

No. _____

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JERRY SCOTT HEIDLER,

Petitioner,

-v-

SHAWN EMMONS, WARDEN,
Georgia Diagnostic Prison,

Respondent.

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

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CAPITAL CASE
QUESTIONS PRESENTED

A district court’s denial of a habeas petition brought under 28 U.S.C. § 2254 may only be reviewed on appeal if a federal judge issues a claim-specific certificate of appealability, which requires the petitioner to make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The petitioner need only demonstrate “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 and n.4 (1983)). Through this process, courts “screen[] out issues unworthy of judicial time and attention and ensure[] that frivolous claims are not assigned to merits panels.” *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012). The COA requirement thus provides the “primary means of separating meritorious from frivolous appeals” *Barefoot*, 463 U.S. at 892-93.

This standard is not especially burdensome. *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003). Nonetheless, as a steady stream of certiorari petitions filed in this Court suggests, the Eleventh Circuit is frequently overly demanding in its application. This case presents a prime example. Although granting a limited COA on issues it later rejected, the court denied a COA to address the following claims, even though they presented complicated and novel legal issues warranting review:

- Whether the district court erred in rejecting Mr. Heidler’s claim that trial counsel’s simultaneous representation of another criminal defendant with conflicting interests created an actual conflict of interest at sentencing, a claim first raised in district court pursuant to *Martinez v.*

Ryan, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), an issue challenging the district court’s arguable misapplication of this Court’s conflict-of-interest precedent and presenting a *res nova* question in the Eleventh Circuit regarding the application of *Martinez* and *Trevino* to habeas cases arising out of Georgia state courts.

- Whether the district court, in rejecting the claim that Mr. Heidler was incompetent at trial, erred in refusing to consider compelling evidence introduced in state habeas proceedings documenting Mr. Heidler’s lifelong history of severe mental illness and his dramatic mental deterioration while he awaited trial (which included recurrent suicide attempts and a psychiatrist’s diagnosis of psychosis), because this evidence had not been presented to the trial court when it found Mr. Heidler competent several months before trial began.
- Whether the district court, in its order denying the habeas petition, erred in dismissing numerous claims on the grounds they were insufficiently pled and/or unexhausted, only after many years of litigation and without providing Mr. Heidler notice and an opportunity to contest or cure any purported defects. Although the Eleventh Circuit had granted a COA to address the district court’s dismissal of just two of the dismissed claims, it ultimately did not reach the procedural issues it had found warranted a COA, but nonetheless refused to expand the COA to address the remaining dismissed claims.

These facts give rise to the following questions:

1. Whether the Eleventh Circuit imposed an erroneously high standard when it denied a COA to address any or all of the above claims and, if so, whether the Court should docket the case for briefing and argument, or summarily reverse?
2. Whether the Court should hold this case pending the Eleventh Circuit’s ruling in *Williams v. Warden, GDCP*, No. 22-10249 (11th Cir.), a capital habeas case addressing some of the same procedural issues presented here, which has been briefed and argued, and awaits adjudication. Mr. Heidler had asked the Eleventh Circuit on rehearing to hold the case pending its decision in *Williams*, but the Eleventh Circuit instead denied rehearing.

RELATED PROCEEDINGS

Trial and Direct Appeal

State v. Heidler, No. 98-CR-48 (Toombs Cnty. Super. Ct., September 3, 1999)

Heidler v. State, No. S00P0808 (Ga. October 2, 2000), *reh'g denied* (October 26, 2000)

Heidler v. Georgia, No. 00-9194 (S.Ct. May 14, 2001), *reh'g denied* (June 29, 2001)

State Habeas Proceedings

Heidler v. Hall, Warden, No. 2001-V-844 (Butts Cnty. Super. Ct. September 8, 2009)

Heidler v. Hall, Warden, No. S10E0385 (Ga. April 18, 2011)

Federal Habeas Proceedings

Heidler v. Warden, Georgia Diagnostic Prison, No. 6:11-cv-00109-LGW (S.D. Ga., Statesboro Div., December 12, 2019)

Heidler v. Warden, Georgia Diagnostic Prison, No. 20-13752 (11th Cir. August 2, 2023), *reh'g denied* (October 10, 2023)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jerry Scott Heidler respectfully submits this Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The direct appeal opinion of the Georgia Supreme Court is published at 537 S.E.2d 44 and is reproduced in the Appendix hereto at Pet. App. 552a-579a. The unpublished order of the Butts County Superior Court is reproduced in the Appendix hereto at Pet. App. 433a-550a. The Southern District of Georgia's unpublished order denying an evidentiary hearing is reproduced in the Appendix hereto at Pet. App. 210a-240a. The unpublished opinion of the Southern District of Georgia is reproduced in the Appendix hereto at Pet. App. 115a-183a. The unpublished judgment of the Southern District of Georgia is reproduced in the Appendix hereto at Pet. App. 580a. The Eleventh Circuit's unpublished orders denying a COA on the issues raised in this petitioner are reproduced in the appendix hereto at Pet. App. 200a-202a, 203a-204a, and 205a-206a. The Eleventh Circuit's unpublished opinion is reproduced in the Appendix hereto at Pet. App. 1a-114a. The Eleventh Circuit's unpublished order denying rehearing is reproduced in the Appendix hereto at 207a-209a.

JURISDICTION

This court has jurisdiction to hear this case under 28 U.S.C. § 1254(1). The Eleventh Circuit denied a petition for panel and *en banc* rehearing on October 10, 2023. Pet. App. 207a-209a. On December 27, 2023, this Court extended the deadline to file a petition for writ of certiorari to February 7, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments:

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No State shall . . . deprive any person of life, liberty or property, without due process of law.

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified in relevant part at 28 U.S.C. §§ 2253 and 2254:

28 U.S.C. § 2253 states in relevant part:

(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.

28 U.S.C. § 2254 states in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Jerry Scott Heidler has suffered from severe mental illness—characterized by auditory and visual hallucinations, major depression, and repeated suicide attempts—since childhood. From the start of their representation at his capital trial, counsel recognized that mental illness would be central to Mr. Heidler’s case and elected to raise a guilty-but-mentally-ill defense—a defense requiring proof of a “disorder of thought or mood”¹ that Mr. Heidler’s psychiatric history in fact supported. Yet, due to counsel’s inadequate investigation, during his three-day trial in September 1998, in which Mr. Heidler was convicted and sentenced to death for the murder of four members of the Daniels family when he was 20 years old, D.14-7:74-76; D.15-9:24-26,² the trial judge and

¹ To obtain a guilty but mentally ill verdict, a defendant has to demonstrate he has “a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life,” but expressly excludes “a mental state manifested only by repeated unlawful or antisocial conduct.” O.C.G.A. § 17-7-131(a)(3).

² Citations to “D.-” refer to the federal district court docket entries in *Heidler v. Warden*, Case No. 6:11-cv-00109 (S.D. Ga.) and the relevant page numbers therein.

jurors did not learn of the severity of Mr. Heidler's mental illness, including his long history of psychosis and severe depression (*i.e.*, disorders of *both* thought and mood).³ Instead, they heard only that Mr. Heidler had borderline and/or antisocial personality disorder, evidence that, by definition, could not satisfy the criteria for a guilty-but-mentally-ill verdict and that were, moreover, inaccurate and, at sentencing, aggravating. Although counsel were purportedly focused on Mr. Heidler's poor mental health, moreover, they failed to consider its impact on his competence to stand trial. Thus, when the trial court, aware that mental health would be an issue, appointed experts to evaluate competence and conducted a hearing on the issue roughly half a year before trial, Mr. Heidler's lawyers essentially stood mute, providing no information relevant to the issue and asking only one expert a few questions about his understanding of the guilty-but-mentally-ill statute. During this non-adversarial hearing, the experts uniformly declared Mr. Heidler competent and the trial court subsequently issued an order finding Mr. Heider competent to stand trial.

³ Mr. Heidler has continued to suffer from severe depression and debilitating psychosis for the over 24 years that he has spent on death row. Soon after his arrival at Georgia Diagnostic and Classification Prison, Mr. Heidler was diagnosed with a psychotic disorder, D.25-18:36, and has been treated with heavy doses of anti-psychotics and anti-depressants ever since. Dr. Jack Matteson, a psychiatrist who treated Mr. Heidler at GDCP for years, testified that at times his psychosis would become "totally debilitating," resulting in an inability to bathe, feed himself, or carry on a simple conversation. D.19-4:50-51, 58. Indeed, Mr. Heidler was unable to participate in much of his state habeas hearing because he had a psychotic break during the proceedings and was administered such a massive dose of anti-psychotics that he was left in a trance-like state. D.19-6:3-4. During his years on death row, Mr. Heidler has been tormented by voices telling him to harm himself, has been subject to multiple involuntary medication orders, and has been admitted to the prison's crisis stabilization unit (CSU) on numerous occasions because he posed a danger to himself. D.19-4:50, 63, 71. For decades, Mr. Heidler's thought patterns have been characterized by unusual beliefs (e.g., that he is a fairy, that he is both a child and an old man, that he is immortal, that he is Jesus, that he is an angel, and that his thoughts are monitored by a computer) that are wholly unconnected to reality and that persist for years. D.71:31.

Counsel's failure to present an accurate account of Mr. Heidler's serious mental illness was not because the evidence was beyond reach. Counsel ignored significant red flags in the records they had collected on Mr. Heidler that should have clued them in to Mr. Heidler's symptoms, such as medical records documenting pediatrician Adrienne Butler's observation of him at 12 years old, actively hallucinating in front of her when he was brought, "in crisis," by school officials to the community health center. *See* D.29-10:8. Although Dr. Butler wrote that she "strongly suspect[ed a] thought disorder in this child" and referred Mr. Heidler to a psychiatric facility for in-patient evaluation, Mr. Heidler's mother instead took him home. D.19-6:94-95; D.19-10:65, 88; D.28-15:59. Counsel made no effort to speak with Dr. Butler (or other witnesses to this event) and failed to direct the testifying experts to medical records reflecting her observations of his active psychosis as a child. *See, e.g.,* D.19-6:95; D.23-12:38-39. Similarly, counsel knew that Mr. Heidler, while in jail awaiting trial, reported auditory and visual hallucinations; that jail nurse George Dykes had referred him for mental health treatment numerous times; and that the jail administered him Haldol, an antipsychotic. *See* D.12-17:9-10; D.13-18:115; D.19-13:6, 10, 15-17. Yet, counsel made no effort to speak with Mr. Dykes,⁴ nor did they request records of the treatment he received while awaiting trial. *See, e.g.,* D.22-16:6-7. Notes by the treating psychiatrist at the community clinic where he was seen, Dr. David Faulk, reflect Mr. Heidler's complaint of "seeing things," a diagnostic impression of psychotic disorder, and a prescription for Haldol. D.21-17:33.

⁴ The state court found that counsel had interviewed Dykes, but the record shows by clear and convincing evidence, ignored by both the state court and the panel, that counsel never did. D.19-6:79-80 (Dykes state habeas testimony).

The trial court, when assessing competency, and later the jury, when assessing guilt and punishment, heard none of this critical evidence. Instead, the mental health experts testified that Mr. Heidler had a borderline and/or antisocial personality disorder—an incorrect and aggravating diagnosis the prosecutor used to his advantage. *See, e.g.*, D.13-3:6-7, 10; D.13-18:79; D.13-19:101-03; D.14-11:50.

In state habeas proceedings, Mr. Heidler presented extensive evidence demonstrating that jurors and the trial court were misled by the mental health expert testimony at trial, explaining the severity of his longstanding and continuing mental illness,⁵ and documenting the decline of his mental health as his trial date approached. Mr. Heidler also presented extensive evidence documenting the neglect and frequent, severe abuse inflicted by his mentally ill and substance-abusing caregivers on him and each other. *See, e.g.*, D.19-6:43, 48; D.19-11:8-9, 15 22-24, 26-27. This evidence, *inter alia*, countered the misleading picture of Mr. Heidler’s background at trial, where his mother and sister had indicated Mr. Heidler was *not* the subject of physical abuse.

In its final order, the state habeas court, in light of this compelling evidence, expressly found “that for the majority of Petitioner’s life, Petitioner has been significantly impaired by his mental illness and that it is ‘highly unlikely’ he will ever be free of the substantial impairments.”

⁵ Witnesses included Dr. Butler, D.19-6:88-99; D.19-10:63-64; nurse Dykes, D.19-6:64-87; D.19-10:13-31; and psychiatrist David Faulk, D.19-10:32-58. Teachers and family members described symptoms of psychosis Mr. Heidler experienced during childhood, his longstanding depression, and recurring suicidality. *See, e.g.*, D. 19-11:2, 10. Psychiatrist Sarah Deland and psychologist John Carton detailed Heidler’s history of depression and psychosis, described his family history of mental illness, and explained how his mental illness, exacerbated by his traumatic upbringing and triggered by the death of his newborn son, led to the tragic events of the crime. D.19-4:88–19-5:40; D.19-6:99–19-7:99.

Pet. App. 450a. The court nonetheless denied relief. Pet. App. 433a-550a. The Georgia Supreme Court summarily denied Mr. Heidler leave to appeal. Pet. App. 551a.

The district court, in turn, denied Mr. Heidler's federal habeas corpus petition and denied a COA on any claim. Pet. App. 115a-183a; 184-199a. The Eleventh Circuit granted a COA to address counsel's effectiveness in the investigation and presentation of mental health and mitigation evidence, and the district court's dismissal on procedural grounds of ineffective-assistance claims regarding a motion to suppress ("suppression IAC claims"). *See* Pet. App. 200a-202a. The court ultimately affirmed. *See* Pet. App. 1a-114a. On several occasions, Mr. Heidler asked the Eleventh Circuit to expand the COA to include three claims he had raised in his initial COA application, to wit (1) trial counsel's conflict of interest at sentencing; (2) the district court's disposition of his claim of incompetence at trial; and (3) the district court's dismissal of numerous other claims for the same reasons it had dismissed the suppression IAC claims for which the Eleventh Circuit had granted a COA. The court rejected each request, including a renewed request to expand the COA on rehearing after the Eleventh Circuit affirmed the district court's denial of the habeas petition. *See* Pet. App. 203a-204a; 205-206a; 207-209a (denying rehearing). The facts surrounding each of these claims are addressed below.

I. Trial counsel's actual conflict of interest at sentencing.

In the sentencing phase of trial, the State presented evidence that shortly before trial, Mr. Heidler escaped from the county jail and was found wandering back in its direction several hours later. The state habeas court observed in its final order that this was "[t]he most important evidence presented to show Petitioner's future dangerousness to the rest of society" Pet. App. 456a. Unknown to Mr. Heidler and presumably the trial court, appointed counsel Kathy Palmer

simultaneously represented another jail inmate, Joel Buttersworth, who had escaped from the same jail several months before, leaving behind pieces of the hacksaw blade he had used and, essentially, a blueprint for how to escape.⁶

Eleven days before trial began, the State noticed its intent to introduce non-statutory aggravation evidence in the sentencing phase, including evidence of Mr. Heidler's escape a month before. D.12-5:27-53. Mr. Heidler had cut through the jail bars, using tools left behind by Mr. Buttersworth in his own escape, and left the county jail; he was found, several hours later, walking down the middle of the highway heading back towards the jail. D.14-9:5, 7, 17-18; D.23-14:30-33. Mr. Heidler had essentially followed in Mr. Buttersworth's footsteps. Kathy Palmer's concurrent representation of Mr. Buttersworth on his own escape charge was an obvious conflict of interest—but she never advised Mr. Heidler or the court of her conflict.

The escape was, predictably, an important theme of the State's sentencing phase presentation. *See* D.14-7:97. The prosecutor announced in his penalty phase opening statement:

[P]erhaps the most compelling piece of evidence we're going to present to you at this part of the case is that *Jerry Heidler will escape because he did*. We're going to show you that this man is looking for a way to get out of incarceration and he remains the same horrible killer that he was on December 4, 1997. *Not only can he escape, he will*.

D.14-7:97 (emphasis added). The prosecutor returned to this theme in his sentencing summation, arguing that Mr. Heidler not only had the wherewithal to have escaped in the past, but that he

⁶ The trial court appointed two attorneys to represent Mr. Heidler, lead counsel Michael Garrett, who was based two hours away in Augusta, Georgia, and second chair Kathy Palmer, the contract public defender in Toombs County, Georgia. As the local attorney, Ms. Palmer was charged with developing mitigation and being "the main person on the ground, where Scott was," while Garrett focused on mental health issues. D.19-3:41, 43-44.

would do so again if he was not executed, and attacking defense counsel's cross examination of Deputy White, one of the jailors who testified about the escape:

Mr. Garrett made light of this a little bit with Mr. White. He called it, what other mischief did he get in? James Snell, who has to watch Jerry Scott Heidler, did not call it mischief. Maybe it is mischievous to someone who stands in the courtroom with him for five or six days, but it's not mischief to a man who watches him for 60 years. *There's nothing funny about the fact that a man has constantly taken apart the prison or jail he's constituted in. There's nothing funny about the fact that this man has escaped and has taken four lives. That's not mischief; that is evil. That's not anger or rage; that is evil.*

D.14-11:47 (emphasis added).

The state habeas court recognized that the prosecution's escape evidence was key to the State's case for death, observing in its final order:

The most important evidence presented to show Petitioner's future dangerousness to the rest of society was Petitioner's escape from jail. Petitioner planned and successfully executed a fairly complex plan of escape. First, Petitioner acquired a piece of hacksaw and then began cutting through a bar in his cell. . . . It took Petitioner several days to cut through the bar and, in order to cover up his criminal behavior, Petitioner made a paste out of toothpaste and ash and put it over the cut in the bar. Petitioner then timed his exit to coincide with the guards' rotation and slipped out through the bars in his cell, cut through the perimeter fence and fled on foot. *Id.*

Pet. App. 456a.

It of course would have benefitted Mr. Heidler to demonstrate that Ms. Palmer's other client Mr. Buttersworth had essentially left a blueprint, as well as materials, for the escape, and thus Mr. Heidler had not executed "a fairly complex plan of escape" on his own, but was merely following someone else's lead. *See* D.127:155-65. But due to her conflict of interest, Ms. Palmer failed to investigate and present evidence that would have mitigated the escape, showing that Mr. Heidler had not developed the plan but instead had copied her other client. *See, e.g.,* D.31-2:14-15; D.68:17-20, and accompanying exhibits. While Ms. Palmer testified in state habeas

proceedings, that the defense wanted to minimize the escape as much as possible, she could not reasonably ignore it. Counsel were on notice that evidence of the escape was coming in, and they had an affirmative duty to address it effectively. *See Rompilla v. Beard*, 545 U.S. 374, 385-386 (2005).

Ms. Palmer's conflict did not become apparent until she was testifying in state habeas proceedings, when the following exchange took place:

Q. And are you familiar with how Scott escaped?

A. Somehow he had gotten a little blade. I think the guy who had escaped before, who was also my client, by the way--

Q. He probably was.

A. He, that guy had left some blades that were hidden, I think, maybe two of them that were not found when he escaped, and Scott had those blades and then he used the blades to saw.

D.19-3:81. Although Mr. Heidler had alleged in state habeas proceedings that his attorneys were ineffective in addressing the escape charge at sentencing, state habeas counsel failed to recognize the conflict of interest revealed by Ms. Palmer's state habeas testimony. Reasonably effective postconviction counsel, however, would have raised the conflict, as an actual conflict of interest requires reversal without the proof of prejudice required under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Cuyler v. Sullivan*, 446 U.S. 335, 345-350 (1980); *Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (observing that *Sullivan* "require[es] a showing of defective performance, but *not* . . . in addition (as *Strickland* does in other ineffectiveness-of-counsel cases), a showing of probable effect upon the outcome of trial").

Mr. Heidler raised the conflict claim for the first time in federal district court, seeking an evidentiary hearing on the claim, amending the federal habeas petition to include the claim, and

arguing that under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), state habeas counsel’s ineffective assistance excused the default of the claim. *See* D.68 (motion for evidentiary hearing); D.70 (amended petition). The district court assumed that *Martinez* and *Trevino* applied,⁷ but denied an evidentiary hearing and ultimately relief on the ground that trial counsel’s simultaneous representation of Mr. Heidler and Mr. Buttersworth was not prejudicial. Pet. App. 229a-338a; Pet. App. 140a. Although recognizing that *Sullivan* applied to an attorney’s simultaneous representation of defendants with conflicting interests, the district court’s analysis arguably misapplied that case by ratifying conflicted counsel’s decisions on the ground they were “reasonable,” instead of determining whether there were plausible alternative strategies that unconflicted counsel could have pursued. *See* Pet. App. 233a-238a.

Although reasonable jurists could dispute the district court’s application of *Sullivan* and the *res nova* issue of whether *Martinez* and *Trevino* apply to federal habeas cases arising from Georgia state courts, the Eleventh Circuit denied a COA to address this claim and rejected Mr. Heidler’s efforts to expand the COA to include it. *See* Pet. App. 200a-202a; 203a-204 a; 207a-209a; 316a-317a; 372a-377a; 422a-432a.

II. Mr. Heidler’s Incompetence at Trial.

Since childhood, Jerry Scott Heidler has suffered from debilitating mental illness characterized by severe psychotic and depressive symptoms, including auditory and visual

⁷ The application of those cases to federal habeas cases arising from Georgia state courts remains an open question in the Eleventh Circuit. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014). A COA grant on the conflict-of-interest claim would necessarily include the applicability of *Martinez* and *Trevino*.

hallucinations and repeated suicide attempts leading up to trial.⁸ As the state court found, after considering the extensive evidence that Mr. Heidler presented in habeas proceedings, “for the majority of [Mr. Heidler’s] life, [he] has been significantly impaired by his mental illness and . . . it is ‘highly unlikely’ he will ever be free of the substantial impairments.” Pet. App. 450a.

Since at least his pre-teen years, Mr. Heidler has been tormented by debilitating psychosis and severe depression. At age 11, Mr. Heidler spent six weeks in an inpatient psychiatric hospital after attempting to hang himself and standing in the middle of the road in the path of oncoming logging trucks, which had to jackknife to avoid him. D.*** He told his psychiatrist that he was hearing voices telling him to kill himself. D.21-10:8, 40. He was discharged from the hospital on “AWOL” status after six weeks only because his mother refused to return him for treatment following a two-day weekend pass. D.21-11:9-10; D. 15-7:49. At age 12, a pediatrician referred him for involuntary psychiatric hospitalization, after observing that he was actively hallucinating in front of her. D.28-15:53. Instead, his mother again took him home and thereafter did not seek treatment for him, a pattern of evading treatment that continued throughout Mr. Heidler’s childhood. *See* D.20-7:46, 50, 54, 56, 62, 64, D.15-7:49, D.20-9:52-53, 61. As a result, he was never able to consistently attend mental health appointments.

With limited access to treatment, Mr. Heidler’s depression and psychosis worsened during adolescence. His teenage years were characterized by suicide attempts, involuntary psychiatric hospitalization, and bizarre, alarming behavior. *See, e.g.*, D.21-11:51 (involuntary hospitalization for mental illness upon a finding of imminent risk to self, age 13); D.21-14:20-23, 65-70 (repetitive

⁸ Mr. Heidler attempted suicide by hanging on August 6, 1999. D.20-20:28-31. Trial began with jury selection on August 23, 1999. D.13-5.

attempts at self-harm resulting in crisis intervention and the use of restraints, age 14); D.21-9:12-15, 21-14:15 (suicidal, curled in a fetal position sucking a pacifier, age 17).

On December 4, 1997, at age 20, Mr. Heidler was arrested for killing four members of the Daniels family. At the time, he was in the midst of a mental health crisis, triggered by the death of his stillborn son days before. D.23-4:34. Witnesses reported that, in the hours leading up to the crimes, Mr. Heidler was “torn up” and “distraught,” having just attended his son’s funeral. D.19-4:105. He could not recall the events leading to the crimes, but remembered waking up on his son’s grave after they occurred. D.21-17:30.

Following arrest, Mr. Heidler’s psychosis and depression intensified. In January 1998, while awaiting trial in the jail, he attempted to hang himself twice, D.20-19:51-57, and later that spring twice attempted to overdose on medication. D.20-19:59-61. He wrote frenzied letters to trial counsel, begging for help and explaining that he was haunted by the voice of his dead baby crying, that he was seeing things, that he was not eating or sleeping, and that he did not want to live because he was so depressed. D.19-13:6-8, 10-11, 13-14. George Dykes, the jail nurse who referred Mr. Heidler for psychiatric care, recalled in state habeas proceedings that Mr. Heidler would burn himself with cigarettes and tear pieces of flesh off his face just to stay awake in order to avoid terrifying nightmares. D.19-6:69-73. Mr. Dykes described Mr. Heidler as “one of the most seriously...mentally ill inmates” he had ever seen. D.19-6:79.

In late June 1998, jail staff took Mr. Heidler for his first mental health appointment. D.21-17:30. By September, Dr. David Faulk, a psychiatrist with a community mental health center that contracted with the jail, diagnosed Mr. Heidler with psychosis NOS (not otherwise specified) and prescribed Haldol, a powerful anti-psychotic. D.19-10:33; D.21-17:33. For the next eight months,

jail staff administered Haldol to Mr. Heidler, and he took the drug with some consistency. D.20-20:64-77; D.20-21:1-5. Haldol helped mitigate Mr. Heidler's worst symptoms, as evidenced by the fact that he did not make a single suicide attempt during this period.

Although counsel recognized early on that Mr. Heidler's mental illness would be the centerpiece of the defense, *see, e.g.*, D.19-3:36; D.22-16:48, and despite evidence that Mr. Heidler had been descending deeper into psychosis as he awaited trial, counsel did not raise the issue of Mr. Heidler's competency. Instead, the trial court, knowing that counsel planned some sort of mental health defense, *sua sponte* ordered three court-appointed experts, Dr. Gordon Ifill, Dr. Nic D'Alessandro, and Dr. Everett Kuglar, to evaluate Mr. Heidler. D.23-12:26-36. These assessments were made without the benefit of critical information bearing on Mr. Heidler's condition. D.23-4:58 (Ifill deposition in state habeas proceedings, noting that missing information about psychotic episodes would have been "very material" to his evaluation); D.23-12:39 (Kuglar affidavit, acknowledging that he was missing "vital" information). None the of doctors were aware that Mr. Heidler had been diagnosed with psychosis while in jail by a treating psychiatrist. The evaluations, moreover, occurred during a period—between February and May of 1999—when Mr. Heidler's most severe symptoms were mitigated by anti-psychotic medication. Unsurprisingly, given the nature of the evaluations, these experts found Mr. Heidler competent.

On May 25, 1999, the trial court held a hearing on Mr. Heidler's competence and took testimony from its three experts. D.13-3. This testimony encompassed no more than twelve pages of transcript. Mr. Heidler's competence was not subjected to any adversarial process. Instead, counsel asked questions of only one of the experts, Dr. Kuglar, on an issue that had nothing to do with competence—whether Dr. Kuglar was familiar with the statutory requirement for a finding

of guilty but mentally ill and whether Mr. Heidler satisfied that criteria. D.13-3:8. The trial court subsequently found Mr. Heidler competent, expressly stating that this decision was based on the conclusions of its court-appointed experts. D.12-7:59-60.

Between May 25 and August 23, when jury selection began, Mr. Heidler's mental health took a rapid downturn. In early June, Mr. Heidler stopped taking Haldol. D.20-21:6-11. Untreated, his mental health sharply declined. In early July, Mr. Heidler briefly escaped from jail and was found less than 12 hours later, walking back in its direction on a public highway, wearing his jail clothing. D.23-14:30-33. Later that month, in immense psychic pain, Mr. Heidler wrote his trial counsel a barely coherent letter begging for the death penalty:

...you are the onle one can stop it for hap me get the deft penalty it wot I wat...I must be stop one way or the uther...im a veree evl pasn...

D.19-13:22-23. On August 6, 1999, Mr. Heidler attempted to hang himself—the first time he had attempted suicide since he had begun receiving treatment for psychosis. D.20-20:28-31. He spent many of his final days before trial on suicide watch, receiving 15-minute checks to ensure that he did not continue to hurt himself. D.20-20:32-37.

Moreover, due to the severity of Mr. Heidler's psychosis, he was unable to communicate his lawyers. D.19-3:36.⁹ At the state habeas hearing, lead counsel Michael Garrett testified that, "I couldn't communicate with [my client] at all; nobody [could]." D.19-8:62. Second-chair Kathy Palmer testified that Mr. Heidler was withdrawn, non-responsive, disengaged, unable to maintain eye contact, and "not very communicative." D.19-3:32-33, 45.

⁹ This is an impairment that the Court has repeatedly recognized as the cornerstone of any competency inquiry. *See, e.g., Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (*citing Drope v. Missouri*, 420 U.S. 162, 171-172 (1975)).

Despite the alarming decline in Mr. Heidler’s mental condition, trial counsel did not raise the issue of Mr. Heidler’s competency or present this evidence to the trial court, which never reconsidered its prior finding. Mr. Heidler was thus brought to trial despite a substantial probability that he was not competent.

In state habeas proceedings, Mr. Heidler presented extensive evidence of his longstanding and severe mental illness in support of a wide-ranging challenge to trial counsel’s representation. State habeas counsel, however, did not raise a claim challenging Mr. Heidler’s competence at the time of trial, despite the fact that the new evidence cast substantial doubt on it. On the basis of the compelling evidence of Mr. Heidler’s substantial psychiatric impairments, the state habeas court found that Mr. Heidler had suffered from severe mental illness since childhood, but nonetheless denied relief. Pet. App. 433a-550a.

In federal district court, pursuant to circuit law recognizing that a substantive competency claim may not be procedurally defaulted, Mr. Heidler alleged that he was tried while incompetent and, in briefing, relied on the extensive evidence of his incompetence that had been introduced in state habeas proceedings.¹⁰ Both Respondent and the district court recognized that Mr. Heidler’s substantive incompetency claim was properly before the court for merits review, *see* Pet. App. 163a (district courts order), D.128:36 (Respondent’s Answer to Third Amended Petition), but, the district court refused to consider any of the evidence Mr. Heidler had introduced in state habeas proceedings, including evidence of his marked deterioration leading up to the trial, and instead

¹⁰ In the Eleventh Circuit, substantive competency claims cannot be defaulted, and habeas petitioners are entitled to an evidentiary hearing upon “clear and convincing evidence” that creates a “real, substantial, and legitimate doubt” as to competence to stand trial. *See Lawrence v. Sec’y Fla. Dep’t of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012).

assessed the claim solely on the basis of the months-old, limited, incomplete, and inaccurate evidence before the trial court when it found Mr. Heidler. Pet. App.168a.

The Eleventh Circuit denied a COA on this claim and denied Mr. Heidler's subsequent motions to expand the COA to include this claim. *See* Pet. App. 200a-202a; 203a-204a; 207a-209a; 305a-316a; 353a-365a; 422a-432a.

III. The district court's *sua sponte* dismissal of numerous claims on procedural grounds.

Mr. Heidler filed his federal habeas petition on October 7, 2011, and amended it three times. *See* D.1 – D.1-1; D.45; D.70; D.124. Respondent filed answers to each petition, identifying certain claims as unexhausted, non-cognizable, or procedurally defaulted (none of which are at issue here). *See* D.10; D.46; D.74; D.128. Respondent's answers did not challenge any allegations as insufficiently pled. Significantly, Respondent's responded to Mr. Heidler's third amended petition more than three months after Mr. Heidler had filed his merits brief and more than a month after he filed a corrected merits brief. *See* D.118; D.127; D.128.

In his final answer, Respondent conceded that, apart from Mr. Heidler's allegation that trial counsel had a conflict of interest at sentencing, the entirety of Claim 2, addressing counsel's ineffectiveness, as well as numerous other claims, were properly before the district court for merits review. D.128:18-36. In his merits brief, however, Respondent argued that many of these same claims were unexhausted—despite his repeated concessions that the claims were exhausted and properly before the Court. *See* D.129:152, 155-56, 172, 175-77, 179, 181-83, 187-88, 202. Respondent never raised the issue of insufficient pleading in either his answers nor his brief on the merits. Mr. Heidler's reply brief pointed out that Respondent had waived his procedural arguments many times in his responses to the original and amended petitions, and asked that the district court

permit him to fully brief Respondent’s newly raised default argument if the court disagreed that Respondent had waived exhaustion. D.130:6-9.

Roughly six months later, the district court issued its order denying relief on Mr. Heidler’s claims—eight years after Mr. Heidler had filed his initial federal habeas petition. Pet. App. 115a-183a. In its order, the district court dismissed numerous colorable claims as insufficiently pled and/or unexhausted. The dismissed claims included numerous claims Respondent had conceded in briefing were properly before the court. The district court dismissed many claims *sua sponte*, without notice or an opportunity to cure many of the purported defects and despite the State’s waiver of exhaustion. Mr. Heidler sought reconsideration of the court’s dismissal and/or an opportunity to amend pleadings the court had found inadequately pled in a motion brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, but the district court denied the motion and ratified its decision not to grant a COA on any issue. Pet. App. 184a-199a.

The Eleventh Circuit granted a COA to address the district court’s ruling Mr. Heidler’s claim that counsel provided ineffective representation in the investigation and presentation of mental health and mitigation evidence and the district court’s dismissal of only a small portion of the claims the court threw out: “Whether the district court erred in concluding that Mr. Heidler did not sufficiently plead; and did not exhaust, his claim that trial counsel was ineffective by failing to adequately present information and evidence in pretrial motions relating to Mr. Heidler’s waiver of constitutional rights during interrogation by the police.” Pet. App. 200a-202a.¹¹ Thereafter, the Eleventh Circuit refused to expand the COA to include the many other claims the district court

¹¹ The suppression IAC issue was articulated in two IAC subclaims in the petition. *See* D.124:19-20.

had dismissed on the same or similar grounds. *See also* Pet. App. 200a-209a; 319a-339a; 366a-371a; 381a-396a; 422a-432a. It did so despite the fact that its grant of a COA to address the dismissal of the suppression IAC claims indicated the court's recognition that reasonable jurists could debate or disagree with the district court's procedural ruling generally. *See Slack*, 529 U.S. at 483-84.

Although the Eleventh Circuit had granted a COA to address the district court's dismissal of the suppression IAC claims, it decided not to, instead deciding that the claims failed on the merits. *See* Pet. App. 110a-112a. In his petition for panel and *en banc* rehearing, Mr. Heidler challenged the panel's refusal to expand the COA to include the district court's dismissal of the other claims (as well as its failure to grant a COA on the other two claims discussed herein). Pet. App. 422a-423a. Mr. Heidler also requested a stay of proceedings pending the Eleventh Circuit's resolution of a similar claim in a case that had been briefed and argued, *Williams v. Warden, GDCP*, No. 22-10249 (11th Cir.).¹² The court instead denied rehearing on October 10, 2023. Pet. App. 207a-209a.

¹² Mr. Heidler is aware of only two other Georgia capital cases where a federal district court has *sua sponte* thrown out numerous claims near the end of the case, without providing notice or an opportunity to address or cure the purported defects. In one, *Williams*, the court granted a COA to address whether the district court had erred in dismissing numerous claims as insufficiently pled without providing notice or an opportunity to amend and conducted oral argument on July 26, 2023. *See* Docket in *Williams v. Warden, GDCP*, No. 22-10249 (11th Cir.). A decision in the case remains pending. In *O'Kelley v. Warden, Georgia Diagnostic Prison*, No. 23-124947 (11th Cir.), the court stayed appellate proceedings pending the court's decision in *Williams*. *See* Order dated Oct. 2, 2023.

This Court granted Mr. Heidler a 30-day extension of time in which to file his Petition for Writ of Certiorari, until February 7, 2023. *See* Order dated Dec. 27, 2023 in *Heidler v. Emmons*, No. 23A585 (U.S.). This timely petition for certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. This Court Should Grant Certiorari to Review the Eleventh Circuit’s Excessively Demanding Standards for Issuing a Certificate of Appealability Under 28 U.S.C. § 2253(c).

A circuit court has jurisdiction to review a district court’s denial of habeas relief only if the district court or a circuit court judge issues a certificate of appealability to review one or more claims. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1). “A COA *should issue* if the applicant has ‘made a substantial showing of the denial of a constitutional right,’” which this Court has explained, “require[s] that the ‘petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.’” *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting 28 U.S.C. § 2253(c)(2) and *Slack*, 529 U.S. at 484) (emphasis added); *see also Miller-El*, 537 U.S. at 336 (“Under the controlling standard, a petitioner must ‘show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further’”). “At the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El*, 537 U.S. at 327). “This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Id.* (quoting *Miller-El*, 537 U.S. at 326).

“In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of [appealability]. . . .” *Barefoot*, 463 U.S. at 893.¹³

This process is intended to “screen[] out issues unworthy of judicial time and attention and ensure[] that frivolous claims are not assigned to merits panels.” *Gonzalez*, 565 U.S. at 145. It is not intended to bar circuit consideration of issues that are not squarely foreclosed under the law or facts. *See, e.g., Welch v. United States*, 578 U.S. 120, 127 (2016) (reversing Eleventh Circuit’s denial of a COA and noting that the lower court’s ruling “determined not only that Welch had failed to show any entitlement to relief but also that reasonable jurists would consider that conclusion to be beyond all debate”); *see also McGee v. McFadden*, 139 S. Ct. 2608, 2611 (2019) (Sotomayor, J., dissenting) (noting that the COA “triage process focuses judicial resources on processing the claims most likely to be meritorious,” but warning that if courts fail to “take care to carry out the limited COA review with the requisite open mind, the process breaks down”).

That breakdown is apparent in the Eleventh Circuit. This case is hardly the first case to argue that the Eleventh Circuit has employed an unduly onerous standard for deciding whether to grant a COA. This Court has granted certiorari to correct the Eleventh Circuit’s erroneous denial of a COA in at least two cases. *See Tharpe v. Sellers*, 583 U.S. 33, 34-35 (2017) (“At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court’s factual determination was wrong. The Eleventh Circuit erred when it

¹³ Although *Barefoot* addressed the pre-AEDPA requirement that a habeas petition obtain a “certificate of probable cause” to appeal, this Court has recognized that, apart from “substituting the word ‘constitutional’ for the word ‘federal,’ § 2253 is a codification of the CPC standard announced in *Barefoot*” and that the Court accordingly “give[s] the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word ‘constitutional.’” *Slack*, 529 U.S. at 483 (citing *Barefoot*, 463 U.S. at 894).

concluded otherwise.”); *Welch*, 578 U.S. at 135 (holding that “reasonable jurists at least could debate whether Welch is entitled to relief” and remanding for further consideration).¹⁴

This Court has as well seen a steady stream of cases challenging the Eleventh Circuit’s COA practices. *See, e.g., Allen v. Dixon*, No. 23-5620 (U.S.) (asking whether the Eleventh Circuit “flouted this Court’s relevant decisions and precedents” in denying a COA despite dissenting opinions from the relevant state court decision), *cert. denied*, 144 S. Ct. 434 (November 20, 2023); *Arrowood v. Fla. Dep’t of Corr.*, No. 23-505 (U.S.) (asking whether the Eleventh Circuit’s COA practice violates fundamental due process), *cert. denied*, 217 L. Ed. 2d 302 (January 8, 2024); *Tomlin v. Patterson*, No. 19-7127 (U.S.) (asking “whether the Eleventh Circuit impose[d] an improper, too demanding, and unduly burdensome COA standard” in denying COA to address an undecided issue in the circuit regarding which the circuits were split and over the dissent of one circuit judge), *cert. denied*, 140 S. Ct. 2829 (June 1, 2020); *Cromartie v. Sellers*, No. 18-5796 (U.S.) (asking whether a COA should issue where one judge has voted in favor of review); *Hutchinson v. Sec’y, Fla. Dep’t of Corr.*, No. 21-5778 (asking whether a circuit court may forbid

¹⁴ The Court has also granted a “GVR” (granting certiorari, vacating the judgment, and remanding the case for further proceedings) in light of intervening events in several cases where the Eleventh Circuit had denied a COA, but those summary rulings do not address the propriety of the Eleventh Circuit’s COA determination. *See, e.g., Watkins v. United States*, No. 18-15261, 2019 U.S. App. LEXIS 9168 (denying COA), *vacated by Watkins v. United States*, 140 S. Ct. 432 (2019) (vacating in light of intervening decision); *Franklin v. United States*, No. 17-14495, 2018 U.S. App. LEXIS 37313 (11th Cir. 2018), *vacated by Franklin v. United States*, 139 S. Ct. 1254 (2019) (vacating in light of Solicitor General’s position); *Enix v. United States*, No. 17-11716, 2017 U.S. App. LEXIS 21700 (2017), *vacated by Enix v. United States*, 138 S. Ct. 1983 (2018) (vacating in light of intervening decision); *see also Santos v. United States*, No. 17-14291, 2018 U.S. App. LEXIS 32462 (11th Cir. Nov. 15, 2018), *vacated by Santos v. United States*, 139 S. Ct. 1714 (2019) (remanding for further consideration in light of government’s changed position). In *Santos*, the habeas petitioner challenged the Eleventh Circuit’s COA standards in his petition for writ of certiorari. *See* Question Presented 4 in *Santos*, No. 18-7096.

the granting of a COA based on circuit precedent, irrespective of a circuit split on the issue), *cert. denied*, 142 S. Ct. 787 (January 10, 2022); *Melton v. Sec’y, Fla. Dep’t of Corr.*, No. 15-5522 (U.S.) (asking whether a COA should issue “when one of the judges who is authorized to consider its application has determined that issues are debatable amongst jurists of reason”), *cert. denied*, 577 U.S. 926 (October 13, 2015); *Esposito v. Ford*, No. 20-7185 (U.S.) (challenging Eleventh Circuit’s practice of granting a COA on limited portions of constitutional claims that must be assessed cumulatively, such as ineffective-assistance-of-counsel claims), *cert. denied*, 141 S. Ct. 2727 (June 7, 2021); *Wilson v. Sellers*, No. 16-6855 (U.S.) (same).

This case presents an excellent vehicle for addressing the Eleventh Circuit’s excessively demanding standard for granting COAs. The court below denied a COA to address claims that clearly satisfied this Court’s COA standard because “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack*, 529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. 880, 893 and n.4). Specifically, the Eleventh Circuit denied COA to address claims where:

- 1) The district court applied the wrong standard in rejecting a conflict-of-interest claim and, in doing so, bypassed an important recurring issue the Eleventh Circuit has not yet decided;
- 2) The district court rejected the claim that Mr. Heidler was incompetent to stand trial without considering any of the extensive evidence presented in state habeas proceedings, including his diagnosis of psychosis by the jail psychiatrist and a suicide attempt shortly before trial—evidence demonstrating his lack of competence—on the ground that this evidence had not been before the trial court; and
- 3) The Eleventh Circuit, although it had implicitly found that the district court was actually or debatably wrong in *sua sponte* dismissing numerous claims as insufficiently pled, unexhausted, or otherwise procedurally defaulted, as

the circuit court granted a COA to address the district court's dismissal of only the suppression IAC claims and refused to expand the COA to include numerous other colorable claims the district court had dismissed on the same grounds—even after the panel, in its opinion affirming the district court, ultimately did not reach the district court's procedural rulings and instead held that the two dismissed claims for which it had granted COA lacked merit.

These issues are all sufficiently complicated and consequential to warrant a COA.¹⁵ Yet, despite repeated attempts by Mr. Heidler seeking expansion of the limited COA the Eleventh Circuit had granted, the court refused to address any of them.

A. COA Should Have Issued to Address the Conflict of Interest Claim.

Trial counsel did not disclose prior to her testimony in state habeas proceedings that she also represented the prisoner Joel Buttersworth, who had escaped from the county jail roughly eight months before Mr. Heidler escaped using tools Mr. Buttersworth had left behind and following the blueprint Mr. Buttersworth's escape had provided. D.23-14:30-33. In state habeas proceedings, counsel testified that their strategy for dealing with the escape was to downplay it, D.19-4:35, a strategy that left Mr. Heidler defenseless against the prosecutor's predictable use of the escape to stress that Mr. Heidler would be a danger to others if he was allowed to live.

Although the district court acknowledged that *Cuyler v. Sullivan*, 446 U.S. 335 (1980), governs the analysis of conflicts arising from counsel's concurrent representation of defendants with divergent interests, it clearly misapplied *Sullivan* and case law applying it by assessing the

¹⁵ See, e.g., Order, dated Dec. 8, 2016, *Stuckey v. United States*, No. 16-CV-1787 (S.D.N.Y) (granting COA to address novel and complex issues); *United States v. Kinman*, No. 16cv1360, 2016 U.S. Dist. LEXIS 145691, *30 (S.D. Cal. Oct. 20, 2016) (granting COA where “the motion presents complex issues”).

reasonableness of conflicted counsel’s decisionmaking—an aspect of *Strickland*’s more demanding standard for assessing attorney competence. But, under *Sullivan*, a defendant may prove the denial of his Sixth Amendment right to counsel by showing “that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* at 348. “Adverse effect” requires proof that counsel failed to pursue an available “plausible alternative defense strategy or tactic” that was “reasonable under the facts” and “possessed sufficient substance to be a viable alternative.” *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (citations omitted). A petitioner also “must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” *United States v. Novaton*, 271 F.3d 968, 1010 (11th Cir. 2001); *see also Boykin v. Webb*, 541 F.3d 638, 644 (6th Cir. 2008) (“Causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client’s interests.”).

Reasonable jurists could disagree with the district court’s rejection of the conflict claim on the ground that it would not have been a reasonable alternative strategy to disprove affirmatively Mr. Heidler’s ability to mastermind an escape because such evidence would have conflicted with the defense strategy of “minimizing” the escape.¹⁶ “Counsel’s obligation to rebut aggravating

¹⁶ “Plausible does not mean winning, as the Supreme Court has rejected the application of harmless error in the context of an actual conflict.” *United States v. Grayson*, 950 F.3d 386, 399 (7th Cir. 2020) (citation omitted).

evidence extend[s] beyond arguing it ought to be kept out”¹⁷—an argument Mr. Heidler’s defense counsel never even made.

Counsel knew the escape evidence was coming in and, given its importance to the State’s aggravation case, reasonable jurists could debate the district court’s determination that no actual conflict of interest existed because counsel reasonably chose what was essentially a head-in-the-sand approach to defending against it. Moreover, reasonable jurists could debate the district court’s conclusion that it would have been unreasonable to present evidence showing “that [the] circumstances of the [escape] were less damning than the prosecutor’s characterization of [it] would suggest.” *Rompilla*, 545 U.S. at 386 n.5.¹⁸ Particularly in light of the highly damaging nature of the escape evidence and the district court’s erroneous application of *Sullivan*, reasonable jurists could debate the district court’s rejection of this claim and the Eleventh Circuit should have granted a COA to address it.

Had the Eleventh Circuit granted a COA on the conflict issue, moreover, it would have been presented the opportunity to decide an important issue that is *res nova* in the circuit—whether *Martinez* and *Trevino* apply to federal habeas cases arising out of Georgia courts. The court pretermitted that issue in *Hittson*, 759 F.3d at 1262, and has not had occasion to revisit it. Reasonable jurists could certainly debate the issue. In Georgia, ineffective-assistance-of-trial-counsel claims cannot be raised on direct appeal if trial counsel continues their representation on

¹⁷ *Rompilla*, 545 U.S. at 386 n.5.

¹⁸ Reasonable jurists could also debate the district court’s alternate conclusion that Mr. Heidler could not satisfy *Strickland*’s prejudice prong because reasonable counsel could opt to “minimize” evidence that was certain to be admitted and highlighted by the prosecutor instead of investigating and presenting evidence demonstrating why that evidence was “less damning” than the prosecutor’s version of it. *See* Pet. App. 236a-238a.

appeal, as happened in this case. *See, e.g., Hood v. State*, 651 S.E.2d 88, 89 (Ga. 2007) (“Because a lawyer may not ethically present a claim that he/she provided a client with ineffective assistance of counsel . . . , a claim of ineffective assistance of trial counsel *cannot be pursued* unless trial counsel is no longer representing the convicted defendant.”) (emphasis added). At the same time, Georgia’s statutory law provides that appointed trial counsel should remain on the case to handle the appeal, as happened in this case. *See* O.C.G.A. § 17-12-12(d) (providing that, in a capital case, counsel’s appointment “shall include all proceedings in the trial court *and any appeals* to the Supreme Court of Georgia) (emphasis added); O.C.G.A. § 17-12-23(a) (providing *inter alia* that the circuit public defender shall provide representation in criminal cases prosecuted in the superior court and any direct appeal from that proceeding). Thus, Georgia law, “by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.” *Trevino*, 569 U.S. at 429. This issue too deserved the Eleventh Circuit’s consideration on appeal. *See, e.g., Salcedo v. United States*, No. 10-00055, 2016 U.S. Dist. LEXIS 189607 (D. Haw. May 5, 2016) (granting COA for claim raising “an interpretation of a legal issue that is undecided in the Ninth Circuit”); *Jahagirdar v. United States*, 653 F. Supp. 2d 125, 129 (D. Mass. 2009) (granting COA where claim “present[s] a novel issue, undecided by any court”).

B. Reasonable Jurists Could Disagree with the District Court’s Unduly Circumscribed Review of Petitioner’s Substantive Incompetency Claim.

This Court has “repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process,” *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992)), and that “court[s] must always be alert

to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial,” *Drope v. Missouri*, 420 U.S. 162, 181 (1975). In the instant case, relying on expert opinions that were made without full and accurate information regarding Mr. Heidler’s long-term, serious mental illness and that were, moreover, outdated by the time of trial, given Mr. Heidler’s descent into an acutely psychotic, suicidal state following the trial court’s competency hearing, there is a substantial probability that Mr. Heidler was tried, convicted, and sentenced to death while incompetent.

Although not raised in state habeas proceedings, Mr. Heidler alleged that he was incompetent at trial in his third amended habeas petition, as Eleventh Circuit precedent permitted him to do, D.124:93, and the district court (and Respondent) recognized that the claim was properly before the court for merits review, D.129:205-06 (Respondent’s merits brief, conceding that, “a substantive claim of incompetency when tried cannot be defaulted, thus, this claim is before the Court on *de novo* review”); Pet. App. 163a (district court merits denial). The district court, however, in ruling on the claim, concluded that it could not consider any of the abundant evidence documenting Mr. Heidler’s serious, practically lifelong mental illness or his decompensation in the months immediately leading up to the trial, and limited its review of the claim to the incomplete, inaccurate, and outdated evidence the trial court had considered almost half a year before trial began. *See* Pet. App. 168a (“Mr. Heidler looks to evidence developed during the state habeas evidentiary hearing and the state habeas case; however, this evidence was not before the trial court when it made its decision on this claim. Accordingly, this Court cannot consider it.”) (citing *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)).

1. It Was At Least Debatable Whether §2254(d) Applied to Mr. Heidler’s Substantive Incompetency Claim.

Whether a defendant was tried while incompetent is a question of fact. *See Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (citing *Maggio v. Fulford*, 462 U.S. 111, 117 (1983)). As Mr. Heidler argued in the court below, federal courts have accordingly struggled to identify the appropriate standard of review applicable to a substantive incompetency claim that was not adjudicated on the merits in state post-conviction proceedings. Multiple courts confronting this question have concluded that these cases fall outside the scope of §2254(d) and should be analyzed under § 2254(e)(1). *See, e.g., Grant v. Royal*, 886 F.3d 874, 912 (2018) (citing *Demosthenes*, 495 U.S. 731) (assuming, but not deciding, that only §2254(e), and not § 2254(d), would apply to a trial-court competency finding, based on review of decisions by other federal courts); *Austin v. Davis*, 876 F.3d 757, 778 (5th Cir. 2017) (applying only §2254(e)’s “presumption of correctness” standard to trial court competency determination, where issue was not adjudicated on the merits in subsequent state proceedings); *Buchanan v. Lamarque*, 121 Fed. Appx. 303, 313 (10th Cir. 2005) (finding § 2254(d) did not apply because petitioner “did not assert a substantive due process claim in the state-court proceedings” and applying § 2254(e) to trial court’s competency determination); *see also Best v. Griffin*, 695 Fed. Appx. 18, 19 (2^d Cir. 2017) (concluding that § 2254(e), rather than § 2254(d), would most appropriately govern review of a trial court competency finding, “an essentially factual determination”); *Nara v. Frank*, 488 F.3d 187, 200-201 (3^d Cir. 2007) (only §

2254(e) would apply if there were no adjudication on the merits of a substantive incompetency claim in post-conviction proceedings).¹⁹

It is unsurprising that courts have been reluctant to apply § 2254(d) to constrain evidentiary review to the trial-court record in such cases, given that “post-conviction evidence can often be relevant to establishing substantive incompetency.” *Grant*, 886 F.3d at 893; *Williams v. Woodford*, 384 F.3d 567, 608 (9th Cir. 2004) (“In deciding a claim of actual incompetence, we may consider facts and evidence that were not available to the state trial court before and during trial.”). Indeed, Respondent conceded in merits briefing that the claim was before the court for *de novo* review. D.129:205-206. That numerous federal courts have considered the question and adopted a different approach underscores that the issue is debatable and deserved appellate review.²⁰ The Eleventh Circuit was wrong to deny that review.

¹⁹ This Court has yet to decide the interplay between § 2254(d)(2) and § 2254(e)(1). *See, e.g., Brumfield v. Cain*, 576 U.S. 305, 322 (2015).

²⁰ Even if § 2254(d)(2) applied, moreover, it is debatable that *Pinholster* precluded consideration of evidence presented in state court. In that case, this Court held that the Ninth Circuit should not have considered new evidence presented in federal district court when determining whether the state court unreasonably applied *Strickland* under 28 U.S.C. § 2254(d). *See Pinholster*, 563 U.S. at 182 (“Limiting § 2254(d)(1) review to the state-court record is consistent with our precedents interpreting that statutory provision.”). Whether *Pinholster*’s reasoning applies to this different context, involving evidence that was presented in state court and involving factual questions, rather than the state court’s reasonable application of governing Supreme Court law are questions that deserve encouragement to proceed further. *See, e.g., Sanchez v. Roden*, 753 F.3d 279, 307 (1st Cir. 2014) (“*Pinholster* . . . applies only to situations in which the petitioner claims additional evidence beyond the state court record is necessary”); *Higgins v. Cain*, 720 F.3d 255, 262-263 (5th Cir. 2013) (“*Pinholster* itself preclude[s] review only of evidence that was never revealed in *any* state court proceeding”); *Jamerson v. Runnels*, 713 F.3d 1218, 1226-1227 (9th Cir. 2013) (*Pinholster* bars “evidence adduced for the first time at a hearing in federal district court”, and nothing in the decision bars consideration of evidence in the trial court record that state appellate court did not consider); *Hanna v. Ishee*, 694 F.3d 596, 606 (6th Cir. 2012) (noting that *Pinholster*’s evidentiary limitation “may not always apply”).

2. It Was at Least Debatable that Mr. Heidler’s Substantive Incompetency Claim was Fundamentally Different from the Competency Issue Before the Trial Court.

A defendant’s mental status may not be stable and “[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to the circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.” *Drope*, 410 U.S. at 181. Here, the state habeas record reflects that Mr. Heidler’s mental state took a dramatic turn for the worse subsequent to the competency hearing conducted almost half a year before trial. The trial court was never informed that, just two weeks before jury selection began, Mr. Heidler tried to hang himself and was placed on suicide watch by the jail. Nor did the court learn that Mr. Heidler was no longer taking Haldol, an antipsychotic, or other indications of Mr. Heidler’s mental decline, such as his incoherent, suicidal letter to counsel, D.19-13:22-23.

Lacking such evidence, the trial court had no occasion to revisit its ruling. Nonetheless, it was a proper subject for renewed inquiry into Mr. Heidler’s competence at trial. The trial court’s determination, based on evidence predating Mr. Heidler’s marked decline, amounts to a very different competency claim than the one presented to the district court on the basis of new evidence introduced in state habeas proceedings. Reasonable jurists could conclude that that new claim, unadjudicated in state court but not susceptible of default under binding Eleventh Circuit law, was not governed by the restrictions on federal review set forth in 28 U.S.C. § 2254(d).

As Mr. Heidler argued below, this Court has recognized that the introduction of new evidence may fundamentally alter an issue such that it becomes a new claim, *Cullen v. Pinholster*, 563 U.S. 170, 186 n.10 (2011), rendering it “effectively unadjudicated.” *Id.* at n.11. Whether that happened in this case is subject to reasonable debate. *See also id.* at 213 n.5 (Sotomayor, J.,

dissenting) (noting that the majority opinion in *Pinholster* “does not foreclose th[e] possibility” that “new evidence supporting a claim adjudicated on the merits gives rise to an entirely different claim”).

This Court has acknowledged the difficulty of distinguishing between “new claims” and “claims adjudicated on the merits,” *Pinholster*, 563 U.S. at 186 n.10, and indeed, the distinction is the subject of frequent litigation. *See, e.g., Nelson v. Lumpkin*, 72 F.4th 649, 658 (5th Cir. 2023) (“To date, the Supreme Court has not identified where to draw the line”). In identifying “new claims,” federal courts of appeals have adopted varying tests that generally focus on the significance of the additional evidence to the substance of the underlying legal issue.²¹

In the instant case, the district court disregarded substantial evidence that Mr. Heidler’s mental state deteriorated significantly between the time that he was evaluated by the court’s experts and the time that he was brought to trial. *See* IA, *supra*. Such evidence, though, was highly probative of Mr. Heidler’s competence when he was tried. *See, e.g., Grant*, 886 F.3d 899, 901 (“it is clear... that the competency claim... presented in [state court]...is not a ‘substantial equivalent’ of the claim...presented in...habeas” because “the basis” for the competency argument “shifted”).

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²¹ *See, e.g., Burr*, 19 F.4th at 418 (new evidence that “bolsters” existing claim may produce new claim); *Grant*, 886 F.3d at 891 (claim is not “substantially equivalent” to original claim if the claim raised in habeas proceedings is in a “significantly different and stronger posture”); *Poyson v. Ryan*, 879 F.3d 875, 879 (9th Cir. 2018) (new factual allegations will transform a claim if they “fundamentally alter” the legal issue considered by the state courts); *Franklin v. Jenkins*, 839 F.3d 465, 474 (6th Cir. 2016) (claim must be considered new if new evidence transforms the “gravamen of petitioner’s argument”).

²² *Maxwell v. Roe*, 606 F.3d 561, 565-571 (9th Cir. 2010) (trial judge’s initial competency inquiry incomplete where evidence existed of subsequent suicide attempt, worsening psychosis, and recurrent self-harm); *McGregor v. Gibson*, 248 F.3d 946, 955-956 (10th Cir. 2001) (post-

When Mr. Heidler presented the district court with evidence of his deteriorating mental state, evidence that the trial court never considered, it was at least “debatable” that he presented a “new claim” for the purposes of federal habeas review, warranting consideration²³ outside the parameters of § 2254(d). *Pinholster*, 563 U.S. at 186 n. 10. At the very least, given the foundational importance of competency to the constitutional fair trial guarantee, *Cooper*, 517 U.S. at 354, 383 U.S. at 378, Mr. Heidler’s substantive incompetency claim was “adequate to deserve encouragement to proceed further,” *Slack*, 529 U.S. at 483-84. The Eleventh Circuit should have granted a COA to review this claim.

C. Reasonable jurists could disagree with the Eleventh Circuit’s refusal to expand the COA to include other colorable claims the district court dismissed.

The district court never reached the merits of numerous colorable claims on the basis of a tangle of confusing and questionable procedural rulings, many adopted without prior notice of any deficiencies and without providing any opportunity to address the court’s concerns or to cure any

evaluation evidence that issues with administration of the psychotropic medication Thorazine caused worsening of schizophrenia symptoms altered competency inquiry); *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1318-19 (9th Cir. 1997) (“an attempted suicide is an extremely serious action”; finding that failure to reevaluate competency following suicide attempt violated due process); *Miles v. Stainer*, 108 F.3d 1109, 1113 (9th Cir. 1997) (“two-week lapse in medication” and accompanying deterioration undermined prior competency finding); *State v. Hollars*, 852 S.E.2d 135, 142 (N.C. 2020) (updated evidence essential given the “temporal nature” of mental illness and “numerous concerns about the potential for [d]efendant’s mental stability to drastically deteriorate over a brief period of time”); *State v. Snyder*, 750 So. 2d 832, 852 (La. 1999) (remanding for a *nunc pro tunc* competency determination were medical evidence of subsequent deterioration may have undermined prior competency determination).

²³ As indicated above, the district court recognized that Mr. Heidler’s claim was properly before it, consistent with Eleventh Circuit precedent. Accordingly, the procedural default rule would not have operated to bar merits review of Mr. Heidler’s claim.

problems. The Eleventh Circuit granted a COA to address the district court's dismissal of the tiny portion of the dismissed claim, regarding counsel's inadequate litigation of a suppression motion, but refused to expand the COA to consider numerous other claims that had been suppressed on the same or similar grounds. *See* Pet. App. 200a-202a, 203a-204a, 205a-206a, 207a-209a. Yet, in granting its limited COA, the Eleventh Circuit implicitly acknowledged that the district court's procedural rulings were subject to debate, or even flat-out wrong. The district court's dismissal of numerous other claims on the same or similar grounds was equally dubious and should have warranted expansion of the COA to include them.²⁴ As noted, the Eleventh Circuit ultimately never addressed the district court's procedural rulings it had granted a COA to review. *See* Pet. App. 110a-112a.

There was no cogent basis to distinguish the suppression IAC claims from the numerous other claims the district court dismissed. The district court struck numerous colorable claims as insufficiently pled and/or unexhausted despite: accepting the adequacy of the pleadings for over eight years and then dismissing on the basis of insufficient pleading without notice or an opportunity to cure any purported deficiency, *see* Pet. App. 317a-319a; the exhaustion of some claims in state habeas proceedings, *see id.* at 323a-324a; and the State's waiver of exhaustion with respect to many of the claims, *see id.* at 325a-326a.

²⁴ When a federal district court has denied a constitutional claim on procedural grounds without reaching the merits, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. As detailed below, the district court dismissed many colorable constitutional claims that warrant consideration.

The dismissed claims included numerous aspects of trial counsel’s alleged ineffectiveness, the prejudicial impact of which should properly have been cumulated with aspects of trial counsel’s deficient performance that were already before the court.²⁵ For instance, although Mr. Heidler alleged in state and federal court that counsel were ineffective in failing to object to inadmissible evidence presented in aggravation, and although Respondent agreed these allegations were exhausted and properly before the district court, the district court dismissed them as inadequately pled, without providing notice or an opportunity to cure any pleading deficiency.²⁶ *See* D.18-25:15, 17, 19, 20; D.124:19, 22, 24, 25; D.127:187-93; D.128:19, 21, 23; D.136:30-31.

Likewise, the district court dismissed Mr. Heidler’s claim that the prosecutor engaged in misconduct during both phases of trial, *see* Pet. App. 148a-156a, even though much of that claim had in fact been adjudicated on the merits on direct appeal, *see* Pet. App. 329a-331a, and Respondent agreed it was properly before the district court, *see* D.128:25. The misconduct was prolific, beginning in line one of the guilt-phase opening statement and running through the sentencing-phase closing argument. There is, at the least, a debatably valid claim that it “so infected the trial with unfairness as to make the resulting [verdicts] a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal citation omitted).

²⁵ *Strickland* requires courts to determine whether counsel’s “errors” (in the plural) created “a reasonable probability that . . . the result of the proceeding would have been different.” 466 U.S. at 694.

²⁶ Counsel, for instance, failed to object to inadmissible, prejudicial evidence, such as un-Mirandized statements made to the county jailer and jail medical forms purporting to show Mr. Heidler’s belief in devil worship. *See* COA App. at 54-55. They did not object to Dep. White’s testimony that Mr. Heidler had been caught at the jail with “weapons” some “50 or 75 times,” D.14-9:7-10, even though the prosecutor had noticed only a single occasion when Mr. Heidler was found with a weapon, D.127:190-92, and Dep. White’s testimony relied on hearsay and inaccurately portrayed Mr. Heidler’s infractions, *see* D.31-3:53, 80-82.

For instance, the prosecutor, Rick Malone, opened the trial with a prohibited “Golden Rule” argument,²⁷ inviting the jurors to imagine themselves as the crime victims:

What is your worst nightmare? If you’re a father, perhaps it’s an intruder coming into your house and harming your family. . . . If you’re a child it may be that you’re being awakened and taken from your home in the middle of the night and then sexually molested. If you’re an infant, maybe you’re left alone in the home with only the dead bodies of your mother and father to listen to your cries for help. What is your worst nightmare? The only good thing about a nightmare is that you wake up. . . . This case is about all of those things, all of those things happening to a good family in a very small town called Santa Claus in South Georgia, but they didn’t wake up.

D.13-14:38. Then, throughout the guilt phase, Mr. Malone made false assertions in an effort to impugn the evidence concerning Mr. Heidler’s mental health, misrepresenting to the jury that the Diagnostic and Statistical Manual cannot be used to diagnose a criminal defendant, *see* D.13-18:88; D.13-19:104, and insinuating that the mental health evaluations of Mr. Heidler were done without the State’s knowledge and were therefore not credible—when in reality the State knew about the evaluations and even sent records to the evaluators. *See* D.12-4:37-39; D.13-19:29; D.23-6:84. In guilt-phase closing, Mr. Malone argued to the jury that the expert testimony was not actual evidence and could not be considered because the experts had relied on information gleaned from witnesses and documents to inform their expert opinions—although Georgia law expressly allows this.²⁸ *See* D.13-19: 83, 84, 102, 108. These false assertions were “calculated to mislead the jury”

²⁷ *See, e.g., Braithwaite v. State*, 572 S.E.2d 612, 615 (Ga. 2002) (observing that the court had repeatedly held improper “[a] ‘golden rule’ argument . . . ask[ing] the jurors to place themselves in a victim’s position”); *Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006).

²⁸ *See, e.g., Roebuck v. State*, 586 S.E.2d 651, 655 (Ga. 2003) (quoting *King v. Browning*, 268 S.E.2d 653, 655 (Ga. 1980)).

and were improper. *See Berger v. United States*, 295 U.S. 78, 85 (1935); accord *United States v. Young*, 470 U.S. 1, 18-19 (1985) (“[T]he prosecutor’s opinion . . . may induce the jury to trust the Government’s judgment rather than its own view of the evidence.”).

The misconduct continued in the penalty phase, where Mr. Malone argued, among other things, that the defense expert was a “hired gun” who lied when he explained Mr. Heidler’s borderline personality disorder diagnosis, repeatedly argued to the jurors that they represented the State of Georgia, the party Mr. Malone himself represented, and further suggested the State and jury’s entanglement by arguing “it’s in your power . . . to correct *as best a government and a group of people can correct* this horrible, terrible crime.”²⁹ *See* D.14-11:44, 45, 50, 52 (emphasis added). He urged that the jury’s failure to vote for death would make a future prison guard Mr. Heidler’s next victim. *See* D.14-11:46-47 (“They’ve got 60 years to make a mistake that can cost them their life at the hands of this man. Do we really want to do that? Is that a good and just sound decision?”). “Arguing that any future victim would be on the jury’s conscience, and that jurors were the *only* people who could stop [the defendant] from killing” is improper. *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985) (emphasis in original).

Jurists of reason could find it debatable whether claims such as these challenging trial counsel’s ineffectiveness or the prosecutor’s misconduct stated valid claims of the denial of constitutional rights. Given the Eleventh Circuit’s recognition that the district court’s procedural rulings were debatable with respect to the suppression IAC claims, it logically follows that the

²⁹ *See, e.g., Leavitt v. Arave*, 371 F.3d 663, 687 (9th Cir. 2004) (improper to “portray[] the jury as part of a team opposing the defendant”) (internal citation omitted); *United States v. Manning*, 23 F.3d 570, 573 n.1 (1st Cir. 1994) (telling juror they “represent the people of the United States” was improper).

COA should have been expanded to cover the other valid constitutional claims the district court dismissed on the same or similar grounds.

This Court has acknowledged that “[a] petitioner, having successfully obtained a COA, has no control over how the judge drafts the COA and . . . may have done everything required of him by law.” *Gonzalez*, 565 U.S. at 144. This case exemplifies this problem many times over, as Mr. Heidler made repeated efforts to expand the COA based on this Court’s clear and binding explication of § 2253(c)’s standard. He respectfully submits that this Court should grant certiorari to review the Eleventh Circuit’s unjustifiably parsimonious and erroneous view of its role as an appellate court—almost uniformly the last one available—required to review colorable constitutional claims, even in habeas.

II. This Court Should Hold the Petition Pending the Eleventh Circuit’s Decision on Related Issues in a Separate Case.

In the event the Court does not determine that the above issues warrant plenary or summary review at this juncture, Mr. Heidler respectfully submits that the Court should hold this case pending the Eleventh Circuit’s decision in *Williams v. Warden, GDCP*, No. 22-10249 (11th Cir.). In that case, the Eleventh Circuit granted a COA to review whether the district court had violated a habeas petitioner’s due process rights by dismissing numerous claims “without giving him notice of its intent to dismiss these claims or an opportunity to respond,” and “denying him leave to amend” after dismissing “these claims as insufficiently pled under Rule 2(c) of the Rules

Governing Section 2254 Proceedings.”³⁰ See Pet. App. 581a-582a. The case is fully briefed and was argued on July 26, 2023. It is awaiting a decision from the panel.

The issues the Eleventh Circuit will decide in *Williams* have obvious relevance to Mr. Heidler’s case, given that here as well the district court dismissed many claims on insufficient pleading grounds, *sua sponte* and without providing an opportunity to defend against the ruling or to amend the claims. Even with respect to claims in this case that were dismissed for other reasons, the *Williams* decision will likely bear on the propriety of the district court’s actions in Mr. Heidler’s case. Accordingly, Mr. Heidler requests that the Court hold his case pending the decision in *Williams* and that it remand his case for further consideration in the event that the Eleventh Circuit grants relief in that case. Doing so would promote consistency and fairness in the application of the law, principles that are especially critical in this case in light of Mr. Heidler’s death sentence.³¹

This Court has “a broad power” to “grant certiorari, vacate the judgment below, and remand the case (GVR)” for further proceedings in the lower court. *Lawrence v. Chater*, 516 U.S. 163, 165-66 (1996) (citing 28 U.S.C. § 2106). The practice has many benefits that would be appropriately applied in this case:

³⁰ In *Williams*, the petitioner had also challenged the district court’s actions under the rules of civil procedure and rules governing habeas cases, but the Eleventh Circuit limited the COA to due process grounds. Mr. Williams has asked the court to expand the COA to encompass these additional bases to find that the district court erred in dismissing the claims.

³¹ Mr. Heidler had asked the Eleventh Circuit to hold his case pending *Williams*, but that request was denied. See Pet. App. 422a-432a (rehearing petition); Pet. App. 207a-209a(denial of rehearing). The Eleventh Circuit, however, granted a stay of appellate proceedings in a third Georgia capital habeas case presenting these issues. See Oct. 2, 2023 Order in *O’Kelley v. Warden, Georgia Diagnostic Prison*, No. 23-124947 (11th Cir.) (staying appellate proceedings pending the court’s decision in *Williams*). As noted, Mr. Heidler does not know of any other cases in the circuit with similar issues.

[A] GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the 'potential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Id. at 606-07.

A GVR is "potentially appropriate" when "intervening developments, or recent developments [that may not have been] fully consider[ed], reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation" *Id.* at 607. Although this Court's GVR's are most commonly granted when the Court itself issues an intervening decision that has bearing on the subject case, the GVR power is not limited to those situations. This Court has, in fact, issued GRV orders in light of intervening lower court decisions that might prompt a different outcome. *See, e.g., Kyle v. United States*, 504 U.S. 980 (1992) (GVR order remanding for further consideration in light of intervening circuit court decision); *Smith v. Noble Drilling Corp.*, 390 U.S. 143 (1968) (GVR order remanding to Louisiana Supreme Court for further consideration in light of circuit court decision); *Garner v. Yeager*, 389 U.S. 86 (1967) (GVR order remanding to the Third Circuit for further consideration of habeas case in light of state court's contrary ruling in co-defendant's case).

CONCLUSION

For the reasons set forth above, Mr. Heidler respectfully asks the Court to grant his petition for writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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