

No. 23-6721

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JERRY SCOTT HEIDLER,

Petitioner,

-v-

SHAWN EMMONS, WARDEN,
Georgia Diagnostic Prison,

Respondent.

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Petitioner Jerry Scott Heidler respectfully submits this reply brief in support of his petition for a writ of certiorari.

Respondent attacks a certiorari petition that Mr. Heidler has not filed. Mr. Heidler seeks this Court’s review of the Eleventh Circuit’s denial of a certificate of appealability (“COA”) with respect to three claims. That determination required the lower court to “limit its examination to a threshold inquiry into the underlying merit of his claims.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)).¹ Mr. Heidler asks no more of this Court regarding the merits of the underlying claims and, indeed, has suggested that summary reversal may be appropriate, given the clarity of this Court’s pronouncements on the COA standard. Yet, rather than addressing whether the issue before the Court—namely, whether the lower court erred in denying a COA—the bulk of Respondent’s brief (“BIO”) opposes certiorari on the grounds that the underlying claims do not involve a circuit split and that Mr. Heidler has asked the Court to “embark on a factbound error review of three claims that no court granted him a certificate of appealability to review.” BIO at 1; *see, e.g.*, BIO at 27, 28, 31, 37.

Respondent’s arguments beg the question before this Court and should be rejected. Certiorari is appropriate because, as the mechanism for determining which habeas claims *must* be reviewed by a federal appeals court, the COA standard serves a critically important role in focusing

¹ *See, e.g., Buck v. Davis*, 580 U.S. 100, 116 (2017) (“But the question for the Fifth Circuit was not whether Buck had ‘shown extraordinary circumstances’ or ‘shown why [Texas’s broken promise] would justify relief from the judgment.’ Those are ultimate merits determinations the panel should not have reached. . . . A ‘court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,’ and ask ‘only if the District Court’s decision was debatable.’”) (quoting *Miller-El*, 537 U.S. at 327, 348 (2003)).

judicial resources on colorable federal habeas claims and, with regard to cases arising from the Eleventh Circuit, is a frequently challenged issue before this Court.²

I. Because reasonable jurists could debate both whether Mr. Heidler’s counsel had an actual conflict of interest and whether and how *Martinez v. Ryan* applies to habeas cases like Mr. Heidler’s, a COA should have issued to permit development of these claims.

Respondent urges that Mr. Heidler’s “conflict-of-interest claim is splitless, defaulted, and meritless,” BIO at 28, but the question before this Court is whether reasonable jurists could debate the district court’s resolution of the claim or whether the claim deserves encouragement to proceed further. *Slack*, 529 U.S. at 484. The conflict claim passes this low threshold.

First, reasonable jurists could debate whether the district court wrongly concluded that counsel’s concurrent representation of Mr. Heidler and Joel Buttersworth, who escaped from the jail several months before Mr. Heidler did the same, following Mr. Buttersworth’s blueprint, did not constitute an actual conflict of interest. An actual conflict of interest is “a conflict *that affected counsel’s performance . . .*” *Mickens v. Taylor*, 535 U.S. 162, 171 (2005) (emphasis in original). And “a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief.” *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (emphasis added by *Mickens* Court)).

Reasonable jurists could disagree with the district court’s conclusion that Mr. Heidler’s interests did not diverge from Mr. Buttersworth’s. To the contrary, Mr. Heidler stood to gain by

² Since filing the Petition, at least one other petition has been filed challenging the Eleventh Circuit’s misapplication of the COA standard. See *Windsor v. Marshall*, No. 23-7128 (U.S.) (asking whether “when both the state trial court and the federal district court agree that a habeas petitioner has pleaded a claim that, if true, would warrant relief and when reasonable jurists could debate whether the district court erred in limiting discovery, a Court of Appeals should issue a Certificate of Appealability”).

demonstrating that it was Mr. Buttersworth who had devised and first implemented the escape plan, whereas such evidence would have been detrimental to Mr. Buttersworth's interest in favorably resolving his own charges. Mr. Heidler's jail escape was, in the words of the state habeas court (taken from Respondent's proposed order), "[t]he most important evidence presented to show Petitioner's future dangerousness to the rest of society" Pet. App. 456a; D.31-9:23. The escape evidence was especially compelling, the court observed, because "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," a task that took "several days." *Id.* "[I]n 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[,] 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; D.31-9:23.

Mr. Heidler, however, had not developed any of these escape tactics himself. He simply copied what Mr. Buttersworth had done, using the tools Mr. Buttersworth had left behind. Thus, Mr. Heidler, painted by the prosecution as a dangerous inmate whose devious, MacGyver-like skills³ routinely evaded jail security and outsmarted the guards,⁴ would have benefited significantly from evidence showing that he had simply followed the plan Mr. Buttersworth had devised, using a portion of the hacksaw Mr. Buttersworth had left behind during his own escape.

³ See *Dixon v. United States*, 900 F.3d 1257, 1259 (11th Cir. 2018) (explaining that the Oxford Dictionary had added the name MacGyver "as a verb meaning 'to [m]ake or repair (an object) in an improvised or inventive way, making use of whatever items are at hand'" (citing https://premiumoxforddictionaries.com/us/definition/american_english/macgyver)).

⁴ See, e.g., D.14-7:97 (prosecutor's penalty-phase opening argument); D.14-11:47 (State's closing argument at sentencing); see also D.14-19:8-9, 20 (Jailor White testifying that Mr. Heidler managed to remove the "security type locks" from the cell doors and security screws holding in mirrors and the cages over fire alarms without having the special tools needed to remove them).

But that defense on Mr. Heidler’s behalf would have been detrimental to Mr. Buttersworth’s case, whose escape charges had not been adjudicated by the time of trial. *See, e.g.*, D.68-6.

An actual conflict is shown “when one client would benefit by a person testifying and one client would be harmed by it.” *Perillo v. Johnson*, 79 F.3d 441, 447 (5th Cir. 1996) (citation omitted). Here, Mr. Buttersworth would have been harmed by a vigorous defense of Mr. Heidler’s escape, the pivotal evidence at his capital sentencing, such as by calling Mr. Buttersworth and/or others housed in the jail to testify about the earlier escape and the prison conditions that led to it.⁵ “[I]f the Petitioner shows . . . that the alternative defense was inherently in conflict with . . . the attorney’s other loyalties or interests,’ . . . he thereby satisfies his burden of proving the requisite link” between the conflict and the plausible alternative defense. *Nicholson*, 611 F.3d at 212 (quoting *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (en banc)) (some ellipses in original).

Reasonable jurists could likewise debate whether Mr. Heidler established cause and prejudice to excuse the default of the conflict-of-interest claim under *Martinez v. Ryan*, 566 U.S. 1 (2012).⁶ State habeas counsel patently erred in overlooking the conflict claim. In state habeas

⁵ Reasonable jurists could also debate the district court’s conclusion that trial counsel’s purported strategy—essentially to ignore this highly damaging aggravator—demonstrated that laying blame on Mr. Buttersworth would not have been a plausible alternative strategy. *See* Pet. App. 234a-236a. Counsel had a duty to mitigate this aggravating evidence. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 385-386 (2005). Moreover, “it is unnecessary—and even inappropriate—to accept and consider evidence of any benign motives for the lawyer’s tactics, including the lawyer’s testimony about his subjective state of mind.” *United States v. Nicholson*, 611 F.3d 191, 213 (4th Cir. 2010) (citing *United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir 1995)). Yet the district court credited counsel’s explanation of her strategy as the only reasonable approach to address this highly aggravating evidence. Pet. App. 234a-236a.

⁶ Under *Martinez*, “a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland* To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-

proceedings, they attempted to show that trial counsel were ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to investigate and present evidence to mitigate the escape, and presented evidence to show that Mr. Heidler had copied Mr. Buttersworth when executing the escape. *See, e.g.*, D.18-25:15 (alleging in Second Amendment to Petition for Habeas Relief that trial counsel were ineffective in failing “to conduct an adequate investigation into the circumstances surrounding Petitioner’s escape from Toombs County Detention Center, which would have uncovered readily available and compelling evidence which would have mitigated the escape”); D.31-2:14 (post-hearing brief explaining that Mr. Heidler “followed Mr. Buttersworth’s lead and escaped in the same manner—even down to using part of the hacksaw blade Mr. Buttersworth had left behind” and that “[b]oth Scott and Mr. Buttersworth were able to escape so easily because of problems with the jail,” including the “substandard . . . soft, pliable metal” used to build it); *see also* D.23-14:30-33 (newspaper article about Mr. Heidler’s escape). Recognizing that contract public defender Kathy Palmer’s concurrent representation of Mr. Buttersworth created an actual conflict that adversely affected her representation of Mr. Heidler at sentencing would have greatly strengthened the Sixth Amendment claim by eliminating proof of prejudice from the analysis. *See, e.g., Mickens*, 535 U.S. at 171. That conflict was patent from the record, and state habeas counsel’s failure to recognize it and amend the Sixth Amendment claim to include it was deficient. *See, e.g., Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (“An attorney’s ignorance

counsel claim is a substantial one, *which is to say that the prisoner must demonstrate that the claim has some merit.*” *Martinez*, 566 U.S. at 14 (emphasis added). As noted in the Petition, it is currently an open question in the Eleventh Circuit whether *Martinez* applies to habeas cases arising out of Georgia, at least where, as here, state law precluded Mr. Heidler from raising the IAC claim on appeal, an important issue that also warrants a COA grant. *See* Pet. at 26-27.

of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.”).

Likewise, reasonable jurists could debate whether the conflict claim presented a “substantial” claim of trial counsel’s ineffectiveness—*i.e.*, that the claim “has some merit.” *Martinez*, 566 U.S. at 14. Even under *Strickland*, the claim is substantial—as noted, the escape evidence was highly aggravating and fit neatly into the prosecutor’s theme that Mr. Heidler could not be safely contained. Evidence showing that, rather than being a criminal mastermind capable of evading restraints, he had simply followed a plan devised by someone else, would have substantially neutralized the State’s powerful aggravating evidence. And, this showing of prejudice was unnecessary to establish that an actual conflict of interest adversely affected counsel’s performance, making the ineffectiveness claim all the more substantial.⁷

Respondent contends that the Court should deny review because, as to the merits of these claims, “[t]here 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,” BIO at 31, but that is beside the point. The court that should have addressed these complicated, factbound issues was the Eleventh Circuit, given that Mr. Heidler met the COA standard, and Mr. Heidler respectfully asks this Court to send the case back for it to do so.

⁷ Respondent contends that Mr. Heidler, without support, “repeatedly states in his brief that he was captured heading back to the jail.” BIO at 18 n.4. This is inaccurate on two grounds. First, Mr. Heidler did not say that Mr. Heidler was “heading back to jail.” He asserted, consistent with the sentencing phase testimony, that Mr. Heidler was found several hours after his escape “walking down the middle of the highway heading back *towards* the jail.” Pet. at 8 (citing D.14-9:5, 7, 17-18; D.23-14:30-33). *See also* Pet. at 7, 15. Second, these assertions were consistent with trial testimony. *See* D.14-9:6, 17.

II. Reasonable jurists could debate whether the district court erred in refusing to consider abundant evidence, newly presented in state post-conviction proceedings, of Mr. Heidler's severe mental illness when addressing whether Mr. Heidler was competent at the time of trial.

In the Eleventh Circuit, trial incompetence claims may not be defaulted. *See, e.g., Lawrence v. Sec'y Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012). Accordingly, on the basis of the extensive record of Mr. Heidler's mental illness developed in state habeas proceedings, Mr. Heidler argued in federal habeas proceedings that he was incompetent at the time of trial, even though that issue had not been raised in state habeas proceedings on the basis of the new evidence. Reasonable jurists could debate whether the district court properly limited its consideration of the issue to the evidence presented to the trial court at the non-adversarial competency hearing conducted months before trial for several reasons.⁸ First, because trial competence is a question of fact, a state court's presumed-correct finding may be rebutted "by clear and convincing evidence," 28 U.S.C. § 2254(e)(1), which the state habeas record arguably provides.⁹ Second, the trial court based its ruling on stale evidence that did not incorporate Mr. Heidler's mental decline in the months following the competency hearing and leading up to the trial¹⁰ and, accordingly, the

⁸ As previously noted, *see* Pet. at 4, 14-15, trial counsel did not move for a competency determination and did not engage in any advocacy on the issue at the competency hearing the trial court held *sua sponte*.

⁹ In the Tenth Circuit, which also recognizes that substantive competency claims may not be defaulted, the courts consider new evidence presented in state post-conviction proceedings in addressing such claims. *See, e.g., Valdez v. Ward*, 219 F.3d 1222, 1241 (10th Cir. 2000) (noting that "[w]ith respect to Mr. Valdez's substantive competence claim, the only new evidence Mr. Valdez presented on mental capacity was the deposition of Dr. Mynatt taken seven and one-half years after trial" and that his failure "to provide additional evidence of his incompetency at the time of trial" precluded a finding that he was incompetent at the time of trial) (citing *Nguyen v. Reynolds*, 131 F.3d 1340, 1345-47 (10th Cir. 1997), for the proposition that state post-conviction evidence may be considered).

¹⁰ Respondent criticizes Petitioner for citing only the "incoherent letter" to counsel in support of his post-evaluation deterioration. BIO at 32. While that is the only record citation in one particular sentence, the Petition cites to significant additional evidence in support, including

competency claim the trial court decided was not the same claim that Mr. Heidler raised in federal court.¹¹ Third, as numerous courts have recognized, “a federal habeas petitioner presents a new claim . . . when he submits evidence which (1) ‘was not presented to the state court,’ and (2) ‘places his case “in a significantly different and stronger evidentiary posture than it was when the state courts considered it.”’ *Mahdi v. Stirling*, 20 F.4th 846, 915-16 (4th Cir. 2021) (citations omitted).¹² The abundant evidence Mr. Heidler presented in state habeas proceedings concerning his lifelong struggles with serious mental illness, information that did not inform the trial court’s consideration

his complete cessation of anti-psychotic medication in the period leading up to the trial, and his attempted suicide by hanging, as well as his delusional communications with trial counsel. *See* Pet. at 15.

¹¹ *See, e.g., Drope v. Missouri*, 420 U.S. 162, 181 (1975) (“Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial”); *United States v. Alhindi*, No. 23-11349, 2024 U.S. App. LEXIS 7681, *18 (11th Cir. April 1, 2024) (noting that, as this “Court has recognized, mental competency can be fluid during criminal proceedings” and observing that 18 U.S.C. § 4241 accordingly “empowers courts to account for changes in competence ‘at any time’ by ordering a competency evaluation,” as “[l]imiting courts to only one order . . . no matter the defendant’s condition, would risk trying an incompetent defendant”); *cf. Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1596 (2020) (noting, in the context of claim preclusion, that “[e]vents that occur after the plaintiff files suit often give rise to new “[m]aterial operative facts” that “in themselves, or taken in conjunction with the antecedent facts,” create a new claim to relief”) (quoting Restatement (Second) §24, Comment *f*, at 203; 18 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Federal Practice §131.22[1], p. 131-55, n. 1 (3d ed. 2019)).

¹² *See also, e.g., Wise v. Warden, Maryland Penitentiary*, 839 F.2d 1030, 1033 (4th Cir. 1988) (“The exhaustion doctrine is not satisfied where a federal habeas petitioner presents evidence which was not presented to the state court and which places his case ‘in a significantly different and stronger evidentiary posture than it was when the state courts considered it.’”) (quoting *Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983), and citing cases from the First, Sixth, and Tenth Circuits); *Sears v. Warden*, 73 F.4th Cir. 1269, 1286 n.10 (2023) (recognizing that this Court “left open the possibility that sometimes, new facts supporting a previously raised claim ‘may well present a new claim’” and noting that “many of our sister circuits have acknowledged that new evidence could ‘fundamentally alter’ a claim and thus create[] a new claim”) (*citing Cullen v. Pinholster*, 563 U.S. 170, 186 n.10 (2011), and cases from the Third, Fifth, Sixth, and Ninth Circuits).

of his competence, could be considered to have “fundamentally altered” the claim presented to the trial court so as to preclude application of 2254(d)’s limitations on federal review.¹³

The Eleventh Circuit had no procedural barrier to its consideration of this claim, given its recognition that a trial incompetency claim cannot be defaulted—as Respondent acknowledged below. *See, e.g.*, D.129:206 (conceding in his brief on the merits that “a substantive claim of incompetency when tried cannot be procedurally defaulted, thus, this claim is before the Court on de novo review”); *see also* D.128:36 (answer to third amended petition).¹⁴

These are complicated issues that properly should have been addressed by the Eleventh Circuit on appeal. Contrary to Respondent’s assertions, Mr. Heidler has not asked the Court to weigh in on them.¹⁵ Instead, he seeks a remand to the Eleventh Circuit so that the competency claim may receive the appellate consideration it deserves under the COA standard.

¹³ *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) (holding in pre-AEDPA case that supplemental evidence requested by district court “did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence”).

¹⁴ Respondent’s current argument is a departure from this position, as Respondent now argues that the mental health evidence introduced in state habeas proceedings “is not a ground for de novo review in the federal habeas area” BIO at 32. Moreover, although Respondent claims that “this Court has never held that additional evidence in support of a claim previously presented in state court creates an entirely new claim,” he nonetheless relies on this approach in urging, with respect to the district court’s dismissal of numerous claims as unexhausted and/or inadequately pled, that “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.” BIO at 33, 36. Inasmuch as Respondent had in fact conceded that almost all of the dismissed claims were properly before the district court, his flip-flopping on the issue should be rejected.

¹⁵ Respondent also misrepresents the evidence in arguing that the new state habeas evidence “did not alter [the substantive competence claim] so that it is a new claim.” BIO at 35. He contends that Mr. Heidler “was re[-e]valuated in state habeas by new experts, and none opined that he was incompetent either in that proceeding or at trial.” *Id.* This is not accurate. In state habeas proceedings, Jack Matteson, M.D., the prison psychiatrist, testified at length on the first day of the evidentiary hearing about Mr. Heidler’s ongoing treatment for severe mental illness, which included the administration of heavy doses of antipsychotic medications. *See* D.19-4:45-87.

Respondent takes issue with a handful of citations in the Petition addressing the issue of when the introduction of additional facts in federal habeas proceedings creates a “new” claim by “fundamentally altering” a claim raised in state habeas proceedings. *See* BIO at 34, 34 n.10.

Respondent’s criticism of Mr. Heidler’s citations to *Nelson v. Lumpkin*, 72 F.4th 649, 658-60 (5th Cir. 2023), *Poyson v. Ryan*, 879 F.3d 875, 879 (9th Cir. 2018), and *Franklin v. Jenkins*, 839 F.3d 465, 474 (6th Cir. 2016), are unwarranted and inaccurate. The *Nelson* court said precisely what Mr. Heidler indicated: “To date, the Supreme Court has not identified ‘where to draw the line between new claims and claims adjudicated on the merits.’” *Nelson*, 72 F.4th at 658. Mr. Heidler was not required, as Respondent contends, to write more about the case. And, contrary to Respondent’s assertion that the court in *Poyson* never stated that “new factual allegations will transform a claim if they ‘fundamentally alter’ the legal issue considered by the state courts,” *see* Pet. at 32 n.21; BIO at 34 n.10, that is a fair summary of the court’s observation that, while “‘new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not ‘fundamentally alter the legal claim already considered by the state courts.’” *Poyson*, 879 F.3d at 879. Finally, the Court in *Franklin* did state that a claim should be considered new if new evidence transforms the “gravamen of petitioner’s argument.” *Franklin*, 839 F.3d at 474. While that case may be of limited relevance, given its focus on whether an ineffectiveness claim presented in a second petition was “successive” under 28 U.S.C. § 2244(b)(1), it does not demonstrate that the district court’s resolution of Mr. Heidler’s competency claim was beyond dispute. To the contrary,

The next day, Dr. Matteson was recalled to testify regarding Mr. Heidler’s dramatic decomposition the evening before, which had resulted in his being heavily sedated and incapable of attending the hearing. D.19-4:2-5. The habeas court noted that both parties had waived Mr. Heidler’s presence “because of his medical condition” and that the court had no objection to waiving his presence. D.19-4:5. Clearly Mr. Heidler *was* incompetent during the evidentiary hearing to the point that he could not even be physically present due to his mental illness.

the complicated question of whether a federal court may properly consider evidence newly introduced in state post-conviction proceedings demonstrates that a COA should have issued to address the competency claim.

As to two other cases, *Grant v. Royal*, 886 F.3d 874 (10th Cir. 2018) and *Burr v. Jackson*, 19 F.4th 395 (4th Cir. 2021), Respondent’s criticisms have at least some support. Nonetheless, the Petition’s minor miscues illustrate the complex nature of the issues arising from this Court’s suggestion in *Pinholster* that additional evidence may, in some circumstances, create a new claim and underscore the appropriateness of a COA to address the issue. In *Grant*, the court concluded that the petitioner had raised an unexhausted procedural competency claim in federal court, whereas he had argued a substantive claim in state court. Undersigned counsel acknowledges that the Petition’s parenthetical explanation of the case could be seen as misleading, as it appears to cite the case for the proposition that new evidence had modified a preexisting substantive competency claim. *See* Pet. at 32. The *Grant* decision nonetheless does have bearing on Mr. Heidler’s case. As the court explained, in contrast to procedural competency claims, where a federal court’s review “is limited to the evidence that was made available to the state trial court, . . . post-conviction evidence can often be relevant to establishing substantive incompetency.” *Id.* at 893 (citations omitted).

The Petition seemingly cited *Burr* for the proposition that the Fourth Circuit had adopted a test that “new evidence that ‘bolsters’ [an] existing claim *may* produce [a] new claim,” *see* Pet. at 32 n.21 (emphasis added), though the court in that passage was actually discussing this Court’s language in *Pinholster*. *See Burr*, 19 F.4th at 418. Consistent with Mr. Heidler’s claims, however, the Fourth Circuit noted that it had held, even post-*Pinholster*, “that a claim was *not* ‘adjudicat[ed] on the merits for purposes of § 2254(d)’ when the state court made its decision ‘on a materially

incomplete record,” and that, in the wake of *Pinholster*’s observations about the impact of new evidence on adjudicated claims, “[w]e are left . . . with a plethora of unanswered questions.” *Burr*, 19 F.4th at 417, 418. Thus, both *Grant* and *Burr* support Mr. Heidler’s arguments that a COA should have issued to address difficult questions surrounding the competency claim.

III. Reasonable jurists could debate whether the district court properly dismissed numerous claims as inadequately pled or unexhausted years after accepting them as properly before the court.

As the Eleventh Circuit’s own COA rulings, in this case and others, clearly establish, reasonable jurists could debate the district court’s procedural rulings dismissing numerous claims as insufficiently pled and/or unexhausted years after Respondent responded that the claims were properly before the court and after the court agreed,¹⁶ and without providing Mr. Heidler notice or an opportunity to cure any defects. In this case, the Eleventh Circuit granted a COA to address a small subset of the dismissed claims, which addressed the ineffective-assistance-of-counsel (“IAC”) subclaim that trial counsel deficiently litigated the motions to suppress inculpatory statements, but then did not reach the procedural question, determining instead that the underlying IAC claims were without merit. *See* Pet. App. 110-12. In *Williams v. Warden, GDCP*, No. 22-10249 (11th Cir.), the court granted a COA to address the district court’s dismissal of numerous claims as insufficiently pled on the eve of merits briefing, received briefing on the issue, and conducted oral argument in July 2023, but has not yet decided the case. And, 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* Pet. at 19 n.12. Having acknowledged

¹⁶ *See* D.56 (order on default); *see also* D.10:16-23, D.46:15-22, D.75:15-21, and D.128:18-25 (Respondent’s answers to original and amended petitions).

the debatability of the issues in all three of these contexts, the Eleventh Circuit’s failure to apply that recognition to Mr. Heidler’s remaining dismissed claims is a gross departure from due process and fair proceedings.

Respondent again argues that this Court should deny review because the dismissed claims “are splitless, generally defaulted, and across the board meritless,” BIO at 36, and that, because “Heidler’s crimes were beyond the pale and the evidence regarding his conduct in jail . . . extremely aggravating,” the dismissed claims “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,’” BIO at 37. Again, these arguments have little to no bearing on the COA question before the Court. Whether a claim is debatable does not depend on the existence of a circuit split, although, certainly, a circuit split would illustrate the debatability of an issue. And that the claims may be defaulted, when the question presented is whether the district court properly dismissed them on this basis, sidesteps the issue before the Court.¹⁷ As to the underlying merits of the dismissed claims, “a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.” *Miller-El* 537 U.S. at 337. Respondent’s contention that this case is too aggravated for any errors to have impacted

¹⁷ Moreover, Respondent’s contention is not accurate across all the claims. The district court, for instance, dismissed as unexhausted claims that the prosecutor’s guilt and sentencing closing arguments were improper, but the Georgia Supreme Court, on direct appeal, considered the propriety of both arguments based on a combination of objections raised at trial and the court’s independent “duty under O.C.G.A. § 17-10-35(c)(1), [to make] an independent examination of the prosecution’s closing argument to determine whether, if improper, it had any effect on Heidler’s resulting death sentences.” Pet. App. at 565a-66a, 573a. The state habeas court ruled that any challenges to the prosecutor’s summations were res judicata. Pet. App. at 443a. These claims were thus fully exhausted and the district court was wrong to dismiss them as unexhausted. *See, e.g., Cone v. Bell*, 556 U.S. 449, 466-67 (2009).

the sentence disregards the cumulative assessment of prejudice required under both *Strickland*, 466 U.S. at 687, and *Darden v. DeChristoforo*, 416 U.S. 637, 639 (1974), and the fact that, even in highly aggravated cases, the death penalty is not mandatory and prejudice can be found.¹⁸

CONCLUSION

The COA process is designed to “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). Nonetheless, “[a] COA *should* issue if the applicant has ‘made a substantial showing of the denial of a constitutional right,’ 28 U.S.C. § 2253(c)(2),” *i.e.*, where the petitioner demonstrates “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 *Slack*, 529 U.S. at 484) (emphasis added). Mr. Heidler did so below and the Eleventh Circuit erred in refusing to expand the limited COA he received.

¹⁸ “Powerful aggravating circumstances. . . do not preclude a finding of prejudice, even when [a federal court’s] review is constricted to assessing the reasonableness of how the state court weighed the mitigating and aggravating factors.” *Foust v. Houk*, 655 F.3d 524, 546 (6th Cir. 2011). In *Williams v. Taylor*, 529 U.S. 362 (2000), for example, the Court found that counsel provided ineffective representation at the capital sentencing hearing despite the highly aggravated circumstances of the offense—the elderly victim was bludgeoned to death with a mattock in his own home during a robbery—and the offender, whose crime was “just one act in a crime spree that lasted most of Williams’ life,” and included “evidence that, in the months following the murder . . . , Williams savagely beat an elderly woman [into a permanent vegetative state], stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner’s jaw.” *Id.* at 368, 418 (quote from dissent of Rehnquist, C.J.) (quoting *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998)). See also, *e.g.*, *Cooper v. Secretary, Dept. of Corrections*, 646 F.3d 1328 (11th Cir. 2011) (finding counsel ineffective at sentencing in triple-murder case); *Anderson v. Sirmons*, 476 F.3d 1131, 1146 (10th Cir. 2007) (in triple-murder case, defense counsel ineffective at sentencing phase despite “callous and brutal” nature of “the multiple murders”).

The courts of appeals serve a vital role in promoting “doctrinal coherence and economy of judicial administration,” especially given the necessary infrequency of this Court’s review. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). “Courts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy,” *id.* at 232, and, even with the constraints on federal power under the AEDPA, are almost always the last line of defense of this Court’s pronouncements in state criminal matters. The issues Mr. Heidler has presented to this Court warrant the Eleventh Circuit’s review, and Mr. Heidler respectfully asks the Court to remand the case so that the challenged district court rulings may receive the appellate review they deserve.

For the reasons set forth above and in his petition, Mr. Heidler respectfully asks the Court to grant his petition to review the Eleventh Circuit’s decision. Alternatively, he asks that the Court hold the case pending the Eleventh Circuit’s decision in *Williams v. Warden, GDCP*, No. 22-10249 (11th Cir.).

Respectfully submitted,

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