No. 23-6721

In the
Supreme Court of the United States

Jerry Scott Heidler,

Petitioner,

v.

Shawn Emmons, Warden,
Georgia Diagnostic and Classification Prison,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Jerry Scott Heidler does not ask this Court to grant certiorari review of the three claims which were decided by the court of appeals, but to instead embark on a factbound error review of three claims that no court granted him a certificate of appealability to review. And the three issues on which Heidler seeks review concern claims that were either never raised or never argued in state court. And all these claims are meritless. So Heidler attempts to raise issues that are factbound, with no splits of authority, where multiple courts have declined even to grant COAs, where the claims are defaulted and meritless to boot. There is no reason to grant review.

For his first claim, Heidler argues one member of his trial team had a conflict of interest because counsel represented another inmate that had escaped from the same jail as Heidler escaped. But there is no split of authority on this question, and Heidler failed to put forth any reasonable theory that trial counsel failed to pursue because of this supposed conflict.

Second, Heidler claims that he was tried while incompetent. But four mental health experts opined, after evaluation and review of copious mental health records, that Heidler was competent to stand trial, and no expert has disputed those findings since. Nor is there any split of authority or other reason to grant review on this question.

Finally, Heidler presented twelve ineffective assistance and prosecutorial misconduct subclaims for the first time in his federal habeas final merits briefs that he had never pleaded in any of his four amended federal petitions and never argued in state court. The district court rightly dismissed the subclaims as either insufficiently pleaded or unexhausted. None of these claims deserved encouragement to proceed further, and the

court of appeals' summary denial of a COA for each is not worthy of this Court's certiorari review.

STATEMENT

A. Facts of the Crimes

On direct appeal, the Georgia Supreme Court summarized the facts as follows:

> Danny and Kim Daniels lived in the town of Santa Claus in Toombs County with their seven children, three of whom were foster children. Heidler's sister was in the Daniels' care as a foster child for 45 days in 1995, and it was then that he began to frequent the house and occasionally to stay there overnight. Months before the murders, Mr. Daniels noticed that Heidler, 20 years old at the time, was beginning to develop a relationship with his 16-year-old daughter, Jessica. He had a conversation with Heidler, after which Heidler stopped visiting the Daniels' home.
>
> At approximately 5:00 a.m. on December 4, 1997, the police in Bacon County found three young girls on the street in their nightclothes. The girls said they had been kidnapped from the Daniels' house in Toombs County by a man they knew as Scott Taylor, who drove them to Bacon County in a white van. The police subsequently learned … that "Scott Taylor" was actually Heidler. The ten-year-old victim told the police that Heidler sexually assaulted her in the van while in Toombs County. This was corroborated by evidence of physical trauma to the child and by DNA testing. The eight-year-old victim told the police that she witnessed the sexual assault. From a photographic lineup, each of the three girls separately identified Heidler as the kidnapper.
>
> Toombs County police officers went to the Daniels' house, where they found the bodies of the four victims. Bryant Daniels, eight years old, was found lying on his bed face- down, where he died from massive head trauma caused by a close-range shotgun blast. Both Mr. and Mrs. Daniels were found lying in their bed, each having been killed by multiple shotgun blasts. The body of Jessica Daniels also was found lying in the master bedroom, near a doorway that led into the hallway. She had been killed by a close-range shotgun blast to the back of her head. A Remington 1100

> semi-automatic shotgun was missing from Mr. Daniels' gun cabinet, the door to which was open. Seven spent shotgun casings were found throughout the house. A firearms expert testified that the Remington 1100 shotgun holds six shotgun shells, so the shooter must have reloaded at least once. A neighbor heard, at 1:45 a.m., noises that could have been shots and the police determined that the assailant entered the house by using a ladder to climb through a bathroom window. A fingerprint lifted from this window matched Heidler's fingerprint. DNA taken from saliva on a cigarette butt found on the floor in the house matched Heidler's DNA.
>
> After dropping the girls off in Bacon County, Heidler went to his mother's house where he slept and played video games with his brother. Heidler asked his brother if he had ever killed anyone, and his brother said no. Heidler then said that killing "gives you a rush, makes you want to go out and kill more people." After his arrest, Heidler confessed to the crimes. He told the police that he threw the shotgun into a river and the kidnapped girls confirmed this assertion.

Heidler v. State, 273 Ga. 54, 58-59 (2000).

B. Proceedings Below

1. Trial Proceedings

A jury convicted Heidler on four counts of malice murder, one count of kidnapping with bodily injury, one count of aggravated sodomy, one count of aggravated child molestation, one count of child molestation, one count of burglary and two counts of kidnapping. Doc. 12-7 at 108-16; Doc. 12-8 at 1-2. On September 3, 1999, Heidler was sentenced to death for each count of malice murder. Doc. 12-8 at 13-26. Heidler was also sentenced to life in prison for kidnapping with bodily injury, life in prison for aggravated sodomy, thirty years for aggravated child molestation, twenty years for child molestation, twenty years for burglary, and twenty years for kidnapping, all to be served consecutively. *Id.* at 26.

a. Mitigation and Mental Health Investigation

Heidler was represented by "two experienced criminal defense attorneys"—Michael Garrett and Kathy Palmer. Pet.App.5a. Garrett had defended about fifty death penalty cases, "had experience presenting a mental health defense in 'many' capital cases," and "'only two received the death penalty.'" *Id.* (quoting Pet.App.471a). Palmer had tried murder cases and a death penalty case prior to Heidler's trial. *Id.* Counsel were aware from the beginning that Heidler was mentally ill and, given the overwhelming evidence of guilt, "decided to pursue a "guilty but mentally ill" verdict to avoid a death sentence." Pet.App.6a.

Trial counsel interviewed at least the following individuals regarding Heidler's background: Heidler's mother, father, sisters, brother sister-in-law, an aunt and uncle, and grandmother; at least six Georgia Department of Family and Children's Services employees, to include caseworkers; various foster parents; many of Heidler's teachers; a juvenile probation officer; Heidler's fiancé and her mother; and the jailers at the Toombs County Detention Center. *See* Doc. 19-3 at 63, 67, 105-106. 113, 117-18; Doc. 19-4 at 15, 23-27; Doc. 29-18 at 61-63, 65-67, 69-70, 74-83. Trial counsel also gathered "DFACS records, school records, mental health center records and [Heidler]'s records from the Toombs County Detention Center records prior to his trial." Pet.App.483a.

The background information showed that when Heidler was eight years old, he was taken to Pineland Mental Health Center for a variety of behavioral issues that included a lack of self-control and violence. Doc. 29-14 at 43. He was diagnosed with an "Adjustment Disorder" and "Disturbance of Conduct." *Id*. at 44-46, 51-52. Less than a month later, but at the age of nine,

Heidler was referred for a psychological evaluation because of behavioral issues at school. Doc. 29-8 at 74-83, 101-104. The evaluation concluded that Heidler had attention deficit difficulties, severe academic deficits, and recommended him for the "Behavior Disordered (BD) Program in his school." *Id.* at 104.

Approximately a year and a half later, when Heidler was ten, he was evaluated by Marc Eaton, Ph.D., P.C., because he had been placed in foster care after being involved in "acts related to breaking and entering and burglary." Doc. 29-15 at 11- 20; Doc. 29-16 at 41. During Eaton's interview of Heidler, he learned that Heidler felt unwanted by his stepfather, Heidler enjoyed "setting things on fire," and Heidler acknowledged fights with peers. Doc. 29-15 at 17-18. Eaton concluded that Heidler did not display "psychotic symptoms," he was manipulative, he had "significant learning disabilities," and he could not "express emotion adaptively" which resulted in "aggressive, threatening behavioral displays." *Id.* at 19. Eaton diagnosed Heidler with Attention-Deficit Disorder and Identity Disorder. *Id.* at 20.

A few weeks later, Heidler was sent by his class teacher to Satilla Community Mental Health Center regarding his medication for attention-deficit disorder. Doc. 21-14 at 45. Satilla noted that Heidler was in foster care, complained of nightmares and "visual hallucinations," and admitted to "breaking into buildings" and "killing dogs, birds and cats." *Id.* at 45-46. Heidler was diagnosed with "Conduct Disorder, Socialized, Non-Agg[ressive], ADHD." *Id.* at 45.

Over the next seven months, Heidler was evaluated twice more through the school system because of behavior problems. Doc. 29-14 at 10-14, 17-23. Heidler's mental health issues included: hyperactivity; depression; "extremely

suicidal" thoughts; explosive behavior; poor self-esteem; and cruelty to small children and animals. *Id.* at 18. Heidler's foster mother reported he had a "fascination" with "evil" and Heidler stated he was involved in the occult and had a fear of ghosts and at "night sometimes he 'can see things going off the wall.'" *Id.*

At the age of eleven, Heidler was admitted to Georgia Regional Hospital after trying to kill himself by hanging and by standing in the middle of the road in front of an oncoming "logging truck" truck. Doc. 21-10 at 8; Doc. 29-14 at 49. He had also attempted to kill his mother and two-year-old sister by choking them. Doc. 21-10 at 17. During his admission, he reported auditory and visual hallucinations. *Id.* at 20. He also displayed behavioral problems while admitted—*e.g.*, he would threaten the staff and consistently sought to be the center of attention. *Id.* at 39-55; Doc. 21-11 at1-11. He was discharged a month later and diagnosed with "Conduct disorder, socialized aggressive, and Dysthymic disorder." Doc. 21-9 at 68.

Approximately two months later, Heidler was sent to Satilla Community Health from Harrell Psychoeducational Center for "crisis evaluation for suicidal/homicidal thoughts and statements" he made at school. Doc. 21-14 at 37. Heidler reported: killing animals; a desire to kill his family; and he "smoked marijuana and crack cocaine." *Id.* Additionally, he reported that "he occasionally hears voices during the day and often 'sees things.'" *Id.* Heidler was found by one evaluator to be manipulative. *Id.* at 38. After evaluation over the next few weeks, he was diagnosed with "Conduct disorder," "Socialized Aggressive," and "Dysthymic" disorder. Doc. 29-9 at 66.

When Heidler was thirteen, he was admitted for a second time to Georgia Regional Hospital. Doc. 21-11 at 42. Again his behavior was violent

and aggressive which included trying to kill his younger sister and assaulting other kids at school. Doc. 21-11 at 65; Doc. 21-12 at 1-3, 11, 25. He was discharged eleven days later and was diagnosed with alcohol abuse and continuous conduct disorder, solitary type. *Id.* at 36.

In the months following his second admission at Georgia Regional Hospital, Heidler was evaluated at Cedarwood Psychoeducational Program. Doc. 29-10 at 63-65. His first evaluation resulted in a diagnosis of "Depressive disorder, Not Otherwise Specified," "Diagnosis of attention-deficit problems by history," "Acting out tendency resulting in conduct problems" and "Anxious tendencies." *Id.* at 64. During his second evaluation, the examiner provided details regarding his behavior that included Heidler's inappropriate behavior at home and school, evidence he "was asked to leave" Georgia Regional Hospital because he "tried to start a gang, pulled staples out of the bulletin board and pulled towels out of the bathroom," and that Heidler was apprehended for "breaking and entry, criminal trespass and burglary." Doc. 29- 11 at 13. It was also noted that Heidler's family had a long history with DFACS, one of his brother's tried to commit suicide with a drug overdose, his mother was involved in "witchcraft, voodoo, and the occult," and he had no consistent father figure. *Id.* at 3. After administering a battery of tests, the evaluator concluded Heidler "manifest[ed] significant depression and anxiety" and he could "be aggressive and has difficulty establishing appropriate peer relationships." *Id.* at 7. The evaluator also concluded that Heidler was "culturally deprived and lacks basic security needs" and recommended he stay in the Cedarwood Psychoeducational Program." *Id.*

While locked up in the Regional Youth Detention Center at the age of fourteen, he was seen several times over two months at Satilla Community Health for more suicidal and homicidal threats. Doc. 21-14 at 65-69. Again, Heidler was found to be depressed, suspected of using drugs, admitted to selling crack and cocaine, and was described as manipulative. *Id.* at 23-24. Heidler also admitted to making dolls and talking to them but denied "any audio or visual hallucinations." *Id.* at 22. He was diagnosed with "Adjustment disorder and Depressed mood." *Id.*

A few months later, Heidler was assessed by a "Parent Liaison" at Cedarwood after he finished his first year of high school. Doc. 29-10 at 62. He was found to be "obnoxious, verbally abusive, depressed," and had threatened and assaulted peers. *Id.* The liaison found his home life had improved and his "[t]hreats and constant abuse of" his younger sister had "lessened." *Id.* The evaluator concluded that Heidler appeared to be unhappy and depressed with his life, and that she would continue to work with his family. *Id.*

The following year, Heidler was evaluated at "DAISY" for more behavioral problems. Doc. 21-14 at 16. These included criminal acts, Satanism, substance abuse, and killing gerbils. *Id.* at 18. He also attempted suicide by obtaining a fake gun, going to a neighborhood store, calling 911 and threatening to shoot himself. *Id.* This behavior resulted in Heidler nearly being shot by the police, which Heidler "thought this was funny." *Id.* The evaluator noted that Heidler's behavior was "bizarre" and that he had low self-esteem, poor hygiene, feelings of worthlessness, and became enraged and hit things. *Id.* at 19. No diagnosis was given.

A year-and-a-half later, Heidler was admitted for a third time to Georgia Regional Hospital because he had a fight with his family that resulted in

another suicide threat. Doc. 21-9 at 12, 16-19. He denied any hallucinations, explained that he was intoxicated when the fight occurred and was diagnosed with "Alcohol Intoxication" and "Conduct disorder." *Id.* at 15. He was advised to detox, referred to Mental Health in Waycross, and sent home with his sister the same day he was admitted. *Id.*

Approximately nine months before Heidler committed the crimes, he "was referred for psychological assessment by the Disability Adjudication Section to assist in determining if he qualifies to continue to receive disability."[8] Doc. 20-1 at 11-17. The evaluator reviewed background information, interviewed Heidler's mother, and administered a battery of psychological tests to Heidler. *Id.* It was noted that Heidler was not currently taking medication for emotional problems. *Id.* at 12. The record mentioned the special education schools Heidler had attended and his problems with the law. *Id.* Heidler described his daily routine as "mainly sitting around all day long watching television and playing Nintendo." *Id.* at 13. The evaluator concluded that Heidler's "Personality assessment" revealed someone who is "depressed, bored, anxious and somewhat frustrated," however, Heidler "did not present as suicidal or psychotic." *Id.* at 17. The evaluator suggested that Heidler "contact the Vocational Rehabilitation office to determine if he may qualify for vocational rehabilitation intervention" and diagnosed Heidler with "Depressive Disorder," "Dependent Personality Disorder," "Reading Disorder," "Mathematics Disorder" and "Disorder of Written Expression." *Id.*

b. Mental Health Experts

Trial counsel hired two mental health experts, Dr. James Maish, a forensic psychologist, and neurological expert, Dr. Albert A. Olsen. Doc. 19-8

at 64-65; Doc. 19-4 at 36-37; Doc. 19-8 at 69; Doc. 29-8 at 25-26, 51; Doc. 29-19 at 62, 80-82; Doc. 31-12 at 47. Heidler was also evaluated by two State mental health experts, Drs. Gordon Ifill and Nic D'Alesandro, and the trial court appointed expert, Dr. Everette Kuglar. These experts were provided the records that contained the information set out in detail above. *See* Pet.App.484a-85a; Doc. 29-19 at 59.

Maish reported that Heidler was "exposed to a great deal of mental abuse and in his mind physical abuse." Doc. 29-19 at 60. Heidler's emotional response to his environment had resulted in "intense anger to the point of rage," suicide attempts, and "aggressive behaviors toward other people and property" suggesting "antisocial characteristics." *Id.* Maish also reported that "[Heidler] ha[d] complained of both auditory and visual hallucinations over the years and he complained of 'hearing voices' now." Maish stated that "[Heidler] could be best described in the old diagnostic categories of being 'Borderline Schizophrenic'" but "the new diagnostic classifications d[id] not have that disorder." Maish concluded that Heidler had "a Borderline Personality Disorder" but also "noted [Heidler] at times experiences true psychotic episodes in which he is at the mercy of his feelings and impulses." Doc. 29-19 at 60.

Maish reported Heidler had "been on many medications to control emotional symptoms and none of these medications ha[d] been totally effective" and went on to say that "no medication regimen ha[d] been able to stop the auditory hallucinations."[9] Doc. 29-19 at 63. Maish concluded that Heidler was "competent to stand trial," did not "meet[] the criteria for Not

Guilty by Reason of Insanity," but met "the criteria of Guilty but Mentally Ill"[1] Doc. 29-19 at 64.

Ifill and D'Alesandro reported to the trial court that Heidler had been "subjected to severe physical and emotional abuse," was a "significant discipline problem," behaved in a "bizarre" manner, expressed the desire to "kill[] himself and his family," admitted to abusing animals and "spoke of attempting to kill pets and other animals," and "admitted to both auditory and visual hallucinations" in his past. Doc. 29-19 at 69; Doc. 31-12 at 79. The experts also pointed out Heidler's "intense anger," his self-mutilation, his suicidal and homicidal thoughts, and that he "smiled when he spoke of his having tortured cats and beaten them to death." Doc. 29-19 at 69. Additionally, the doctors noted that Heidler "had been prescribed Haldol and Vistaril" while incarcerated at Toombs County but "admitted experiencing visual hallucinations only on the few occasions when he drank mushroom tea some years ago." Doc. 29-19 at 70.

Kuglar stated in his report that he interviewed Heidler, reviewed the reports of the other mental health experts, and reviewed Heidler's "extensive records." Doc. 29-19 at 76; Doc. 31-12 at 81. Kuglar reported some of the findings from the other mental health experts regarding Heidler's deprived childhood, his depression, his "abnormal behavior," and his suicidal nature.

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[1] Trial counsel also "hired a neurological expert, Dr. Albert A. Olsen, to conduct neurological testing that Maish was not qualified to perform." Doc. 19-4 at 36-37; Doc. 19-8 at 69; Doc. 29-8 at 25- 26, 51; Doc. 29-19 at 62, 80-82; Doc. 31-12 at 47. However, "Palmer testified that Dr. Olsen found no evidence of a neurological impairment"; and Garrett testified that had Olsen found anything helpful to Heidler's case they would have called him to testify at trial. Doc. 19-4 at 37; Doc. 19-8 at 69; Doc. 31-12 at 47.

Id. Kuglar reported that Heidler stated he had heard voices in the past, to include a crying baby, and while Heidler was upset on the day of his crimes due to the death of his child, there was "no evidence that there was a delusional compulsion in relation to the alleged crime on December 4, 1997." Doc. 29-19 at 77-78. However, Kuglar acknowledged that Heidler had "been prone to brief psychotic breaks in the past and has had periods of time when not only his impulse control, but his thinking and judgment were extremely impaired." *Id.* at 78. Kuglar diagnosed Heidler with a Borderline Personality Disorder and concluded that "[c]onsidering this man's long history of emotional depravation, depression, suicidal behaviors, and self-mutilation, it is my opinion that if found guilty he would qualify for a verdict of "Guilty but Mentally Ill." *Id.* at 78.

c. Competency Hearing

At a hearing held three months prior to trial, the court asked to hear from Drs. Kuglar, D'Alesandro, and Ifill regarding the mental health evaluations that had been conducted. Doc. 13-3 at 4. Before the experts testified, the trial court noted that it had received a "preliminary report" from trial counsel by Maish.[2] Doc. 13-3 at 4. In this report, Maish stated that none of the medication Heidler has been on had been effective, that he was competent, and that based on Heidler's history, "suicide would have been the more likely outcome" than the crimes he committed. Doc. 29-19 at 64.

[2] The trial court did not specifically identify the report, and there is not a report from Maish to the trial court identified in the official Record (*see* Doc. 12-1 at 1-8), but Kuglar references a report from Maish in his report to the trial court, which is presumably the report the trial court had. *Compare* Doc. 29-19 at 62-63; *Id.* at 76.

Also prior to the hearing, Ifil and D'Alesandro had submitted a seven-page report to the trial court which stated that "Mr. Heidler has a very factual understanding about his charges and the gravity of his legal situation. He understands possible outcomes of his trial. He demonstrates a good knowledge of courtroom procedure and is familiar with the role of the judge and other individuals in the trial process, such as witnesses, the prosecutor, defense attorney, and the jury." Doc. 29-19 at 72. "[I]t is our opinion that Mr. Heidler comprehends his own condition in reference to the proceedings against him and is capable of rendering counsel the necessary assistance in his own defense." *Id.*

Kuglar testified first and opined that Heidler was "competent to stand trial" and did not "meet[] the state's criteria for being not guilty by reason of insanity." Doc. 13-3 at 6. D'Alesandro and Ifil testified next, and both concluded, in line with the report that they had submitted to the trial court that Heidler was competent to stand trial. *Id.* at 9, 11.

Contrary to Heidler's implications, the trial court did not rule on Heidler's competency at this hearing. *See* Doc. 13-3 at 14. Instead, following voir dire, on the first day of trial, the trial court entered an order regarding Heidler's competency. Prior to making this ruling, the trial court had received the report from Kuglar. *See* Doc. 29-19 at 75. Kuglar reported that Heidler had a difficult childhood and acknowledged the extensive records of Heidler's mental health issues since he was a child. Doc. 29-19 at 75. Kuglar also noted that Maish's report "elaborate[d] on the auditory hallucinations which this young man has reported for some time and the fact that medications have never been totally effective in treating these hallucinations." *Id.* at 76. In the competency to stand trial portion of the report, Kuglar stated that Heidler

"understands that he is: charged with the killing of four people, with kidnapping three children and with forcing one of the girls to have oral sex. He has a reasonable understanding of the role of the judge, jury, witnesses, the prosecuting and defense attorneys. He understands that at trial he might be found innocent, that he might be found guilty and be sentenced to prison for life or that he could receive the death penalty." *Id.* at 77. In sum, "[i]t is my opinion that while he has some language and intelligence limitations, he is capable of communicating and cooperating with his attorneys, Mr. Michael Garrett and Ms. Kathy Palmer." *Id.*

The trial court ultimately found that "the defendant is competent to stand trial." Doc. 12-7 at 60. "Since the beginning of jury selection of this criminal action I have neither observed facts which raise doubt as to the sanity of the accused, nor have such facts been brought to my attention. Should the defendant's incompetency be observed by me or brought to my attention during trial, appropriate steps will be taken by the court to insure him a fair hearing." *Id.*

At trial, Heidler did not raise any issue regarding his competency.

d. Mental Health Presentation During Guilt Phase

Trial counsel strategically chose not to present Maish during the guilt phase of trial, explaining that counsel "thought [Maish's] testimony was going to be the strongest and we wanted to let the jury hear the mental health evidence on the front end with the other three, Ifill, D'Alesandro and Kuglar." Doc. 19-8 at 67; Doc. 31-13 at 5-6. Consequently, the jury heard from three experts, not employed by Heidler, but instead retained by the trial court and the State, that he suffered from serious mental health issues that qualified him for a guilty but mentally ill verdict.

D'Alesandro testified, "it would be my opinion that there is sufficient clinical documentation to substantiate a consideration of a guilty but mentally ill if that would be the Court or the jury's verdict." *Id.* D'Alesandro diagnosed Heidler with a borderline personality disorder and an antisocial personality disorder. Doc. 13-18 at 77. But D'Alesandro also testified that "the qualification for the guilty but mentally ill is not predicated on the personality disorder, on the antisocial." Instead, it was "predicated" on Heidler's past behaviors "of depression that in some occasions led him to self mutilate or to attempt suicide." *Id.* at 80. D'Alesandro testified that his mental illness was severe enough to require medication, however, even medication would be unable to eradicate his impulsivity problem. *Id.* at 81.

D'Alesandro testified about events in Heidler's background that led to his mental health issues. For example, he testified about the abandonment Heidler had suffered as a child which could cause "distinct behavioral patterns to develop" which could include uncontrollable anger and self-destructive behavior. *Id.* at 100. D'Alesandro testified about the "chaos" in Heidler's life of being "shuffled from household to household," "from various foster homes after the state took custody of him from his mother. *Id.* at 101-103. Additionally, D'Alesandro testified he "found 'severe emotional problems beginning in his [Heidler's] childhood' and that his mental impairments 'would influence his decision-making capacity.'" Doc. 31-12 at 86 (quoting Doc. 13- 18 at 119).

D'Alesandro also testified about Heidler's attempts at self-harm—*e.g.*, Heidler standing in the "middle of the road waiting for a car to try and hit him." Doc. 13- 18 at106. D'Alesandro explained that Heidler had "recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior," and

examples of self-mutilation were given, such as Heidler burning his arms with cigarettes and several suicide attempts after which "he was brought to the mental health center." *Id*. at 107.

Additionally, D'Alesandro testified that while he did not "find sufficient evidence to validate that [Heidler] actually was psychotic" he explained that individuals with Heidler's "type of diagnosis sometimes will get to such an extreme that they may temporarily at least function in a psychotic-like state." *Id.* at 108.

Next, Ifill testified that Heidler suffered "from severe emotional disorders beginning and continuing up until the present." Doc. 13-19 at 12. He also stated that he "reviewed some historical information which described some bizarre behaviors." Doc. 13-19 at 12. Ifill testified that he had observed "self-inflicted" cigarette burns on Heidler and "the history recorded recurrent thoughts of wanting to kill himself and several attempts to do so." *Id.* at 13.

Ifill also had the following to say about Heidler's childhood: "The records I reviewed indicated that the household was chaotic, disorganized, that Mr. Heidler was unable to get the ordinary nurturing that a growing child would need to have for normal development in the household, that there was violence or threats of violence or neglect within the household." *Id*. 636. Dr. Ifill also testified that Heidler had been placed in numerous foster homes and agreed that Heidler was treated in "various mental health facilities in southeast Georgia" throughout Heidler's life, and that he was emotionally deprived as a child. *Id*. at 636-37. Ifill explained that when a child is deprived the "normal maturation" of the personality cannot take place and "is usually the beginnings of development of personality disorders." *Id*. Ifill stated that he found Heidler "to be suffering from aspects of more than one personality

disorder" and that his deprived childhood was likely to have "been a significant contributing factor." *Id*. at 638; Doc. 31-12 at 87.

Kuglar testified last. He explained that Heidler had a "probable degree of depression" and "[h]is behavior at times was certainly a little bit weird, odd, or bizarre.'" Doc.13-19 at 42. Kuglar also testified about Heidler's self-mutilation. *Id.* at 42.

Additionally, Kuglar testified Heidler "had a terrible childhood" and he "was sort of kicked around from pillar to post, his home environment was not very good, etcetera. He was constantly I think off and on during those years threatening to kill himself." *Id.* at 44. Kuglar also testified that Heidler reported hearing voices—to include hearing a "baby crying"—but Kuglar was not "absolutely certain" that Heidler was being truthful. Doc.13-19 at 45, 46. Additionally, Kuglar explained that individuals with borderline personality disorder, such as Heidler, "can have very brief episodes of psychotic behavior," and "tend to over the lifetime mutilate their bodies by any number of means … Deep scratching, light cutting of the arms, forearms, cigarette burning of the skin." Doc. 13-19 at 46. Finally, Kuglar testified that Heidler would, "in his opinion," meet the criteria for guilty but mentally ill. *Id.* at 670.

e. Sentencing Phase Presentation

During the sentencing phase of trial, the State introduced evidence of Heidler's behavior while in jail awaiting trial. The State presented evidence from law enforcement that: Heidler was found in possession of dozens of weapons while incarcerated at the Toombs County Jail; Heidler threatened to kill officers at the jail; Heidler had "Sandman" tattooed on his hand which he described as a man "whose soul belonged to the devil and … he went around killing families while they slept"; and, Heidler removed the lock from one of

his cell doors and removed mirrors and smoke detectors. Doc. 14-7 at 103-04, 110-12, 118-20; Doc. 14-8 at 2; Doc. 14-9 at 4-9; 25-28.

The State also presented evidence regarding Heidler's escape from jail. Jerry White, the Toombs County Jail administrator, testified that a couple of months prior to trial, Heidler escaped from the jail and was found later that day several miles away walking down the middle of a state road in the next town.[4] Doc. 14-9 at 5-7. White testified that Heidler cut through his jail cell bars with a piece of hacksaw and then sawed through the perimeter fence to escape.[5] *Id.* On cross-examination by defense counsel, White testified that another inmate, Joel Buttersworth, had escaped prior to Heidler's escape and Heidler had used a piece of hacksaw "left over" from the previous escape. *Id.* at 15-16. White testified that to his "knowledge" Heidler and Buttersworth did not know each other; however, White testified that Heidler escaped the "[s]ame way" as Buttersworth. *Id.* at 15. Additionally, White admitted that there were construction problems with the jail that aided in the escapes that would probably become the source of future litigation. *Id.*

After the State presented its case in aggravation, trial counsel presented nine witnesses in mitigation of Heidler's crimes. First, three Department of Family and Children's Services caseworkers were presented— Cathy

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[4] Heidler repeatedly states in his brief that he was captured heading back to the jail. There is no evidence that he was headed back to the jail. Pet. at 7, 8, 15. The jail was in Lyons, Georgia, and Heidler was found in the next town to the west, Vidalia. *See* Doc.14-19 at 6-7, 17-18. White, whose testimony Heidler cites, testified that Heidler was found walking towards Vidalia looking for a phone. *Id.* White never testified that Heidler was headed back to the jail.

[5] White did not testify to the full facts of Heidler's escape, *e.g.,* the use of cigarette ash combined with toothpaste to cover the cut in the bars.

McMichael, Willene Wright, and Joanne Oglesby. They provided the jury with his DFCS records and first-hand accounts of Heidler and his family.

In the county caseworker Wright worked in, DFCS investigated Heidler's family on several occasions because his mother had not enrolled him or his sister in school, his mother had failed to follow-up on his medical or mental health needs, and to provide "Medicaid, transportation, Christmas gifts, other donations or energy assistance program." *Id.* at 141-46; Doc. 14-9 at 146-47; Doc. 14-10 at 1. Heidler was placed in foster care on more than one occasion and Heidler's mother harassed one set of foster parents so much Heidler had to be placed in another foster home. Doc. 14-10 at 1-2. Wright described Heidler's mother "as an 'instigator' with DFACS, who threatened caseworkers, was a practitioner of the occult, and would manipulate her children into denying any neglect or abuse in the home." Doc. 31-13 at 9. Additionally, Wright testified that Heidler's DFCS records confirmed that he was admitted at Georgia Regional Hospital the same year his mother's visitation rights were terminated. Doc. 14-10 at 7-10.

Caseworker Oglesby testified that she began providing "child protective services" after a report of "physical abuse, emotional abuse, neglect" was filed. Doc. 14-10 at 18-20. Oglesby testified that neglect was confirmed within Heidler's home, but the case was transferred to another county because the family moved again. Doc. 31-13 at 10. Additionally, Oglesby testified that Heidler attended a psychoeducational school that had a "special program" for children diagnosed with a learning disability and emotional problem.[11] Doc. 14-10 at 24-25.

Oglesby also explained that the family did not trust DFCS and the kids "knew how to talk to DFCS and not tell them anything but to answer their

questions." Doc. 14-10 at 22. And while there were "numerous reports" of physical abuse, the agency could not confirm them. *Id.* at 24-25.

A foster parent, who took care of Heidler when he was eleven, testified about Heidler's fear of the dark, his comments about a knife coming "through a ceiling" to cut him, his imaginary mouse that he talked to and slept with, and the complaint she had to file against Heidler's mother for harassing her family. Doc. 14-10 at 35-39. The foster parent also testified that Heidler was unable to read or write and he was eventually transferred to the Harrell Psychoeducational Program, which she explained was a school for kids with learning disabilities, while he was living with her. Doc. 31-13 at 12.

One of Heidler's teachers from a special psychoeducational center who taught him during his sixth, seventh, and eighth grades also testified. Doc. 14-11 at 6. She witnessed Heidler self-mutilating himself by picking at his skin until it bled and she saw initials carved into his skin, and he had an imaginary friend that he would sometimes keep in his hand and talk to it. Doc. 14-11 at 7-8. Additionally, trial counsel presented one of Heidler's juvenile probation officers. The probation officer testified about the frequent moves of Heidler's family, rumors of the family's "devil worship," and the "poor" condition of Heidler's homes. Doc. 14-9 at 100-104. Johnston stated that he did not have any problems when he supervised Heidler, and Heidler did not threaten him in any way" and that he "took action to have Heidler evaluated by a mental health professional." Doc. 14-9 at 98-99, 103.

Next, Heidler's mother Mary Moseley testified that Heidler's father was an alcoholic and did not treat Heidler or the other children well. Doc. 14-11 at 16. She also testified that Heidler had open heart surgery when he was four and that he had mental problems that required him to attend a "special

school." *Id.* at 16-17. Mosely also testified that her husband Lawton Moseley, Heidler's step-father, was an alcoholic when Heidler was a child and would sometimes say "bad words" to Heidler. *Id.* at 18-19. Mosely also testified that Heidler tried to commit suicide once when he "jumped in front of a semi truck (sic) on a main highway" and once when he attempted to hang himself in a store. *Id.* Moseley testified that Heidler had an imaginary friend named "Boo-Boo" and was afraid to "sleep in the dark." *Id.* at 20. She also testified that Heidler suffered from attention-deficit disorder and he took medication to help manage this illness. *Id.* at 21.

Moseley also testified that she has six children and that her three oldest sons, Buddy, George, and Steve were incarcerated and her youngest daughter, Joanne, was being held at the Youth Detention Center. *Id.* at 21-23. Moseley testified that when Heidler's son died, he attended his funeral on the day of the crimes and Heidler "was really upset." *Id.* at 23-25.

Maish was the penultimate witness and when asked if Heidler met the standard of Guilty But Mentally Ill, Maish stated, "I thought he met the standard and I thought he met the standard with plenty of room to spare." *Id.* at 53. Maish completed his evaluation prior to Drs. Ifill, D'Alesandro, and Kuglar; however he reviewed their reports and concluded that they all came to the same conclusions—which was "unheard of" in his area of practice. *Id.* at 54.

Maish "discussed [Heidler]'s history of hallucinations but he testified that he never saw Heidler act 'overtly psychotic.'"[12] Doc. 31-12 at 89; Doc. 14-9 at 62. However, as noted by the state habeas court, Maish testified that he found Heidler's mental illness to be "severe" and "the nature of his disorder interferes with virtually every aspect of his life." Doc. 14-9 at 63. Maish also

testified to many of the mitigating factors in Heidler's life. *See, e.g., id.* at 73. Maish also explained that while Heidler may seem "cold-blooded," but he saw him as "being confused, disoriented, unable to cope with his life" and that he had witnessed Heidler "express remorse and he had seen him cry." *Id.* at 74-75.

Heidler's sister Lisa Aguilar was the final witness. She testified that her family moved a lot as she was growing up. Doc. 14-11 at 31. Lisa recalled living with her biological dad, George Heidler, when she was very young, and she remembers that he was an alcoholic. *Id.* She also testified that Lawton Moseley was mean to Heidler and to everyone else. *Id.* However, she testified that he never hit her or anybody else. *Id.* at 32. Lisa stated she was told that Heidler tried to commit suicide, but she was not present when he committed the act. *Id.* at 33. Lisa refused to testify that her family practiced black magic or white magic. *Id.* at 34. Lisa asked the jury to spare her brother's life. *Id.* at 36.

2. Direct Appeal

The Georgia Supreme Court generally affirmed Heidler's convictions and death sentences on October 2, 2000 (reversing only the child molestation count because it merged into the aggravated sodomy conviction). *Heidler,* 273 Ga. 54. Heidler did not raise a claim challenging his competency. Heidler challenged the prosecutor's closing arguments, but the only objection made at trial was when "the prosecutor asked the jury to hold Heidler to the same standard 'you hold me.'" *Id.* at 61. "Heidler objected, claiming that this suggested that he was required to prove his innocence." *Id.* The prosecutor explained that "he was only referring to the presumption of sanity and to the absence of any evidence that Heidler was insane" and the court found "no

error." *Id.* The court found the remainder of Heidler's claims regarding the prosecutor's arguments were waived. However, the court "made an independent examination of the prosecution's closing argument to determine whether, if improper, it had any effect on Heidler's resulting death sentences." *Id.* The court "conclude[d] that there [was] no reasonable probability that the argument changed the jury's exercise of discretion in choosing between life imprisonment or death" nor was "there any evidence of prosecutorial misconduct." *Id.* (quotation marks omitted).

Heidler filed a petition for writ of certiorari this Court, which was denied on May 14, 2001. *Heidler v. Georgia*, 532 U.S. 1029 (2001).

3. State Habeas

On November 20, 2001, Heidler filed his petition for writ of habeas corpus, which he amended twice.[6] Doc. 16-3; Doc. 18-4; Doc. 18-25. Heidler did not raise a competency claim or a conflict-of-interest claim. *See* Doc. 18-25. He raised a litany of generic ineffective assistance of counsel claims without any specific facts in support. *Id.* at 14-21. Under his prosecutorial misconduct claim, Heidler included a paragraph regarding the prosecutor's closing arguments at both phases of trial. *Id.* at 29. Heidler did not address this portion of his prosecutorial misconduct claim in his post-hearing briefing. *See* Doc. 31-1:2-11.

At evidentiary hearings, Heidler presented evidence attacking trial counsel's investigation and presentation of his background and mental health issues. Doc. 19-3 thru Doc. 30-13. Heidler also challenged trial counsel's

[6] Heidler was represented by numerous counsel from the law firm of King & Spalding and Georgia Appellate Practice & Educational Resource Center. *See* Doc. 31-7 at 1.

investigation and presentation of evidence regarding his escape from jail. Heidler did not present any evidence during the state habeas evidentiary hearing, which included the presentation of mental health experts, that showed him to be incompetent to stand trial.

The state habeas court denied Heidler's petition on September 8, 2009. Doc. 31-12 thru Doc. 31-13. The court determined that the portion of Heidler's petition that alleged the prosecutor's closing arguments were in error was barred by res judicata to the extent it was decided on direct appeal and to the extent Heidler was alleging instances of misconduct not raised on appeal they were procedurally defaulted. Doc. 31-12 at 10, ¶c, n.1. Regarding Heidler's claim that trial counsel were ineffective in their investigation and presentation of background and mental health evidence, the court determined that: "The majority of this information would be cumulative of that presented at trial and given the atrocity of his crimes it is not reasonable to find that this new evidence had a reasonable probability of changing the outcome of [Heidler's] trial." *Id.* at 65.

Heidler filed an application for certificate of probable cause to appeal with the Georgia Supreme Court on November 9, 2009, which was denied on April 18, 2011. Doc. 31-15; Doc. 31-16; Doc. 31-18.

4. Federal Habeas

Heidler filed his federal habeas corpus petition on October 7, 2011, and amended it years later. Doc. 1; Doc. 70. Heidler requested an evidentiary hearing on a newly added conflict-of-interest claim regarding his escape from jail. Doc. 90. Because Heidler's conflict-of interest claim was unexhausted and procedurally defaulted, Heidler argued in support of cause to overcome the default that under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v.*

Thaler, 569 U.S. 413 (2013) state habeas counsel were ineffective for failing to litigate this claim. *See* Doc. 90. The district court assumed *arguendo* that Heidler was permitted to use the ineffective assistance of state habeas counsel as cause to overcome the default but determined that "[j]urists of reason would not find it debatable" that Heidler failed to plead "a valid claim of the denial of a constitutional right." Doc. 97 at 29. The district court "d[id] not see any affirmative facts, as opposed to speculative and hypothetical suggestions, that demonstrate[d] that [Heidler] and Buttersworth had inconsistent interests" but "assume[d]" "that an actual conflict did exist based on Palmer's simultaneous representation of the two men." *Id.* at 24. Yet even with the benefit of this assumption, the district court held that Heidler "faile[d] to show Palmer's simultaneous representation had an adverse effect on his counsel's performance." *Id.* The court found that there was no evidence that would have refuted the fact that Heidler had escaped and presenting more evidence to draw attention to the fact that Heidler had followed another inmate's plan of escape, while no other inmate had done so, was not a reasonable strategy. *Id.* at 25 (quoting Doc. 9-4 at 35).

Heidler filed a third amended petition at the same time he filed his final merits brief. Doc. 119; Doc. 124. For the first time in his federal proceedings, Heidler raised a claim that he was incompetent to stand trial in his third amended petition and final merits brief. *See* Doc. 124 at 98; Doc. 127 at 282. Pet.App.163a. On December 19, 2019, the district denied Heidler both federal habeas relief and a certificate of appealability as to any of his claims. Doc. 136. The district court detailed the trial court record regarding the state court's decision on Heidler's competency to stand trial and determined that the trial court's decision was not in violation of § 2254(d). Pet.App.163a-69a.

The court found the state habeas court's decision regarding Heidler's claim that trial counsel were ineffective in their investigation and presentation of background and mental health evidence was entitled to § 2254 deference and denied the claim. Pet.App.121a-34a, 136a-40a. The district court also found six of Heidler's ineffective assistance of trial counsel subclaims were either not pleaded in his third amended petition (filed the same time as his final merits brief), insufficiently pleaded in his third amended petition, and/or unexhausted for failure to either present the claim at all to the state courts or for failing to argue the claim through one complete round of appeals as required by this Court in *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). *See* Pet.App.135a-36a, 144a-48a. Finally, the court found six of Heidler's prosecutorial misconduct claims were barred from review for the same reasons as his dismissed ineffective assistance subclaims. *See id.* at 149a-55a, 156a.[7]

Heidler filed a motion with the court of appeals asking the court to grant a COA on several claims to include, *inter alia*, his competency claim, his conflict-of-interest claim, and the claims the district court dismissed for pleading issues and failure to exhaust. The court of appeals granted a COA on three claims that Heidler does not raise here, and it affirmed as to each question. Pet.App.002a.

[7] Heidler filed a motion to alter or amend the district court's final order, which was denied. Pet.App.184a.

REASONS FOR DENYING THE PETITION

I. The court of appeals properly denied Heidler's request to expand the certificate of appealability to include his conflict of interest claim, his competency claim, and the numerous claims dismissed on procedural and pleading grounds.

Heidler asserts the court of appeals applied the wrong standard in denying several of his claims a certificate of appealability. As the court of appeals summarily denied a certificate of appealability for these claims, Heidler is asking the Court to assume the lower court applied an erroneous standard and embark on factbound error correction. These are not appropriate reasons for this Court to grant review, and even if they were, Heidler has fallen far short of showing that the court erred, given the obviously meritless nature of his claims.

To obtain a COA under 28 U.S.C. § 2253(c), a habeas prisoner must make a "substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). 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.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

This Court has explained that "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Where a claim has been dismissed on procedural grounds, then a petitioner must make two

showings—"one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Id.* at 485. As *Slack* pointed out, each "component of the § 2253(c) showing is part of a threshold inquiry," which promotes deciding *first* the component that provides "an answer … more apparent from the record"—typically "procedural issues." *Id.*

Heidler argues that court of appeals has long misapplied this standard and points to a couple of cases from several years ago. Pet. at 21 (citing *Tharpe v. Sellers*, 583 U.S. 33, 34-35 (2018); *Welch v. United States*, 578 U.S. 120, 135 (2016)). He also relies on cases where this Court has *denied* certiorari review of other petitioners' challenges to court of appeals' COA decisions. *Id.* at 22. These arguments do literally nothing to show that the court of appeals applied the wrong standard here.

Regardless, his claims are factbound, usually procedurally defaulted, implicate no splits of authority, and meritless.

A. Heidler's conflict-of-interest claim is splitless, defaulted, and meritless.

Heidler argues that one member of his trial team, Kathy Palmer, represented him under a conflict of interest because she had another client, Joel's Buttersworth, that escaped from the same jail as Heidler and Heidler merely followed Butterworth's method of escape. *See* Pet. at 24. The lower courts correctly denied a COA here and there is no reason to further review those decisions.

Heidler asserted in the district court that under *Martinez*, 566 U.S. 1 9, and *Trevino*, 569 U.S. 413, the ineffective assistance of state habeas counsel could serve as cause to overcome the procedural default of his claim. *See* Pet.App.227a-28a. The district court assumed *arguendo* that *Martinez* and

Trevino applied in Georgia.[8] *Id.* at 229a. Having made that assumption, the court had to determine under *Martinez*: "(1) whether the underlying ineffective assistance of trial counsel claim is a substantial one, and (2) whether appointed counsel in the initial review collateral proceeding was ineffective under the standards of *Strickland*." *Id.* (citing *Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014)).

For the first prong of the *Martinez* test, the district court followed this Court's instruction in *Martinez* that to show "a 'substantial' underlying ineffective assistance of trial counsel claim is one that 'has some merit.'" Pet.App.229a-30a (quoting *Miller*, 132 S. Ct. at 1318-19). For determining whether Heidler had shown a conflict of interest, the district court correctly held he had to make a two-part showing: (1) "whether an 'actual conflict' of interest exists, which requires a factual showing of inconsistent interests"; (2) "whether that conflict adversely affected his representation." *Id.* at 231a (quoting *United States v. Novaton*, 271 F.3d 968, 1010 (11th Cir. 2001)). As the standard for assessing the adverse affect, the district court explained that Heidler "'must point to some plausible alternative defense strategy or tactic [that] might have been pursued'" and that "'the alternative strategy or tactic was reasonable under the facts.'" *Id.* at 232a (quoting *Novaton*, *supra*, at 1011).

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[8] Heidler argues that the court of appeals was in error to deny the COA on this claim because it had yet to determine whether *Martinez* and *Trevino* apply in Georgia. Pet. at 26. However, since reasonable jurists could not debate the district court's procedural ruling, even with Heidler having received the benefit of *Martinez* and *Trevino,* Heidler does not explain why the court of appeals would have wasted its judicial resources to determine an issue that was not outcome determinative.

The district court assumed Heidler had shown an "actual conflict" even though the court did "not see any affirmative facts, as opposed to speculative and hypothetical suggestions, that demonstrate that [Heidler] and Buttersworth had inconsistent interests." Pet.App.233a. But even with this assumption, the district court could still find no "adverse affect." *Id.* The reason for this was based on the court's fact finding that Heidler had failed to present a "plausible alternative defense strategy or tactic that might have been pursued." *See id.* Heidler's alternative strategy was to present "Buttersworth or other inmates …to testify to suggest that [Heidler] merely learned how to escape from Buttersworth's instructions." *Id.* The district court found this was this was not a strategy that would have been pursued because first, "no matter who represented Buttersworth, he could not have been forced to waive his Fifth Amendment right not to testify against himself and confess [] his crime of escape prior to his guilty plea." *Id.* at 233a-34a. And second, as also found by the district court, if "other inmates had testified about Buttersworth's escape" then it would also be brought to the jury's attention that "they did not follow Buttersworth's escape directions while Petitioner did." *Id.* at 234a. The district court correctly found this strategy "would have been potentially disastrous" for Heidler. *Id.*

Heidler argues that "[r]easonable 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." Pet. at 25; *see also* Pet. at 26 ("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"). This jumbled argument has no basis in fact. First, the State never argued at trial that Heidler was the "mastermind" of the escape. *See* Doc. 14-7 at 97; Doc. 14-11 at 47. Second, trial counsel brought out that Buttersworth had escaped the "[s]ame way" as Heidler a few months before Heidler escaped. Doc. 14-9 at 15. And third, the district court did not reject Heidler's proposed alternate strategy because it conflicted with, or was less reasonable than, trial counsel's strategy, but instead found Heidler's proposed strategy was "disastrous" and "not reasonable" on its own merit. Pet.App.234a, 235a.

But even if there were somehow a debate about the merits here—and there is not—Heidler has not even *tried* to show that this is a cert-worthy issue. There is no split of authority, this is a deeply factbound issue, it was procedurally defaulted, and the Court would have a hard time reaching it because of the antecedent issues to be determined (e.g., whether *Martinez* and *Trevino* even apply to Georgia in these circumstances). The Court should deny review.

B. Heidler's incompetence claim is splitless and and meritless.

This Court has long held that to determine competence to stand trial the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). As detailed above, several months before trial, all of the mental health experts opined that Heidler was competent to stand trial. *See* Doc. 29-19 at 64, 72, 77; Doc. 13-3 at 6, 9, 11; Doc. 12-7 at 60. The trial court did not rule at that time, but

instead waited until after voir dire was completed, and the first day of trial had begun, before it determined Heidler was competent to stand trial. *See* Doc. 12-7 at 60. Specifically, the court stated that "Since the beginning of jury selection of this criminal action I have neither observed facts which raise doubt as to the sanity of the accused, nor have such facts been brought to my attention." *Id.* Additionally, the court stated it that if "the defendant's incompetency be observed by me or brought to my attention during trial, appropriate steps will be taken by the court to insure him a fair hearing." *Id.*

Because there was a state court decision on the merits, federal courts review it under 28 U.S.C. § 2254(d). Heidler complains that the trial court was not given enough information to determine Heidler's competency and this should remove the § 2254 standard of review and that his additional evidence converts the claim into a new one. Pet. at 31. But that is not a ground for de novo review in the federal habeas arena, is contrary to this Court's precedent, and is wrong. *See Cullen v. Pinholster*, 563 U.S. 170, 185-86 (2011).

Heidler complains that the trial court did not allegedly know that Heidler had attempted suicide two weeks before trial, had stopped taking Haldol, an antipsychotic medication, and that he had written an "incoherent, suicidal letter to counsel." Pet. at 31. In support, Heidler cites only a letter written by Heidler to trial counsel. *Id.* (citing Doc. 19-13 at 22-23). He does not provide any support for his contention that the trial court was unaware of these issues. The trial court had been provided mental health reports detailing Heidler's serious mental health issues, knew the experts agreed that Heidler qualified for a guilty but mentally ill verdict, knew that he suffered from suicidal ideation, and knew that medication was not effective

with his mental health issues.[9] *See* Doc. 29-19 at 63-64, 72, 77; Doc. 13-3 at 6, 8, 9, 11; Doc. 12-7 at 60. Additionally, the trial court knew that Heidler had great difficulty with being confined and acted out often. *See, e.g.,* Doc. 29-19 at 63, 70. Moreover, none of the evidence Heidler points to shows that he was incompetent but is merely additional evidence of his mental illness. *See, e.g., Pardo v. Sec'y, Fla. Dep't of Corr.*, 587 F.3d 1093, 1101 (11th Cir. 2009) ("evidence of low intelligence, mental deficiency, bizarre, volatile, or irrational behavior, or the use of anti-psychotic drugs is not sufficient to show incompetence to stand trial"). And, as shown in the trial court's order, the court did not make the decision regarding Heidler's competence until after voir dire was concluded and the court had observed Heidler. Doc. 12-7 at 60.

Heidler makes the argument that his "new evidence" that was presented in state habeas in support of his ineffective assistance of trial counsel claim, created a new claim that he was tried while incompetent. He bases this argument on the following footnote from *Pinholster*: "Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, see n. 11, *infra*, Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements, [], may well present a new claim." *Pinholster*, 563 U.S. at 186 n.10 (citation omitted). But this Court has never held that additional evidence in support of a claim previously presented in state court creates an entirely new claim.

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[9] Heidler implies that the mental health experts did not assess whether Heidler could communicate with counsel based on their testimony at the hearing held several months before trial. But the written reports provided to the trial court prior to his ruling show that they did assess this issue. *See* Doc. 29-19 at 64, 72, 77.

Moreover, the cases that Heidler relies upon are unavailing. For example, Heidler cobbles together the following misleading quote from a Tenth Circuit decision: "'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.'" Pet. at 32 (quotation mark omitted) (quoting *Grant v. Royal*, 886 F.3d 874, 901 (10th Cir. 2018)). What the Tenth Circuit actually held was: "the question for resolution in procedural and substantive competency claims is not the same, and it is clear to us that the competency claim that Mr. Grant presented in his direct-appeal brief to the OCCA is not a 'substantial equivalent' of the claim he presented in his habeas petition." *Grant*, *supra.* Heidler also relies on a Fifth Circuit case regarding the lack of line drawing mentioned in *Pinholster*, but even the Fifth Circuit opinion he referenced refused to draw the line where Heidler suggests—i.e., that the presentation of "new, material factual allegations" in support of the same claim raised in state court could not be used to circumvent § 2254(d). *Nelson v. Lumpkin*, 72 F.4th 649, 658-60 (5th Cir. 2023).[10]

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[10] Likewise, the cases listed in Heidler's footnote 21 are either misrepresentation of the cases cited or contradict his theory. In *Burr v. Jackson*, 19 F.4th 395, 418 (4th Cir. 2021), the court was merely acknowledging the footnote in *Pinholster* and how facts that were kept from a petitioner in the state court where the petitioner raised the *Brady* claim creates its own unique set of circumstances. The portion of *Grant*, Heidler quotes is dicta from a 1982 case that was quoted by the court of appeals in its discussion of fair presentation of claim for exhaustion purposes. *Grant*, 886 F.3d at 974. Next, Heidler claims that the Ninth Circuit held that "new factual allegations will transform a claim if they "fundamentally alter" the legal issue considered in state courts." Pet. at 32 n.21 (quoting *Poyson v. Ryan*, 879 F.3d 875, 879 (9th Cir. 2018)). That statement in not contained in *Poyson*, instead the court stated that the petitioner had "presented *not only new facts* in support of a claim presented to the state court, but *also a*

Reasonable jurists could not debate that the competency claim Heidler presented in the trial court was the same as that presented in federal court and the alleged additional facts that he argues the trial court did not have before it do not alter it so that it is a new claim. Given that it is certain that § 2254 is applicable, Heidler has not shown that reasonable jurists could debate the correctness of the state court decision. Moreover, Heidler was revaluated in state habeas by new experts, and none opined that he was incompetent either in that proceeding or at trial. *See* D22-20:76-77; D28-16:57; D23-17:57-58; D23-15:2.

Essentially, what Heidler asks the Court to do is disregard the four mental health experts that found him competent at trial, assume his trial counsel were ineffective, disregard the trial court's observations of Heidler at trial, and assume that his evidence of his mental illness rendered him incompetent despite the fact that no expert has ever made this conclusion. Even if a court were inclined to do so on the merits—and it should not be—this is not a serious argument for review. This claim, like the others, involves no split of authority and is meritless. The Court should deny review.

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fundamentally new theory of counsel's ineffectiveness." *Id.* at 896. Finally, the proposition Heidler relies on from the Sixth Circuit, cuts directly against his argument that his competency claim is new. While the court stated that "it is possible that there are instances when new evidence transforms an old claim into a new one" it then immediately pointed out that this Court "has long cautioned us to draw a distinction between the 'presentation of additional facts' and 'the substance of [a petitioner's] claim.'" *Franklin v. Jenkins*, 839 F.3d 465, 474 (6th Cir. 2016) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 257-58 (1986)). Here, there are only alleged "additional facts" which have not altered the substance or "gravamen" of his competency claim.

C. The claims found procedurally barred by the district court for failure to exhaust or to properly plead are splitless, generally defaulted, and across the board meritless.

Twelve subsets of Heidler's ineffective assistance of trial counsel and prosecutorial claims were determined by the district court to be barred as either unexhausted, improperly pled in Heidler's third amended petition, or not included in Heidler's third amended petition and improperly raised for the first time in Heidler's federal habeas final merits brief. *See* Pet.App.135a, 144a-56a. Heidler never properly pleaded these claims in any of his four federal habeas petitions and failed to properly present these claims in state court. Instead, Heidler asserted a general claim of ineffective assistance or prosecutorial misconduct but never provide any specific facts in either his state or federal habeas petition. *See* Doc. 124 at 16-28, 34-41; Doc. 18-25 at 14-21, 25-30. In his state habeas proceeding, to the extent his state habeas petition could be read to have actually asserted a claim related to these issues, he completely abandoned these subclaims in his post-hearing briefing and on appeal to the Georgia Supreme Court. *See* Doc. 31-1 at 2-12; Doc. 31-7; Doc. 31-15. Finally, the first time Heidler specifically stated his claims and the facts in support in a manner that Respondent could finally understand what he was alleging was in his final merits briefing to the district court. *See* Pet.App.135a, 144a-56a.

Heidler blames the district court and Respondent for not notifying him earlier of his failures but neither the court nor Respondent were under a duty to do so,[11] especially given that he filed his third amended federal petition at

[11] 28 U.S.C. § 2254, Rule 2(c), and the form for filing a federal petition places a petitioner on notice of his filing requirements. *See Mayle v. Felix*, 545 U.S. 644, 655-56 (2005).

the same time as his federal final merits brief. *See* Doc. 118-19. Moreover, reasonable jurists could not debate that these claims did not deserve encouragement to proceed further. Heidler's crimes were beyond the pale and the evidence regarding his conduct in jail was extremely aggravating. His insufficiently pled and unexhausted ineffective assistance and his prosecutorial misconduct claims, even with the assumption of deficiency and error, would never have created *Strickland* prejudice of a reasonable probability of a different outcome or a constitutional harm that "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation marks omitted).[12]

At most, Heidler asks for fact-intensive error correction of procedurally defaulted claims on which he does not cite any split in authority. The Court should deny.

[12] Heidler complains that the court appeals refused to stay the mandate because the court is reviewing a different district court's decision to dismiss certain federal habeas claims that were improperly pleaded. Pet. at 39. However, in this case, the claim that was granted a COA with a similar determination was held to be without merit by the court of appeals, thus making the district court's procedural ruling moot. *See* Pet.App.110a-12a. Therefore, there is no reason for this Court to remand this case to the court of appeals to decide a claim on which Heidler could never obtain relief.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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