeding and denied Miller his due process rights under the Fifth and Fourteenth Amendments.

**II. DID THE ELEVENTH CIRCUIT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND DENY MILLER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT DID NOT ADDRESS MILLER'S CLAIM IN HIS REQUEST FOR A CERTIFICATE OF APPEALABILITY THAT THE DISTRICT COURT ERRED WHEN IT REFUSED TO CONDUCT AN EVIDENTIARY HEARING ON MILLER'S ALLEGATIONS THAT HE SUFFERED FROM SEVERE MENTAL ILLNESS DURING THE PERIOD HIS § 2254 PETITION WAS DUE TO BE FILED AND THAT THAT MENTAL ILLNESS PREVENTED HIM FROM EFFECTIVELY COMMUNICATING WITH COUNSEL AND FROM TIMELY FILING HIS PETITION?**

The United State Court of Appeals for the Eleventh Circuit departed from the accepted and usual course of judicial proceedings and denied Miller his due process rights under the Fifth and Fourteenth Amendments when it did not address Miller's claim in his request for a certificate of appealability that the district court erred when it refused to conduct an evidentiary hearing on Miller's assertions that he suffered from severe mental illness during the period his § 2254 petition was due to be filed and that that mental illness prevented him from effectively communicating with counsel and from timely filing his petition.

Despite repeatedly stating that the limited evidentiary hearing with respect to the period that Norgard represented Miller was to address both the "conduct of Mr. Robert Norgard , Esquire, and the related conduct of Petitioner," the district court denied Miller's motion to continue that sought to allow time for Miller to present expert evidence of his severe mental illnesses that existed throughout the time that Norgard represented him to the present. By the district court's own order, it wanted to address the "related conduct" of Miller and yet it denied Miller the only vehicle available to him to present cohesive evidence of his "related conduct" – an evidentiary hearing with mental health experts. Pet. App. A-3, A039-046. Despite its own

order denying Miller an evidentiary hearing to present mental health evidence, the district court blamed Miller for not providing “the Court with any evidence that Petitioner was, at the time of the state post-conviction evidentiary hearing or during the time Mr. Norgard represented Petitioner, incompetent, insane, or suffering from a major mental illness.” Pet. App. A-3, A58. The district court criticized Miller for not taking the stand to dispute Norgard’s personal, self-serving opinion that Miller was competent. Pet. App. A-3, A059. The district court observed Miller’s courtroom demeanor, stating: “He appeared to be lucid, engaged, and oriented.” Doc. 72 at 40. As a result of the fact that the district court did not grant Miller an evidentiary hearing to develop evidence of his mental health status during Norgard’s representation and as a result of the fact that Miller, a man who was described by one expert as a person with “poor ties with reality”, “unable to perceive the world as other people do”, and “who does not live in a reality based world”, did not testify, the district court found that Norgard’s testimony was “unrebutted.” Pet. App. A-3, A060. Only mental health experts would have been qualified to “rebut” Norgard’s testimony but the district court denied Miller the opportunity to present that qualified rebuttal by way of an evidentiary hearing.

“[M]ental illness can constitute an extraordinary circumstance, which may prevent a habeas petitioner from understanding and acting upon his legal rights and thereby equitably toll the AEDPA limitations period.” *Riva v. Ficco*, 615 F. 3d 35, 40 (1st Cir. 2010); *see, Bolarinwa v. Williams*, 593 F. 3d 226, 231 (2d Cir. 2010); *see Hunter v. Ferrell*, 587 F. 3d 1304, 1308 (11th Cir. 2009)(per curiam); *see Laws v.*



*Lamarque*, 351 F. 3d 919, 923 (9th Cir. 2003). To be successful, a habeas petitioner must show “some causal link between a petitioner’s mental illness and his ability seasonably to file for habeas relief.” *Riva*, 615 at 40. “[M]ental illness is fluid and an inmate’s mental health status may deteriorate at any time.” *Thomas v. Bryant*, 614 F.3d 1288, 1311 (11th Cir. 2010).

In order to demonstrate that a petitioner’s mental illness is an extraordinary circumstance and to show the requisite causal link, the courts in *Riva*, *Bolarinwa*, *Hunter*, and *Laws* remanded the cases back to the district courts for further development of the record to determine if mental illness so severely impacted a petitioner’s ability to pursue legal relief as to justify equitable tolling of the AEDPA limitations period. Similarly in *Ata v. Scutt*, 662 F. 3d 736 (6<sup>th</sup> Cir. 2011), the Sixth Circuit Court of Appeals reversed and remanded the district court’s dismissal of the petitioner’s habeas petition for an evidentiary hearing on equitable tolling due to mental illness based upon allegations that he “had been hospitalized on numerous occasions for paranoid schizophrenia,” and “has been and continues to be medicated by the Michigan Department of Corrections [] for paranoid schizophrenia and other psychoses.”

In his petition, Miller made the following assertions:

One indication that equitable tolling is warranted stems from the fact that Miller has significant mental health issues which impact his ability to communicate with counsel. Miller has been diagnosed with a number of disorders throughout his life, including a mixed personality disorder with features of schizoid personality, schizophrenia, and brain damage. A recent mental health examination confirms that Miller has paranoid schizophrenia, with a history of pervasive hallucinations and delusions dating back to at least the early 1980’s. As is typical in

schizophrenia and schizotypal disorders, Miller suffers from a language disorder. He, like many individuals with schizophrenia, often does not communicate well.

Pet. App. A-8, A263-265. These allegations were far more specific and concrete than those that the Sixth Circuit found warranted holding an evidentiary hearing in *Ata*.

The district court should have held an evidentiary hearing based on Miller's assertions from his petition of severe mental illness causing his inability to file. The necessary further development of the record to demonstrate the causal link between his mental illnesses and his inability to pursue habeas relief so as to justify equitable tolling went to the heart of why Miller asked the district court to allow him to present comprehensive and educational mental health expert testimony.

While Miller had an extensive history of hospitalizations and mental health evaluations prior to the appointment of Norgard as his attorney, what Miller additionally sought to present to the district court by way of an evidentiary hearing was evidence of the status of Miller's mental health from the time of Norgard's appointment through the present. This was essential because Norgard never had Miller evaluated by a mental health professional, and all of the existing mental health documentation, while extensive, could not have possibly addressed Miller's mental status during the relevant period when his petition was due. The mental health evaluation done closest to the relevant period, shortly before Norgard was appointed, found that "Mr. Miller has poor ties with reality and difficulty developing accurate abstractions especially when emotional material is involved. He is unable to perceive the world as other people do, leading to multiple misunderstandings with others....

Mr. Miller is someone who does not live in a reality based (sic) world but in one that is fantasy oriented.” This, combined with the assertions that severe mental illness affecting his ability to file from the petition, memo of law, and reply, were more than sufficient to justify holding an evidentiary hearing.

Miller repeatedly asked the district court to allow him to prevent evidence of his severe mental illness through expert testimony and the district court repeatedly denied these requests only to later complain that Miller had not provided “the Court with any evidence that Petitioner was, at the time of the state post-conviction evidentiary hearing or during the time Mr. Norgard represented Petitioner, incompetent, insane, or suffering from a major mental illness.” Pet. App. A-3, A058. Miller tried to present this exact evidence but the court prevented it and then penalized Miller for not having been able to provide it to the court. The district court’s rulings are clearly irreconcilable.

To address the district court’s grievance that Miller had not presented contemporaneous mental health evidence and to demonstrate the court’s error in not granting an evidentiary hearing, Miller filed a Motion to Alter or Amend Judgment. Pet. App. A-23, A829. Attached to that Motion was a December 16, 2021, psychological evaluation of Miller by licensed psychologist Dr. Eddy Regnier. Pet. App. A-23, A857-881. Dr. Regnier’s evaluation diagnosed Miller with Schizoaffective Disorder, bipolar type, a condition recognized as a Serious Mental Illness (“SMI”). Pet. App. A-23, A877-878.

A diagnosis of Schizoaffective disorder requires the finding that the patient

suffers from:

A. An uninterrupted period of illness during which there is a major mood episode (major depressive or manic) concurrent with Criterion A of schizophrenia.

a. Criterion A of schizophrenia requires

i. Two of more of the following, each present for a significant portion of time during a 1-month period. At least one of these must be (1), (2), or (3):

1. Delusions

2. Hallucinations

3. Disorganized speech (e.g. frequent derailment or incoherence)

4. Grossly disorganized or catatonic behavior

5. Negative symptoms (i.e. diminished emotional expression or avolition).

ii. Delusions or hallucinations for two or more weeks in the absence of a major mood episode (depressive or manic) during the lifetime duration of the illness.

iii. Symptoms that meet criteria for a major mood episode are present for the majority of the total duration of the active and residual portions of the illness.

iv. The disturbance is not attributable to the effects of a substance (e.g., a drug abuse or medication) or another medical condition.

As Dr. Regnier pointed out, schizoaffective disorder is defined by many of the same features as schizophrenia, including hallucinations, delusions, impairments to occupational and social functioning, and anosognosia (poor insight). Pet. App. A-23, A877-878. The main distinction is schizoaffective involves the concurrent diagnosis of a major mood episode, in Miller's case, major depression. Pet. App. A-23, A877. Importantly, one of the psychotic episodes that formed the basis of Dr. Regnier's schizoaffective disorder diagnosis occurred "[i]n the early to mid-2000s." Pet. App. A-23, A864. This is significant because it indicates a progressive

worsening of Miller's condition over the years and occurred during the period when Miller's petition was due to be filed.

And, yet, despite the offer of proof of Dr. Regnier's report, the district court did not grant Miller a full and fair evidentiary hearing to develop and present his mental health status. In finding that Miller did not show that his mental illness prevented him from filing a habeas petition, the district court again referenced Norgard's personal opinion, the court's general observation that Miller was not disruptive, and an old report from a trial expert who evaluated Miller nine years before his petition was due to be filed. Pet. App. A-4, A095; A-24, A913-914.

One of the questions before the Eleventh Circuit on application for a COA was whether jurists of reason could debate the district court's denial of Miller's request for an evidentiary hearing on tolling due to Miller's severe mental illness where Miller had sufficiently alleged both that he suffered from a severe mental illness and that there was a nexus between his mental illness and his failure to timely file a petition. Pet. App. A-24, A906. The Eleventh Circuit's denial of the COA on other grounds did not address Miller's claims that jurists of reason would debate the district court's denial of an evidentiary hearing on tolling due to severe mental illness.

United States Supreme Court Rule, Rule 10, **Considerations Governing Review on Certiorari** provides, in part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

In this issue, Miller asserts that the Eleventh Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the lower court. By failing to address Miller's claim in his COA that he was entitled to an evidentiary hearing at the district court to develop evidence that his mental illnesses entitled him to equitable tolling, the Eleventh Circuit departed from the usual course of judicial proceeding. Additionally, by failing to address the issue, the Eleventh Circuit essentially sanctioned the district court's departure from the usual course of judicial proceeding where that court denied Miller's request for an evidentiary hearing and used that denial to assert that Miller did not present any evidence as to his mental status and so ruled against him on the issue.

As a result of the lower federal courts' departure from the accepted and usual course of judicial proceedings, this "Court has supervisory authority over the federal courts, and ... may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). This Court has the "authority to control the administration of justice in the federal courts." *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008). Miller asks that this Court exercise its supervisory power and remand the matter back to the Eleventh

Circuit Court of Appeals with instructions for the Eleventh Circuit to remand the matter back to the district court to conduct an evidentiary hearing for further development of the record to determine if mental illness so severely impacted a Miller's ability to pursue legal relief as to justify equitable tolling of the AEDPA limitations period.

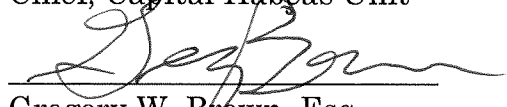
### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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