No.

IN THE

Supreme Court of the United States

VIOLET LOVE RAY,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS;
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A state prisoner can appeal from the denial of a federal petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 only if she first obtains a certificate of appealability under 28 U.S.C. § 2253(c). Section 2253(c)(2), designed to screen out frivolous appeals, provides: "A certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a constitutional right." Two courts of appeals have determined that a state judge's view that post-conviction relief is warranted due to the denial of a constitutional right is ordinarily proof of "a substantial showing of the denial of a constitutional right." The decision below, however, denies Petitioner a certificate of appealability even though a state appellate judge determined she had established a right to relief on the merits of her constitutional ineffective-assistance-of-counsel claim.

The question presented is:

Whether a certificate of appealability should issue under 28 U.S.C. § 2253(c) where one or more judges in the state-court habeas proceedings has determined the petitioner proved the denial of a constitutional right entitling her to post-conviction relief.

RELATED PROCEEDINGS

Violet Love Ray v. Secretary, Florida Department of Corrections, et al., No. 23-13453 (11th Cir., order entered Sept. 12, 2024)

Violet Love Ray v. Secretary, Department of Corrections, et al., No. 5:20-cv-00263-JLB-PRL (M.D. Fla., judgment entered Sept. 21, 2023)

Violet Love Ray v. State of Florida, No. 5D18-1277 (Fla. Dist. Ct. App., order entered Aug. 19, 2019)

Violet Love Ray v. State of Florida, No. 5D12-3745 (Fla. Dist. Ct. App., order entered Jan. 21, 2014)

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INTRODUCTION

This case addresses a uniquely meritorious set of federal habeas claims: those at least one state judge has already found to warrant setting aside the petitioner's conviction on the merits. A state judge's reasoned decision that post-conviction relief is warranted on the merits should ordinarily suffice to establish that a habeas petitioner made the threshold "substantial showing of the denial of a constitutional right" that issuance of a certificate of appealability (COA) requires. 28 U.S.C. § 2253(c)(2). And yet the courts of appeals are divided on whether a COA may be denied in this circumstance.

The purpose of a COA is to screen out frivolous claims while allowing those with arguable merit to proceed to federal appellate review. Hewing to this standard, the Fifth and Seventh Circuits have held that when a state-court judge would have granted post-conviction relief on the merits of a petitioner's constitutional claim, the petitioner has by definition made "a substantial showing of the denial of a constitutional right" in subsequent habeas proceeding absent extraordinary circumstances. 28 U.S.C. § 2253(c)(2). In the decision below, however, the Eleventh Circuit summarily denied a COA despite a reasoned dissent from a state appellate judge concluding that Petitioner Violet Love Ray's counsel was constitutionally ineffective. The Eleventh Circuit not only created a split of authority, but contravened the plain statutory language of § 2253(c)(2). This discrete universe of claims—those that at least one state judge has found to be meritorious—are precisely the type of

substantial claims Congress intended to survive the COA screening process.

This case illustrates the real-world stakes of this consequential split. Ms. Ray is living a parent's worst nightmare, serving a life sentence after being wrongly convicted of murdering her own two-year-old daughter. Her conviction was predicated largely on the State's since-discredited medical testimony at trial that her daughter was struck on the head 13 separate times during a single incident. The academic literature reveals that cases like Ms. Ray's—alleged crimes against children based on medical evidence of head trauma—are highly vulnerable to wrongful conviction based on faulty forensics. But Ms. Ray's trial counsel failed to adequately challenge the State's medical evidence, either through cross-examination or competing expert testimony. Worse, trial counsel put forward confusing defense-expert testimony that affirmatively *undermined* the only defense trial counsel did offer (that the decedent's head injuries were attributable to an accidental fall).

Ms. Ray sought post-conviction relief based on those failings. During these post-conviction proceedings, Ms. Ray amassed evidence thoroughly discrediting the prosecution's medical evidence and established that trial counsel had neglected to investigate or introduce highly plausible, innocuous explanations for the death of her daughter. Even the State's medical expert, in the post-conviction proceedings, could not defend her trial testimony that Ms. Ray's daughter was struck on the head 13 separate times in a single incident. Nevertheless, the post-conviction state court denied relief in the first instance

and the state appellate court affirmed 2-1. The dissenting judge concluded that Ms. Ray should have prevailed on the merits of her constitutional claim, given the extent to which her trial counsel's patent deficiencies undermined confidence in the outcome of the trial.

In the Fifth and Seventh Circuits, Ms. Ray would have been entitled to a COA. But notwithstanding the reasoned difference of opinion among state-court judges regarding the merits of Ms. Ray's claims, the Eleventh Circuit declined to issue a COA after Ms. Ray unsuccessfully sought habeas relief in the federal district court. This Court should grant cert to resolve the circuit split, correct the clear error of law in the Eleventh Circuit's decision, and prevent the ongoing injustice of Ms. Ray's wrongful conviction.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's September 12, 2024 order denying Ms. Ray's application for a certificate of appealability is unpublished and reproduced at Pet. App. 1a-2a. The Eleventh Circuit's November 21, 2024 denial of Ms. Ray's motion for reconsideration is unpublished and reproduced at Pet. App. 125a-126a. The federal district court's September 20, 2023 order denying Ms. Ray's petition for writ of habeas corpus and declining to issue a certificate of appealability is unpublished and reproduced at Pet. App. 3a-61a.

The Florida state court opinion affirming Ms. Ray's conviction on direct appeal is reported at 149 So. 3d 36 and reproduced at Pet. App. 123a-124a. The state court order denying Ms. Ray's amended motion

for post-conviction relief under Florida Rule of Criminal Procedure 3.850, following an evidentiary hearing, is unpublished and reproduced at Pet. App. 73a-122a. The Florida Court of Appeal's August 9, 2019 divided opinion affirming the denial of Ms. Ray's motion for post-conviction relief is published at 325 So. 3d 911 and reproduced at Pet. App. 63a-72a. The Florida Supreme Court's order declining to accept jurisdiction over Ms. Ray's appeal is unpublished and reproduced at Pet. App. 62a.

JURISDICTION

The district court had jurisdiction over this matter under 28 U.S.C. § 2254(a). The Eleventh Circuit issued its order denying a certificate of appealability under 28 U.S.C. § 2253(c) on September 12, 2024 and denied reconsideration on November 21, 2024. On February 7, 2025, this Court extended the time to petition for a writ of certiorari to March 21, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 provides, in relevant part:

> (a) In a habeas corpus proceeding … before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> ….

(c)

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from … (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> …
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Violet Love Ray loses her youngest daughter, F.R., after a fatal fall.

This petition arises from the tragic death of Violet Love Ray's daughter, F.R., at the age of just two years old.

Ms. Ray and her husband, Joe Ray, adopted F.R. after receiving a call from the Florida Department of Childhood and Families ("DCF") asking them to take in a special-needs child. TT.454:15-18.[1] DCF knew the Rays because at time of the call, they had already taken in and adopted four other special-needs

[1] The trial transcript ("TT") of the underlying proceedings leading to the conviction Ms. Ray challenges here is reproduced as Ex. 1-C to Ms. Ray's motion for a COA in the Eleventh Circuit.

children. TT.454:8-455:5, 560:10-20. After several miscarriages, it had become apparent Ms. Ray could not have children of her own. TT.716:16-18. But Ms. Ray loved children. TT.505:20-21. She had grown up carrying for her younger siblings, including a special-needs younger sister named Dawn. TT.506:16-25. And both she and Joe wanted a large family, as each had themselves grown up in large families. TT.454:12-13. So when the call from DCF came, the Rays agreed to welcome F.R. and her prematurely born baby brother into their family. TT.716:17-22.

The Rays did their best to create an environment where their children could thrive. They had a mural painted on the hallway: On one side, trees with the names of the children. On the other, kites. TT.498:5-11. The six children—the oldest five years old—often played together in the house and large backyard filled with toys: a sandbox, swingset, pirate swords. TT.455:3-5, 497:14-498:4, 560:17-20.

In the days leading up to F.R.'s death, rowdy play caused F.R. several injuries—hardly uncommon for active toddlers with disabilities even under the closest supervision. F.R. walked in front of the swingset just as her brother was mid-swing; he crashed into her lower back, causing bruising on her back and side. TT.566:22-567:1. F.R. scraped her forehead tripping on the porch. TT.567:2-5. And critically, on December 4, 2008, F.R. slipped in the bath and fell directly on a pile of toys. TT.706:9-21, 717:11-23.

The next day, December 5, both Ms. Ray and her husband noticed F.R. exhibiting unusually irritable behavior—aggressively pushing her baby brother and

pulling her sister's hair. TT.563:16-21, 718:10-16. In the evening, Ms. Ray gave F.R. a bath after Joe went off to work. TT.565:22-566:14. F.R. stepped out of the tub, and immediately took off running into the kitchen, still undressed and dripping wet. TT.710:14-22. Ms. Ray quickly followed, stopping by the bedroom to pick up F.R.'s pajamas. TT.710:23-24. But when Ms. Ray emerged, she found F.R. unresponsive on the kitchen tile. TT.710:24-711:1.

Ms. Ray immediately telephoned her parents, who lived nearby, and collected F.R. in her arms. TT.515:20-518:15, 710:23-711:5, 712:2-4. By the time they arrived, F.R. was again awake and conscious, but seemed drowsy and kept opening and closing her eyes. TT.482:6-483:10, 500:5-6, 520:15-521:8. While Ms. Ray and her parents tended to F.R., someone—Ms. Ray suspected it was one of the children, possibly her five-year-old son Christian—called 911 and a police officer responded to the call. TT.711:19-24. The officer found nothing amiss at the house and left. TT.501:2-18, 543:13-16. Ms. Ray, her parents, and Joe took turns holding and monitoring F.R. through the night. TT.490:11-491:22.

Around 4:30 a.m., Ms. Ray noticed F.R. having trouble breathing and called 911. TT.491:23-492:9. F.R. was rushed to the hospital. The doctors saw signs of a respiratory infection or pneumonia, hemorrhaging in the brain, and diagnosed F.R. with hypoxic ischemic encephalopathy (a brain injury caused by oxygen deprivation). TT.619:24-622:12, 612:18-613:13, 661:9-662:24, 658:16-659:1, 687:18-688:8. F.R. was officially pronounced brain dead on December 7, 2008, the next morning. TT.670:22-25.

The State charges Ms. Ray with murder and an error-riddled defense results in conviction.

Despite a lack of any direct evidence suggesting Ms. Ray had ever harmed F.R., the State charged Ms. Ray with first-degree felony murder, aggravated child abuse, and child neglect. Pet. App. 4a. The State's theory rested almost entirely on the testimony of Dr. Lavezzi, its expert, as well as the medical examiner who performed F.R.'s autopsy.

Dr. Lavezzi had first heard of F.R. after learning that a suspected victim of child abuse had been taken to the hospital and was unlikely to survive. TT.794:16-21. At trial, she presented her interpretation of the autopsy of F.R. and certain tissue tests, called BAPP stains, she had run on F.R. Most importantly, Dr. Lavezzi observed numerous hemorrhages—including 13 "discrete different" internal head injuries, TT.763:2-8, 765:15-770:1—and external bruising on the head, back, and legs, TT.770:6-21. According to Dr. Lavezzi, the BAPP stains established that these hemorrhages had been "inflicted around the same time." TT.776:23-778:11. Dr. Lavezzi then concluded that the internal brain hemorrhaging she observed resulted from 13 separate impacts—impacts with sufficient force to shear axons in the brain and cause death by "traumatic axonal injury." TT.768:20-769:13, 779:10-18, 783:20-784:14, 1114:7-12. She also concluded that these had occurred as part of a single, violent assault. TT.778:17-22, 782:16-18, 796:22-24.

The defense presented to the jury was that F.R. suffered a single, fatal fall in the kitchen after her bath. Pet. App. 11a. But Ms. Ray's trial counsel failed

entirely to counter Dr. Lavezzi's theory regarding F.R.'s cause of death. Most critically, trial counsel nowhere rebutted Dr. Lavezzi's conclusion that 13 separate impacts caused F.R.'s injuries—a fact that, if true, would foreclose the defense theory of the case. Pet. App. 71a-72a. In fact, the only time trial counsel questioned its pathology expert, Dr. Willey, about this theory, the question and answer served to *reinforce* the State's argument that a single fall could not explain F.R.'s injuries and undermine the defense's contrary theory:

> Q: And Dr. Lavezzi concluded in her report that there were 13 points of impact to [F.R.'s] head. Is that consistent with a single fall?
>
> A: Doesn't sound like it, no.

TT.972:17-20.

Trial counsel also failed to rebut Dr. Lavezzi's conclusion that the 13 purportedly separate impacts took place on the same night. Indeed, although the defense called two experts, neither addressed the 13-separate-impacts theory the prosecution's expert proffered. Defense expert Dr. Willey had requested to see the BAPP stains that formed the basis of Dr. Lavezzi's conclusions about timing, but trial counsel declined to obtain them. R.440-43, 761-62.[2] Dr. Willey thus had no opportunity to examine the BAPP stains

[2] The record on appeal ("R") filed in the Florida Court of Appeal during the post-conviction proceedings is reproduced as Ex. 1-A to Ms. Ray's motion for a COA in the Eleventh Circuit.

himself—and as a result, he had to repeatedly admit at trial that he could not dispute or disprove Dr. Lavezzi's interpretation of that evidence. *E.g.*, TT.970:24-971:7, 988:17-19.

Nor did trial counsel investigate—let alone present to the jury—innocuous explanations for F.R.'s death. A second defense expert, Dr. Lloyd, testified that F.R.'s injuries were caused by a single fatal fall. But Dr. Lloyd's speculative testimony did not hold up to even passing scrutiny: He presented a crash-test based on an adult-sized mannequin designed around the (completely unsupported) theory that F.R. had fallen after climbing on the kitchen table to grab pizza. TT.1019:3-21. He made no argument that a fall from standing height would have been sufficient to cause F.R.'s injuries. And of course, his testimony clashed with the opinion of Dr. Willey—the other defense expert—that 13 separate impacts could not be explained by a single fall.

The prosecution seized on trial counsel's failures during closing argument—making Dr. Lavezzi's unrebutted 13-impacts theory the centerpiece of its case. It advised the jury that F.R.'s death had been caused by "something hitting [F.R.'s] head … 13 different times." TT.1166:13-15. The prosecution further observed: "I think even [the defense's] expert agrees with [Dr. Lavezzi's] findings that blunt force head trauma is what caused [F.R.'s] death." TT.1166:17-19.

The jury convicted Ms. Ray on all counts, and she was sentenced to life imprisonment without the possibility of parole. Pet. App. 4a. The conviction and

sentence were affirmed on direct appeal. Pet. App. 123a-124a.

Post-conviction proceedings reveal that Dr. Lavezzi's testimony rested on junk science and trial counsel neglected to present alternative causes of death.

Ms. Ray sought post-conviction relief, asserting ineffective assistance of counsel. Pet. App. 4a. A hearing on the motion held by a post-conviction court laid bare the extent and extremely prejudicial effect of trial counsel's deficient performance.

To start, Dr. Lavezzi's theory that F.R. was struck 13 separate times that night turned out to be completely unfounded. Dr. Ophoven, a pediatric forensic pathologist, testified that the hemorrhages Dr. Lavezzi had observed could have had numerous possible explanations—like abnormal blood clotting or internal bleeding. R.672-73. Dr. Lavezzi's theory that each hemorrhage had necessarily been caused by a distinct blunt-force trauma was simply wrong.

Dr. Lavezzi's interpretation of the BAPP stains also proved wrong. Dr. Ophoven testified that there is "absolutely no scientific process" to determine the age of injuries except through iron stains (not BAPP stains). R.682-86. Yet Dr. Lavezzi had obtained iron stains corresponding to only two of the thirteen alleged impacts—meaning she could not possibly have concluded that all 13 occurred around the same time. *Id*. Moreover, the two iron stains she did obtain revealed injuries occurring days apart. *Id*. Dr. Lavezzi herself admitted that she had no basis for her

conclusion that all impacts had occurred on the critical night of December 5. R.852-54. In fact, she clarified that even iron stains, had they been done, could have established only that injuries occurred within a four-day window prior to F.R.'s death. R.854-57. In sum, Dr. Lavezzi's testimony regarding a single, violent assault had been groundless.

Further, after finally having an opportunity to examine the BAPP stains he had not seen before, Dr. Willey testified that the stains were more consistent with "hypoxic-ischemic injury"—that is, loss of blood flow and oxygen, the same condition F.R. had presented to doctors when she was first admitted to the hospital—than blunt-force trauma. R.444-45; *see supra* 7. Dr. Auer, a neuropathologist, also examined the BAPP stains and reached the same conclusion: F.R.'s injuries reflected a lack of blood flow—not physical trauma. R.803-07.

Finally, the state post-conviction hearing established that trial counsel had neglected to investigate and present highly plausible alternative explanations for F.R.'s death. Multiple experts testified that children of F.R.'s age and size often suffer fatal injury simply by experiencing a fall at standing height. R.582, 821-23. Dr. Ophoven explained that F.R. might have been uniquely vulnerable to the impact of a fall, given evidence of blood clotting, sickled red blood cells, pneumonia, and other abnormalities in her medical records. R. 658-66. And multiple experts established that F.R. could have suffered injuries from an earlier impact—like the swingset incident with her brother, or the incident in the bathtub—that deteriorated over time or were exacerbated by a fall in the

kitchen. R.634-35, 809-13. Again, Dr. Lavezzi herself walked back prior testimony and conceded that these accidental causes of death were possible. R.863-72.

The post-conviction proceedings further established that trial counsel could not explain away deficient performance by reference to any strategy choice. Trial counsel admitted that minimizing the number or severity of so-called "impacts" had been clearly critical to Ms. Ray's defense, but could not think of a single strategic reason not to present evidence or argument to accomplish this goal. R.756-58.

The denial of Ms. Ray's petition for state post-conviction relief is narrowly affirmed by a split decision.

The state post-conviction court denied Ms. Ray's motion for relief, and its decision was affirmed by a divided panel of the Florida District Court of Appeal. Pet. App. 63a-72a. The panel determined that trial counsel's unwillingness to challenge Dr. Lavezzi's testimony could be explained by a strategic decision to avoid a "battle of the experts" or the admission of prejudicial testimony. Pet. App. 69a.

Judge Cohen issued a lengthy dissent from the Court of Appeal's decision, explaining his view that Ms. Ray had received ineffective assistance of counsel in violation of her Sixth Amendment rights. Pet. App. 71a-72a. Judge Cohen faulted trial counsel for failing to "challenge the alleged [theory of] thirteen separate impacts," which had been "critical to the State's case." Pet. App. 71a. Indeed, by eliciting testimony from Dr. Willey that a single fall was inconsistent with the

"thirteen points of impact" Dr. Lavezzi had observed, trial counsel had "effectively eviscerated [Ms.] Ray's own theory of defense." Pet. App. 71a-72a. At a minimum, Dr. Willey's response contradicted Dr. Lloyd's entire presentation—which sought to prove that F.R.'s death could have been caused by a single fall. Pet. App. 72a. Judge Cohen noted that Dr. Willey testified that "had counsel asked him during trial, he would have disagreed with Dr. Lavezzi's testimony that the victim suffered thirteen contact injuries." *Id.* Last, Judge Cohen noted that "evidence submitted at the hearing … raised serious doubts" about Dr. Lavezzi's 13-separate-impacts theory. *Id.*

After the district court denies federal habeas relief, the Eleventh Circuit declines to issue a certificate of appealability.

After denial of her state habeas petition, Ms. Ray filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the Middle District of Florida. The district court denied the petition, explaining that trial counsel did "question[] Dr. Lavezzi regarding her opinion that F.R. suffered 13 separate impacts, her opinion regarding the ages of the bruises, and her opinion regarding the severity of the bruises," Pet. App. 17a (citing TT.811:3-813:18, 815:4-14, 829:15-25), and did elicit testimony from Dr. Willey "rebut[ing] Dr. Lavezzi's conclusions regarding the victim's injuries," Pet. App. 17a (citing TT.959:2-963:11, 972:9-973:13), which was sufficient to show effective assistance of counsel. Finding no "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the district court denied a COA. *See* Pet. App. 60a.

Ms. Ray then petitioned the Eleventh Circuit for a COA, highlighting Judge Cohen's dissenting opinion in the state appellate proceedings in particular. CA11 Mot. for COA at 3-4, 32, 39. It summarily denied her application in a cursory two-sentence order stating that she had "failed to make a substantial showing of the denial of a constitutional right." Pet. App. 1a-2a. Ms. Ray filed a motion for reconsideration, again drawing the Eleventh Circuit's attention to the division among state court judges, CA11 Mot. for Reconsideration 7-8, but the reconsideration motion was also summarily denied, Pet. App. 125a-126a.

REASONS FOR GRANTING THE WRIT

I. Courts Are Divided Over The Standard For Granting A Certificate Of Appealability.

The decision below has created a circuit split requiring this Court's intervention. The Fifth and Seventh Circuits have held that when state judges disagree on the merits of the constitutional question presented in a state habeas petition, a COA should be granted in subsequent federal habeas proceedings. Here, by contrast, the Eleventh Circuit refused to grant Ms. Ray's request for a COA despite a dissenting state-court judge's view that Ms. Ray had received ineffective assistance of counsel.[3]

[3] This circuit conflict is related to another split of authority that is the subject of a pending cert petition. *See Shockley v. Vandergriff*, No. 24-517 (U.S.). That split concerns how to address differences of opinion among federal appellate judges assessing the substantiality of a petitioner's claims. The Third, Fourth,

Seventh Circuit. In *Jones v. Basinger*, the Seventh Circuit adopted the rule that "[w]hen a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." 635 F.3d 1030, 1040 (7th Cir. 2011); *see also Pierce v. Brown*, 2022 WL 2064653, at *1, *4 (S.D. Ind. June 7, 2022) (granting COA because dissenting state-court judge was "convinced that trial counsel rendered ineffective assistance").

In *Jones*, the petitioner was convicted in Indiana state court. 635 F.3d at 1035. At trial, the court had allowed in a double-hearsay statement on the basis that it was being used only to show the course of the police investigation, not the truth of the matter. *Id.* On direct appeal, the petitioner argued that the prosecution, in introducing that statement, violated his Sixth Amendment right to confront the witnesses against him. The Indiana Court of Appeals affirmed his conviction. *Id.* at 1038. One judge vigorously dissented, however, arguing that the purpose of the testimony "was clearly to bolster the State's case against

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Seventh, and Ninth Circuits require a COA grant if at least one judge on a circuit court panel believes the applicant has made the showing required by 28 U.S.C. § 2253. On the other hand, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits will deny a COA even when at least one judge favors granting it—at times drawing rebuke from members of this Court. *See, e.g.*, *Johnson v. Vandergriff*, 2023 WL 4851623, at *1 (8th Cir. July 29, 2023) (en banc), *cert. denied*, 143 S. Ct. 2551 (2023); *Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014), *cert. denied*, 576 U.S. 1071 (2015).

[the petitioner], not to show the conduct of the police investigation." *Id.* (citation omitted).

After the state courts denied post-conviction relief, the petitioner filed his federal habeas petition, which the district court denied. *Id.* at 1039. Curiously, the court did not address the petitioner's Sixth Amendment claim and further held that any constitutional error was harmless. *Id.* It then denied a COA. *Id.*

The Seventh Circuit, however, granted a COA. *Id.* Its merits opinion explained why it had done so. 28 U.S.C. § 2253(c)(2) requires only "a substantial showing of the denial of a constitutional right." "When a state appellate court is divided on the merits of a constitutional question," the Seventh Circuit explained, "[a] district court could deny a certificate of appealability on [that question] only in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable debate." 635 F.3d at 1040. And if such a "rare" event were to arise, it would at least "call for some explanation" from the district court "in the order denying the certificate of appealability," which was conspicuously absent in *Jones*. *Id.*

Fifth Circuit. In *Rhoades v. Davis*, the Fifth Circuit expressly followed the Seventh Circuit's lead in granting the COA because the state appellate court was divided on the constitutional issue presented. 852 F.3d 422, 428-29 & n.18 (5th Cir. 2017) (quoting *Jones*, 635 F.3d at 1040).

Here again, the facts illuminate the vastly different treatment of identical COA requests across

circuits. In *Rhoades*, the petitioner was convicted on capital charges in Texas state court. *Id.* at 427. At the penalty phase, the trial court excluded childhood photographs that the petitioner had introduced as mitigating evidence, and a jury sentenced the petitioner to death. *Id.* On direct appeal, a majority of the Texas Court of Criminal Appeals (CCA) affirmed the petitioner's conviction and death sentence. *Id.* While the majority thought the photographs were not relevant to the petitioner's blameworthiness for the crime, two judges dissented. *Id.* at 428. The dissenting judges argued that evidence did not need to be relevant to moral blameworthiness to be admissible at sentencing and that the petitioner "had a constitutional right to introduce the photographs even if the only purpose of their introduction was to solicit the mercy of the jury." *Id.* (internal quotation marks omitted).

After the Texas state courts denied post-conviction relief, the petitioner sought federal habeas corpus relief. *Id.* at 427. The district court declined to issue a COA, reasoning that Supreme Court precedent permitted state courts to exclude such evidence as irrelevant and that any error was harmless in any event. *Id.* at 428.

As in *Jones*, the Fifth Circuit reversed. The court noted that the Supreme Court's cases establishing "the right to present sentencers with information relevant to the sentencing decision" did not—and indeed could not—exhaustively detail all evidence that might be "relevant" under its test. *Id.* & n.17 (quoting *Kansas v. Marsh*, 548 U.S. 163, 175 (2006)). And that question was precisely what had divided the CCA. *Id.* at 428-29. Because the CCA was divided on the merits

of this constitutional question, the Fifth Circuit determined that the petitioner had made his "substantial showing of the denial of a constitutional right," warranting a COA grant. *Id.*

District Courts in the Sixth Circuit. Courts in the Sixth Circuit also hew to the Seventh Circuit's *Jones* rule, regularly granting COAs where state judges disagree on the constitutional question. *See, e.g.*, *Miles v. Floyd*, 2024 WL 199540, at *10-11 (E.D. Mich. Jan. 18, 2024) (citing *Jones* and granting COA where Michigan Court of Appeals judge dissented regarding petitioner's ineffective-assistance-of-counsel claims); *Smith v. Winn*, 2017 WL 2351743, at *10 (E.D. Mich. May 31, 2017) (citing *Jones* and granting COA where Michigan Court of Appeals judge and three Michigan Supreme Court justices dissented on the ground that trial counsel was ineffective); *Galvan v. Stewart*, 2016 WL 1090424, at *15 (E.D. Mich. Mar. 21, 2016) (citing *Jones* and granting COA where Michigan Court of Appeals judge dissented regarding petitioner's insufficient-evidence claim); *McMullan v. Booker*, 2012 WL 603990, at *9 (E.D. Mich. Feb. 24, 2012) (citing *Jones* and granting COA where Michigan Court of Appeals judge and Michigan Supreme Court justices dissented regarding petitioner's instructional-error claim). They have applied this rule even where the state-court division is less clear-cut. *See, e.g.*, *Metcalfe v. Howard*, 2022 WL 994877, at *7-8 (E.D. Mich. Mar. 31, 2022) (citing *Jones* and granting a COA where Michigan Court of Appeals judge concurred in majority's decision but questioned the rationale of binding precedent bearing on petitioner's insufficient-evidence claim); *Davidson v. Skipper*, 2022 WL 4088177, at *3, *7 (E.D. Mich. Sept. 6, 2022)

(citing *Jones* and granting a COA where Michigan Court of Appeals denied petitioner's motion for reconsideration on direct appeal but one judge—without "stat[ing] anything further in support of her position"—"would have granted" it); *Richardson v. United States*, 2017 WL 818460, at *4 (E.D. Tenn. Mar. 1, 2017) (reconsidering the denial of a COA on the basis that a federal court of appeals judge had issued a dissent that the type of claim at issue had merit).

Eleventh Circuit. The Eleventh Circuit's decision offers a striking contrast to the approach taken by the Fifth and Seventh Circuits. With no explanation, the Eleventh Circuit denied Ms. Ray's COA request "because she has failed to make a substantial showing of the denial of a constitutional right." Pet. App. 1a-2a. Even on Ms. Ray's motion for reconsideration, where she expressly invoked *Jones* and urged the court to grant the COA in light of the dissent in the Florida Court of Appeal, the Eleventh Circuit concluded she had "offered no new evidence or arguments of merit to warrant relief." Pet. App. 126a.

If Ms. Ray's case had been heard in the Fifth or Seventh Circuits, however, her request for a COA would have been granted. Although it is impossible to divine the specific basis for the COA denial here, the fact of the denial clearly splits with the rule articulated in *Jones* and its progeny, given the state judge's forceful dissent on the constitutional question in the same case. And the very unexplained nature of the Eleventh Circuit's COA denial underscores the split, given the obligation under *Jones* to offer "some explanation" for denying a COA in the "rare" case where "the views of the dissenting judge(s) are erroneous

beyond any reasonable debate." 635 F.3d at 1040. This Court should grant review to resolve this clear split.

II. The Eleventh Circuit's Decision Is Wrong.

A. As a matter of law, a COA should ordinarily issue when a state court divided on the merits of the constitutional question at issue.

1. The Eleventh Circuit's approach flouts the plain language of 28 U.S.C. § 2253. "A certificate of appealability may issue under paragraph (1) [of § 2253(c)] only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). By focusing on "the denial of a constitutional right," the statute zeroes in on the underlying constitutional claim the petitioner is asserting. And a "substantial" claim is one "reasonable jurists could debate." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) ("The question is the *debatability* of the underlying constitutional claim, not the resolution of that debate." (emphasis added)). Division among the state-court judges adjudicating the constitutional issue in the same case is the most direct indication imaginable that such "debate" exists among "reasonable jurists." Thus, a state-court judge's reasoned disagreement amounts to "a substantial showing of the

denial of a constitutional right" justifying issuance of a COA. 28 U.S.C. § 2253(c)(2).[4]

Just as important as the statute's text is what the text *does not* say. It says nothing about the COA decision turning on whether the petitioner will obtain ultimate "entitlement to relief" on his federal habeas claim. *See Miller-El*, 537 U.S. at 337. In fact, in AEDPA, Congress amended § 2253 to *remove* the prior requirement of "'showing … denial of a *federal* right,'" "substituting" instead the obligation to show denial of a *constitutional* right. *Slack*, 529 U.S. at 480-81, 483 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (emphasis added)); 28 U.S.C. § 2253(c)(2).

This reading of the statutory text accords with the purpose of the COA requirement. "Congress established a threshold prerequisite to appealability in 1908, in large part because it was 'concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process.'" *Miller-El*, 537 U.S. at 337 (quoting *Barefoot*, 463 U.S.

[4] Some jurists have suggested that the use of the word "may" in the phrase "may issue … only if" in § 2253(c)(2) grants courts unfettered and unreviewable discretion to deny a COA even when a petitioner makes a "substantial showing of the denial of a constitutional right." *See, e.g., Miller-El*, 537 U.S. at 349 (Scalia, J., concurring). That view has not been widely adopted, and for good reason. "[T]he mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000). Here, the statutory structure, context, and purpose make clear that a COA may not be withheld as a matter of unreviewable discretion when the statutory standard is met.

at 892 n.3). The point of the COA is to identify "issues … adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893 & n.4). Thus, the COA inquiry is, as this Court has repeatedly recognized, just a "threshold question." *Buck v. Davis*, 580 U.S. 100, 115 (2017). It is about whether a claim can "leav[e] the starting gate" at all—to have a court simply *consider* the claim on the merits. *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari). As noted above, it is not intended to be an expedited appeal of whether the petitioner is ultimately entitled to habeas relief. Indeed, for a court addressing a COA to undertake a "full consideration of the factual or legal bases adduced in support of the claims" would in effect be to decide an appeal without jurisdiction. *Id*. at 2650.

Constitutional arguments that were sufficiently meritorious to garner support in the state courts are hardly the kind of claims Congress sought to screen out with the COA requirement. To the contrary, a state-court judge's view that the petitioner's claim is meritorious—or even that petitioner would prevail on the claim—is a claim that should "leav[e] the starting gate." *Id*. at 2652.

2. Moreover, the rule followed by the Fifth and Seventh Circuits—and urged by Ms. Ray here—heeds the warning of several Justices who have cautioned against transforming the COA's low threshold standard into a more onerous roadblock to relief. These Justices have suggested that disagreement among state and federal appellate judges considering a habeas

petitioner's claims should be dispositive at the COA stage.

For example, in *Jordan v. Fisher*, the Mississippi Supreme Court had rejected the petitioner's claim over the dissent of one justice. *Id.* at 2649, 2651. A judge on the Fifth Circuit panel also dissented from the denial of the COA, finding the petitioner's claim highly debatable. *Id.* at 2651. And a different court of appeals had granted relief on a similar claim. *Id.* As the Justices who urged a cert grant asserted, these "facts alone" proved that "reasonable minds" not just *could* differ, but "*had differed* … on the resolution of [the petitioner's] claim." *Id.* In denying the COA, the Fifth Circuit had imposed "too demanding" a standard. *Id.*

Similarly, in *Johnson v. Vandergriff*, the Missouri Supreme Court, over a dissent, had denied the petitioner's claim, and an Eighth Circuit panel had originally granted a COA that was later vacated en banc. 143 S. Ct. at 2551-52 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). As in *Jordan*, the Justices concluded that "reasonable minds … *had differed* … on the resolution of [the] claim." *Id.* at 2553 (quoting 135 S. Ct. at 2651). The Eighth Circuit thus imposed "too demanding" a standard "in assessing whether reasonable jurists could debate the merits of [the] habeas petition." *Id.*

B. The Eleventh Circuit's application of a contrary rule led to an incorrect result in this case.

This is certainly not the kind of extraordinary case warranting denial of a COA notwithstanding that a state-court judge agreed with the merits of Ms. Ray's constitutional claim. On this record, Ms. Ray more than clears the low bar of making a "substantial showing" of ineffective assistance of counsel under any conceivable standard. By departing from the plain language of § 2253(c)(2) and ignoring the reasoned dissenting view of Judge Cohen, therefore, the Eleventh Circuit precluded review of a habeas petition that more than satisfies the requirements for a COA.

Central to the prosecution's theory of the case was Dr. Lavezzi's opinion that F.R. had suffered 13 separate impacts to the head in one incident. The prosecution closed out its presentation by telling the jury: "Dr. Lavezzi told you every one of those impacts is from something hitting [F.R.'s] head 13 different places or her head hitting something 13 different times. That is not from one fall." TT.1166:11-16. And the State repeatedly reiterated in closing that the jury should use its "common sense" as to whether the defense's theory of a single fall could possibly explain those 13 separate "impacts." TT.1150:8-1151:5.

Despite Dr. Lavezzi's instrumental testimony, defense counsel's questions on this point served only to bolster Dr. Lavezzi's view—not to challenge her interpretation of the evidence. *See* TT.811:3-813:18. Defense counsel later admitted that she knew

minimizing the number or severity of these "impacts" was critical to Ms. Ray's defense and could not think of any strategic reason for why she failed to do so. R.756-58.

Moreover, although counsel put on Dr. Willey as a defense expert, he did not rebut the 13-separate-impacts theory either. Pet. App. 66a-67a. Rather, he admitted that he did not have any evidentiary basis to "disprove [Dr. Lavezzi's] conclusions" at all, Pet. App. 66a, because, as explained above (at 9), defense counsel inexplicably failed to request the forensic evidence underlying Dr. Lavezzi's opinion. So all Dr. Willey offered was the feeble opinion that hemorrhages can *theoretically* be attributable to a medical condition rather than trauma, or suffered at different times. Pet. App. 67a. But he made clear that he had "no reason to doubt" Dr. Lavezzi's conclusions regarding the causes of the hemorrhaging she observed in Ms. Ray's case specifically. TT.988:17-19.

Worst of all, having wholly failed to discredit the prosecution's 13-separate-impacts evidence, defense counsel elicited testimony from Dr. Willey *confirming* that the alleged "13 points of impact on the victim's head" were not "consistent with a single fall." TT.972:17-20 (brackets omitted). In other words, defense counsel and the defense expert conceded away Ms. Ray's central theory of defense. The prosecution capitalized on this in its closing, repeatedly emphasizing the extent to which Dr. Willey "agree[d]" with Dr. Lavezzi. TT.1171:10-1172:1.

These failures had catastrophic consequences, especially considering the information that came to

light after Ms. Ray's conviction. At the state post-conviction hearing, several experts testified that there had been *no* evidentiary basis for Dr. Lavezzi to conclude that F.R. had suffered 13 separate impacts. *See supra* 11-12. Equally groundless was Dr. Lavezzi's supposition that these 13 alleged impacts necessarily occurred on December 5 as part of a single violent assault. *See supra* 11-12. Dr. Lavezzi herself conceded that she could not have drawn any conclusions about the timing of 11 hemorrhages that were not age-tested with iron stains, and that the two hemorrhages she did age-test "came out to be different ages." R.853-55. Recall further that, at trial, Dr. Willey had testified he had "no reason to doubt" Dr. Lavezzi's conclusions regarding the causes of the hemorrhaging she observed. TT.988:17-19. But after being given an opportunity to actually examine F.R.'s BAPP stains, he disagreed with her conclusions and explained that extensive hemorrhaging more likely resulted from blood loss than traumatic assault. R.444-46. Experts at the post-conviction hearing also set out multiple, highly plausible and innocuous explanations for F.R.'s injuries that trial counsel had not investigated or presented to the jury. *See supra* 11, 12-13.

This evidence amounts to a substantial showing on both the deficient-performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, (1984), as is necessary for Ms. Ray to obtain a COA. Trial counsel failed to "rebut critical … evidence" and left the prosecution's theory of the case effectively "untouched." *Andrus v. Texas*, 590 U.S. 806, 819-20 (2020) (per curiam). In fact, she elicited testimony that "unwittingly *aided* the State's case"—further underlining the extent of her deficient performance. *Id.*

at 817-18 (emphasis added). Meanwhile, trial counsel entirely failed to "uncover and present voluminous … evidence" that would have undermined the State's presentation and established alternative, plausible causes of F.R.'s death. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). These errors suffice to "undermine confidence" in Ms. Ray's guilty verdict, providing a "reasonable probability" that she would have not been convicted otherwise. *Strickland*, 466 U.S. at 694.

Whether or not Ms. Ray is entitled to relief on her constitutional claim—as Judge Cohen held—there can be little doubt that she has made a sufficiently "adequate" showing on the merits to appeal the district court's denial of her habeas petition. *Miller-El*, 537 U.S. at 327.

The Eleventh Circuit's wrongful denial of a COA here was highly prejudicial because Ms. Ray has not only made a "substantial showing" on the merits of the constitutional claim to warrant a COA, but she has a strong argument that she is ultimately entitled to relief on appeal under AEDPA. The state appellate court majority did not dispute that defense counsel failed to refute the prosecution's 13-separate-impacts theory. Pet. App. 69a-70a. The sole basis for its decision was that defense counsel's decisions reflected "a reasonable trial strategy." Pet. App. 69a. Reasonable jurists could at least debate whether that conclusion about defense counsel's patent deficiencies was "contrary to" or "an unreasonable application of[] clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1); *see Wiggins*, 539 U.S. at 522 (failure to investigate plausible defense theories cannot be justified as a "tactical decision"); *Chandler v. United*

States, 218 F.3d 1305, 1315 (11th Cir. 2000) (explaining that a strategy decision may constitute ineffective assistance of counsel where it is so patently unreasonable no competent attorney would have chosen it); *see generally* Dkt. 1 at 43-56, *Ray v. Florida Dep't of Corrections*, No. 5:20-cv-263-JLB-PRL (M.D. Fla. filed June 12, 2020) (laying out AEDPA arguments in detail). Indeed, defense counsel herself testified that failing to contest the prosecution's medical evidence was *not* a strategic choice. *Supra* 13. So the merits of Ms. Ray's federal AEDPA claim are not just debatable; they could ultimately prevail on appeal.

In sum, Ms. Ray should have been given an opportunity to prove up her entitlement to habeas relief before the Eleventh Circuit.

III. This Petition Presents An Ideal Vehicle For Resolving The Question Presented And Ensuring Federal Appellate Review For The Wrongfully Convicted.

The question here is whether a COA must issue to authorize federal appellate review of habeas claims at least one state judge has found to be meritorious. As explained above, issuing a COA in this circumstance is required by the plain language in 28 U.S.C. § 2253(c)(2) and furthers the purposes of the COA in focusing federal appellate review on the most meritorious habeas claims. The stakes of erroneously denying a COA are enormous: A wrongfully convicted petitioner is denied relief, with no further appellate review or further judicial recourse. Ms. Ray's case perfectly encapsulates the problem: Even though her prosecution was for a crime particularly vulnerable to

wrongful conviction, and even though a state judge agreed that she put forward a compelling case of ineffective assistance of counsel and should be granted post-conviction relief, her federal habeas petition was erroneously deemed so insubstantial as to not even warrant appellate review. Ms. Ray's case presents a uniquely good vehicle to clarify the law to ensure that petitioners most vulnerable to wrongful conviction and with the most meritorious claims are not denied a COA under an erroneous standard.

A. Federal habeas review is the last line of defense for wrongfully convicted people to challenge their conviction in court. Despite the numerous substantive and procedural protections our legal system has in place to prevent wrongful convictions, they are far more common than we like to think. In recent years, there have been three exonerations a week, on average. Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 Ohio St. J. Crim. L. 753, 754 (2017). Since 1989, at least 3,659 wrongfully convicted people have been exonerated in the United States. *See* The National Registry of Exonerations, https://tinyurl.com/nwz3t86n (last visited Mar. 21, 2025).[5] And "false convictions outnumber exonerations by orders of magnitude." Gross, *supra,* 14 Ohio St. J. Crim. L. at 753.

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[5] A formal "exoneration" occurs when a person is convicted of a crime but is "officially cleared after new evidence of innocence becomes available." The National Registry of Exonerations, *Glossary, Exoneration*, https://tinyurl.com/4z6tcwbb (last visited Mar. 21, 2025).

One frequent source of wrongful conviction in homicide cases is faulty medicolegal death investigation. *See, e.g.*, Simon A. Cole et al., *Medicolegal Death Investigation and Convicting the Innocent*, The National Registry of Exonerations (August 2024), https://n2t.net/ark:/88112/x2991r. Given that the overwhelming majority of incarcerated people are men,[6] it is notable that more than one in four people exonerated after faulty medicolegal death investigation are women. *Id.* at 7. Relatedly, cases with child victims represent just shy of *one half* of such exonerations. *Id.* at 7-8. This data reveals that "female defendants" and "cases involving the killing or harming of children" are "especially …. vulnerable to false conviction" based on "death investigation evidence." *Id.* at 77. Perhaps the most notorious such cases involve "Shaken Baby Syndrome" or "Abusive Head Trauma," "controversial diagnoses" accounting for almost *"one fifth* of the [exoneration] cases in which death investigation contributed to false convictions." *Id.* (emphasis added); *see also id.* at 7, 9, 62-63 (further discussing Shaken Baby Syndrome).

In sum, cases just like Ms. Ray's—where women are accused of killing their young children based on (alleged) medical evidence of head trauma—present unique and persistent risks of wrongful conviction.

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[6] In 2022, there were roughly 180,000 women incarcerated in state and federal prisons and jails, out of a total population of 1,230,000 inmates—representing roughly 14% of the prison population. *See* Kristen M. Budd, *Fact Sheet: Incarcerated Woman and Girls*, The Sentencing Project (July 24, 2024), https://tinyurl.com/3mbedf29; E. Ann Carson & Rich Kluckow, *Prisoners in 2022 – Statistical Tables*, U.S. Department of Justice, Bureau of Justice Statistics (Oct. 15, 2024), https://tinyurl.com/yck65sfj.

Federal habeas review is Ms. Ray's—and every other petitioner's—last hope of judicial relief.

B. The COA, as the gatekeeper for appellate review, is designed to permit appellate review of claims "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893 n.4). Although a petitioner must show "something more than the absence of frivolity," she "obviously … need not show that [s]he should prevail on the merits," because "[sh]e has already failed in that endeavor." *Barefoot*, 463 U.S. at 893 & n.4. This Court's precedents make clear that, while the COA requirement was designed to "prevent frivolous appeals" and "delay[in] the States' ability to impose sentences," it was not intended to make appellate review a nullity. *Id*. at 892. But that is exactly what it has become.

One study estimates that more than *92%* of requests for COAs are denied. Nancy J. King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 Fed. Sent'g Rep. 308, 308 (2012). And COA grant rates vary widely across circuits. During one period under review, district judges in the Third, Fifth Circuit, and Tenth Circuits did not grant a *single* COA, while district judges in the other circuits granted COAs between 2% and 25% of the time. *Id*. at 310. These disparities illustrate a persistent lack of clarity about the standard for issuing a COA.

C. This case is an ideal vehicle for resolving the question presented. Ms. Ray squarely raised the question presented here to the Eleventh Circuit. *See* CA11

Mot. for COA 3-4, 32, 39; CA11 Mot. for Reconsideration 7 (citing *Jones*, 635 F.3d at 1040). Moreover, Ms. Ray's petition could clarify two different aspects of the COA process; depending on the Court's reasoning, resolving the question presented has the potential to resolve the closely related split of whether a COA may be denied over a circuit judge's dissent. *Supra* 15-16 n.3. This Court's review of the COA standard is particularly appropriate here because Ms. Ray has put forward a powerful showing of her entitlement to federal habeas relief under 28 U.S.C. § 2254(a) and could very well prevail on appeal if granted a COA. Denying Ms. Ray the opportunity to present the merits of her arguments on appeal would result in manifest injustice, not only for Ms. Ray but for all wrongfully convicted individuals who have convinced state and federal judges of the substantiality of their claims but are nonetheless denied a COA in violation of 28 U.S.C. § 2253(c)(2).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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March 21, 2025