CASE NO._____

In The
Supreme Court of the United States

MANUEL SEPULVEDA,

***Petitioner*,**

v.

LAUREL HARRY,
SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

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

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QUESTIONS PRESENTED

1. Should this Court resolve a split among the courts of appeals and decide whether an unreasoned blanket denial of a certificate of appealability that fails to address whether a petitioner's specific claims have "some merit" conflicts with 28 U.S.C. § 2253 and this Court's precedents by effectively precluding a habeas petitioner from seeking meaningful federal appellate review?

2. Do Petitioner's claims that trial counsel was ineffective due to his failure to investigate and present mental health evidence in support of his chosen defense and his failure to object to a jury instruction that lessened the prosecution's burden of proof in contravention of *In re Winship*, and that the prosecution suppressed material, exculpatory evidence, have at least "some merit" and thus meet the standards for a COA?

PARTIES TO THE PROCEEDING

Petitioner MANUEL SEPULVEDA was appellant in the court below and is an indigent prisoner within the Pennsylvania Department of Corrections. Respondent LAUREL HARRY is the secretary of the Pennsylvania Department of Corrections.

No party is a corporation.

RELATED PROCEEDINGS

United States Court of Appeals for the Third Circuit:

Manuel Sepulveda v. Secretary, Pennsylvania Department of Corrections, No. 23-1813

United States District Court for the Middle District of Pennsylvania:

Manuel Sepulveda v. Laurel Harry, No. 3:06-cv-00731

Supreme Court of Pennsylvania:

Commonwealth of Pennsylvania v. Manuel Sepulveda, No. 402 CAP (direct appeal)

Commonwealth of Pennsylvania v. Manuel Sepulveda, No. 553 CAP (initial post-conviction appeal)

Commonwealth of Pennsylvania v. Manuel Sepulveda, No. 712 CAP (post-conviction appeal following remand)

Court of Common Pleas of Monroe County:

Commonwealth of Pennsylvania v. Manuel Sepulveda, No. 1522 CR 2001 (trial)

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PETITION FOR WRIT OF CERTIORARI

Manuel Sepulveda respectfully petitions for a writ of certiorari to review a judgment and decision of the Third Circuit Court of Appeals.

OPINIONS BELOW

The Third Circuit's order summarily denying Mr. Sepulveda's request for a certificate of appealability ("COA") is unpublished and appears in the Appendix at App. 1a. The Third Circuit's order denying Mr. Sepulveda's timely petition for rehearing and rehearing en banc is unpublished and appears in the Appendix at App. 5a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit declined to issue a COA on September 29, 2023, and denied a petition for panel and en banc rehearing on January 12, 2024. Petitioner's application to extend the time to file a petition for a writ of certiorari was granted by Justice Alito on March 27, 2024, extending the time to file until May 13, 2024. This petition timely follows.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28 U.S.C. § 2253(c)(1) provides, in part: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(2) provides that a COA "may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

Nine years after Manuel Sepulveda was sentenced to death for first-degree murder, the Pennsylvania Supreme Court vacated his death sentence in light of his counsel's constitutionally deficient performance at the trial's penalty phase. App. 140a. Following remand, the Commonwealth elected not to pursue the death penalty and Mr. Sepulveda was resentenced to two concurrent life terms without the possibility of parole for his two first-degree murder convictions, plus twelve to twenty-four years imprisonment for conspiracy.

Mr. Sepulveda's first-degree murder convictions suffer from similar constitutional infirmities as his death sentence. Immediately before the killings that led to his convictions, Mr. Sepulveda smoked crack with Robyn Otto at the home she shared with Daniel Heleva and their two young children, where Mr. Sepulveda was staying. App. 20a, 200a. Ms. Otto told Mr. Sepulveda she feared that John Mendez would hurt her and her children. App. 20a, 200a. Shortly thereafter, Mr. Mendez and Ricardo Lopez came to the house and took two guns from Mr. Heleva's bedroom. App. 82a. When Mr. Heleva arrived home later that night and noticed that the guns were missing, he confronted Mr. Mendez and Mr. Lopez, and a fight ensued. App. 82a. As Mr. Sepulveda testified at trial, he "got scared," grabbed a shotgun off the kitchen table, and shot both Mr. Mendez and Mr. Lopez, who died in the house. App. 20a. At trial, counsel's chosen defense was that Mr. Sepulveda acted out of a genuine (even if unreasonable) belief that the killings were necessary to protect others. However, counsel failed to investigate Mr. Sepulveda's background, mental health, and daily drug use—evidence which would have

supported this defense. Trial counsel also did not object to substantial defects in the court's jury instructions and failed to challenge the Commonwealth's presentation of false evidence which suggested Mr. Sepulveda acted with malice and intent.

Despite trial counsel's repeated errors, Mr. Sepulveda has not received meaningful appellate review of the district court's denial of habeas relief on Mr. Sepulveda's guilt-phase claims. The district court recited the correct threshold COA standard but did not offer any explanation as to why each of Mr. Sepulveda's claims failed to satisfy that minimal standard. *See* App. 42a. ("In the instant case, jurists of reason could not disagree with the Court's resolution of Sepulveda's constitutional claims or conclude that the issues presented are adequate to deserve encouragement to proceed further. Accordingly, the Court will not issue a COA in this case.").

Mr. Sepulveda then filed a COA application in the Third Circuit requesting permission to brief and present several of his remaining guilt-phase claims on appeal. On September 29, 2023, a panel of the Third Circuit issued a blanket unreasoned denial of a COA and dismissed the appeal. App. 1a. Like the district court, the panel cited the correct standard but noted in a conclusory footnote that Mr. Sepulveda had failed to satisfy that minimal standard. The footnote order states in full:

> The foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would not debate the District Court's denial of the claims raised in Sepulveda's request for a certificate of appealability. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)

> (describing elements of a claim based on *Brady v. Maryland*, 373 U.S. 83, 87 (1963)); *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984) (describing standard for claims of ineffective assistance of counsel); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The motion to exceed the word limit is granted.

Id. The court denied panel rehearing and rehearing en banc on January 12, 2024. App. 5a. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S UNREASONED BLANKET DENIAL OF A COA TO A HABEAS PETITIONER SERVING LIFE WITHOUT THE POSSIBILITY OF PAROLE DIVERGES FROM THE PRACTICES OF OTHER COURTS OF APPEALS AND VIOLATES 28 U.S.C. § 2253 AND THIS COURT'S PRECEDENTS.

To obtain a certificate of appealability, a habeas petitioner need only make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). That showing is satisfied when a petitioner demonstrates that his claim has "some merit." *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). A claim is only insubstantial if "it does not have any merit or . . . it is wholly without factual support." *Id.* at 16. If "jurists of reason could conclude that the District Court's dismissal on procedural grounds was debatable or incorrect," a COA must be granted. *Slack v. McDaniel*, 529 U.S. 473, 485 (2000). The petitioner's burden at this stage is minimal: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Although not dispositive, the severity of a petitioner's penalty is a proper consideration when determining whether to issue a COA. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Slack*, 529 U.S. at 483-84 (holding that the COA requirement codified the pre-AEDPA *Barefoot* standard).

The COA process plays an important "gatekeeping function" that is only fulfilled when the reviewing court makes an actual "determination" that a COA is or is not warranted. *Gonzalez v. Thaler*, 565 U.S. 134, 157 (2012) (Scalia, J., dissenting). Given its essential function in the federal habeas corpus system, this Court has mandated that the COA process "must not be *pro forma* or a matter of course." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Rather, "the COA determination under Sec. 2253(c) *requires* an overview of the claims in the habeas petition and a general *assessment of their merits*." *Id.* at 336 (emphasis added).

The Third Circuit's unexplained denial of a COA for each of Mr. Sepulveda's claims is in direct conflict with § 2253(c) and this Court's decisions in *Miller-El* and *Hohn v. United States*, 524 U.S. 236 (1998). The court's blanket order effectively precluded any meaningful federal appellate review of Mr. Sepulveda's first-degree murder convictions for which he will be incarcerated for the rest of his life. In doing so, the Third Circuit also joined a growing split between the courts of appeals on whether a panel can issue an unreasoned denial of a COA.

A. The Courts of Appeals are Split on Whether a Panel Can Issue an Unreasoned Blanket Denial of a COA to a Habeas Petitioner.

In denying a COA to Mr. Sepulveda in an unreasoned footnote, the Third Circuit split with other courts of appeals' interpretations of § 2253. Section 2253(c)(3) provides that a court "shall indicate which specific issue or issues satisfy the showing" required to grant a COA. 28 U.S.C. § 2253(c)(3); *see also* Randy Hertz & James S. Liebman, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4 (2023) (explaining that a court must state reasons for granting a COA and "may not

simply find that the overall habeas corpus petition or section 2255 motion meets the standard."). Although stating the issues on which a COA is granted is not a jurisdictional requirement, *see Gonzalez*, 565 U.S. at 137, the courts of appeals generally provide a statement of reasons when granting a COA. *See, e.g., Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014); *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *United States v. Weaver*, 195 F.3d 52, 53 (D.C. Cir. 1999); *Muniz v. Johnson*, 114 F.3d 43, 46 (5th Cir. 1997); *Johnson v. Gramley*, 929 F.2d 350, 350 (7th Cir. 1991); *Bradley v. Birkett*, 156 F. App'x 771, 774 (6th Cir. 2005). Indeed, this is the Third Circuit's own practice when issuing COAs and when reviewing district court decisions issuing COAs. *See, e.g., Satizabal v. Folino*, 318 F. App'x 78, 81 (3d Cir. 2009) (remanding to the district court to "indicate the specific issue or issues on which [petitioner] has made his substantive showing.").

Nonetheless, the courts of appeals are split on whether a panel can issue an unreasoned blanket *denial* of a COA. Both the Sixth and Tenth Circuits have prohibited such unreasoned denials because they undermine the COA's gatekeeping function and hinder further judicial review. In *Herrera v. Payne*, the Tenth Circuit held that a statement of reasons must accompany a denial of a COA (then a certificate of probable cause): "[T]he proper exercise of [the district court's] discretion cannot be adequately reviewed where no reasons for the determination have been given. Clearly the rule imposes a responsibility on the district judge to issue a certificate or a statement detailing his reasons for declining to confer one."). 673 F.2d 307, 307 (10th Cir. 1982). More recently, in *Murphy v. Ohio*, the Sixth

Circuit stated: "Such a blanket *denial* of a COA by a district court in this case is at least as objectional as the blanket *grant* of a COA . . . if not more so." 263 F.3d 466, 467 (6th Cir. 2001). The Sixth Circuit vacated the district court's unreasoned denial of a COA and remanded the case for consideration of each of petitioner's claims. *Id.* at 466. The court reasoned: "The district court here failed to consider each issue raised by [petitioner] under the standards set forth by the Supreme Court in *Slack*. . . . As such, the district court effectively delegated the COA determination process to this Court." *Id.* at 467.

In contrast to the Sixth and Tenth Circuits, the Eighth Circuit has held that courts do not need to publish a statement of reasons when denying a COA. *See Dansby v. Hobbs*, 691 F.3d 934, 936 (8th Cir. 2012) ("Whether to issue a summary denial or an explanatory opinion is within the discretion of the court."). Other courts of appeals have noted this split and highlighted its significant implications for meaningful federal review of habeas petitions. For instance, in *Haynes v. Quarterman*, the Fifth Circuit noted the split and declined to reach the issue, instead assuming arguendo that Federal Rule of Appellate Procedure 22(b)(1) requires a district court to state individualized reasons when denying a COA. 526 F.3d 189, 194 (5th Cir. 2008).[1]

Although many courts of appeals have yet to rule directly on this issue, the

[1] Federal Rule of Appellate Procedure 22(b)(1) was revised in 2009 and no longer delineates this requirement. *See* Fed. R. App. P. 22(b)(1) advisory committee's note to 2009 amendment. Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts now governs: "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)."

practices of other circuits generally align with that of the Sixth and Tenth. *See, e.g., Swisher v. True*, 325 F.3d 225 (4th Cir. 2003); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016); *Woods v. Buss*, 234 F. App'x 409 (7th Cir. 2007); *Dickens v. Ryan*, 552 F. App'x 770 (9th Cir. 2014); *Franklin v. Hightower*, 215 F.3d 1196 (11th Cir. 2000) (all providing reasons for denying a COA).

B. This Court's Precedents Establish that Issuing an Unreasoned Blanket Denial of a COA Does Not Comply with the Minimum Requirements of 28 U.S.C. § 2253.

The Third Circuit's unreasoned blanket denial of Mr. Sepulveda's COA application conflicts with this Court's precedents. This Court has repeatedly emphasized that the threshold COA inquiry is merely whether a habeas petitioner has made a "substantial showing of the denial of a constitutional right." *Slack*, 529 U.S. at 483. Therefore, a reviewing court must not conduct a full analysis of the ultimate merits of a petitioner's claims. *Miller-El*, 537 U.S. at 336. "When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 336-37. But the Third Circuit's conclusory footnote does not allow Mr. Sepulveda nor this Court to evaluate whether its denial is erroneously based on whether his claims will ultimately succeed on the merits, or the less searching analysis mandated by *Slack*. Although the Third Circuit cited the correct standard in its footnote order, its dearth of explanation does not demonstrate whether its review was based on its agreement with the district court's merits decision or upon an independent determination of whether Petitioner's claims had some merit. Indeed, the Third

Circuit's footnote makes no mention of any review of whether any claim had "some merit" or was fairly supported by the record. The Third Circuit provided no reasoning whatsoever to support a finding that the claims were so insubstantial as to lack any merit at all.

The Third Circuit's *pro forma* denial thus improperly hinders this Court's review of Mr. Sepulveda's claims. In *Hohn v. United States*, this Court held that it has jurisdiction under 28 U.S.C. § 1254(1) to review the denial of a COA by certiorari. 524 U.S. at 239-40. The availability of this review presupposes something for this Court to review in the first place. By merely citing relevant cases rather than engaging in any substantive legal analysis, the Third Circuit's unexplained order insulates Mr. Sepulveda's conviction from this Court's review as contemplated by *Hohn*.

The Third Circuit's conclusory denial also does not comport with this Court's emphasis on protecting a state prisoner's access to a complete round of federal habeas corpus review, including appellate review. *See* Hertz and Liebman, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4 (2023) ("[T]he [*Hohn*] Court construed AEDPA broadly, rejecting a literal interpretation . . . that would have deprived the Court of jurisdiction over denials of certificates of appealability and thereby denied habeas corpus petitioners at least one full (three-court) round of federal post-conviction review."). As this Court observed in *Banister v. Davis*, "[a] state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction." 590 U.S. 504, 507 (2020). Mr. Sepulveda did not have such an

opportunity and has been provided no meaningful explanation as to why.

The district court's unreasoned blanket denial of Mr. Sepulveda's COA, followed by the Third Circuit's *pro forma* denial, violates § 2253 and this Court's precedents. This Court should therefore grant certiorari to resolve the split among the courts of appeals and reinforce the minimum requirements of § 2253.

II. A CERTIFICATE OF APPEALABILITY IS WARRANTED BECAUSE MR. SEPULVEDA'S CLAIMS RAISE IMPORTANT AND DEBATABLE QUESTIONS OF FEDERAL LAW.

Mr. Sepulveda satisfied the minimum COA threshold standard articulated by this Court in *Slack* and *Miller-El* with respect to the following claims: 1) his trial counsel was ineffective for failing to present evidence in support of his imperfect defense of others theory; 2) the Commonwealth suppressed a key witness statement in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); 3) the trial court's jury instructions violated his due process rights under *In re Winship*, 397 U.S. 358 (1970); and 4) the Commonwealth's use of false, supposedly "reconstructed" portions of his statement to police violated his due process rights under *Napue v. Illinois*, 360 U.S. 264 (1959). As summarized below, each of these claims has at least "some merit," and each claim is factually supported by the record.

When applying the COA standard, both the district court and the Third Circuit should have resolved any doubts in Mr. Sepulveda's favor and considered the severity of the penalty—here, life without the possibility of parole. *See Barefoot*, 463 U.S. at 893. Had the Third Circuit done so, as mandated by *Slack* and *Miller-El*, it would have granted a COA and considered the important questions of federal law raised by Mr. Sepulveda's claims.

A. Reasonable Jurists Would Debate Whether Mr. Sepulveda's Trial Counsel Was Ineffective for Failing to Present Evidence in Support of His Imperfect Defense of Others Theory.

At trial, defense counsel argued that Mr. Sepulveda was guilty of only voluntary manslaughter because he acted out of a genuine (even if unreasonable) desire to protect others. *See* App. 123a, n.11. In Pennsylvania, evidence supporting a defendant's subjective belief that he, or others, were in imminent danger is admissible and relevant to establish "imperfect" self-defense or defense of others. *Commonwealth v. Light*, 326 A.2d 288, 292, 294 (Pa. 1974). Although trial counsel sought and obtained an instruction regarding voluntary manslaughter based on this theory, he offered no mental health or other background evidence to support his chosen defense. In his habeas petition, Mr. Sepulveda alleged that he was prejudiced by his counsel's deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984).

The Pennsylvania Supreme Court held that Mr. Sepulveda had not demonstrated that he was prejudiced because, even if the jury had credited expert testimony on the subjective elements of the imperfect defense of others claim, the jury was unlikely to find that those "perceptions, if genuinely held, were objectively reasonable," as required by Pennsylvania law. App. 133a.[2]

The district court did not scrutinize the Pennsylvania Supreme Court's prejudice determination, apparently believing that the fact that the Pennsylvania

[2] In this context, Pennsylvania courts discuss the objective reasonableness of an unreasonable belief. Essentially, this doctrine means that imperfect self-defense must arise from the facts of the case. *Commonwealth v. Sheppard*, 648 A.2d 563, 569–70 (Pa. Super. Ct. 1994). As such, imperfect self-defense cannot be a free-floating product of the defendant's mental illness. *Id.*

Supreme Court's decision involved a discussion of state law placed it outside the district court's responsibilities under 28 U.S.C. § 2254(d). *See* App. 40a-41a.

Although it is "not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), § 2254(d) still requires federal courts to analyze whether a state court's decision was contrary to clearly established federal law, regardless of whether the claim touches upon questions of state law. This Court should grant certiorari to correct the Third Circuit's apparent acceptance of the district court's abdication of its duties under 28 U.S.C. § 2254(d).

B. Reasonable Jurists Would Debate Whether the District Court Reversed the Applicable Burden of Proof When Rejecting Mr. Sepulveda's *Brady* Claim.

Prior to trial, the Commonwealth failed to disclose statements from a key witness that would have supported Mr. Sepulveda's defense that he was guilty of voluntary manslaughter, rather than first-degree murder. The Commonwealth's suppression of the statements violated Mr. Sepulveda's right to due process because the statements were favorable and material to Mr. Sepulveda's degree of culpability. *See Brady*, 373 U.S. at 87. Additionally, when the witness offered false testimony at trial that directly contradicted her undisclosed pretrial statements, the prosecutor remained silent in violation of *Napue*.

The district court correctly applied de novo review but held that the claim failed on the merits. According to the district court, even if the jury had learned of the suppressed statements, it would have nonetheless returned a first-degree murder verdict because Mr. Sepulveda "had little likelihood of *satisfying* the

requirements of the defense [of others] under state law, as articulated by the supreme court." App. 32 (emphasis added).

However, the district court's holding misattributed the relevant burden—Mr. Sepulveda was not required to satisfy or prove the elements of imperfect defense of others at trial. Once Mr. Sepulveda raised the defense, the Commonwealth bore the burden of disproving the claim beyond a reasonable doubt. *See Commonwealth v. Torres*, 766 A.2d 342, 245 (Pa. 2001) ("If there is any evidence that will support the claim," then "the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt."). Thus, the district court should have determined whether there was a reasonable probability that the suppressed evidence, and the witness's false testimony, would have raised a reasonable doubt as to whether Mr. Sepulveda acted under a genuine but unreasonable belief that he was protecting others from serious harm or death. The district court never asked, and never answered, the proper dispositive question. As such, the district court erred by reversing the burden and requiring Mr. Sepulveda to "satisfy" or prove the elements of imperfect defense of others.

The Third Circuit did not explain why it nonetheless adopted the district court's flawed reasoning. Given this error and the lack of explanation from the panel, certiorari should be granted.

C. Reasonable Jurists Would Debate Whether the Trial Court's Jury Instructions Violated Mr. Sepulveda's Due Process Rights Under *In re Winship*.

Mr. Sepulveda sought a COA on his claim that several of the trial court's jury instructions reduced the prosecution's burden of proving the elements of the

relevant offenses and, therefore, violated his due process rights under *In re Winship*. The panel's order denying a COA cites to the standards set forth in *Brady*, *Strickland*, and *Napue* but it does not contain a similar conclusory citation to *Winship* or any other case governing Mr. Sepulveda's claim that the jury instructions violated his right to due process. As such, it appears that the panel may have overlooked this claim in its entirety. A COA should be granted to ensure that this claim receives at least some degree of federal appellate review.

Furthermore, a COA is warranted because the panel's decision also leaves unexamined several fundamental errors in the district court's merits determination. As part of his *Winship* claim, Mr. Sepulveda argued that the trial court failed to provide the jury with the proper definition of malice under Pennsylvania law as set forth in *Commonwealth v. Heatherington*, 385 A.2d 338 (Pa. 1978), and that the trial court's error reduced the Commonwealth's burden of proving murder in violation of his due process rights. The district court rejected this aspect of the *Winship* claim on the merits, holding that Mr. Sepulveda "cited no clearly established federal law as determined by the United States Supreme Court that requires the *Heatherington* instruction." App. 47a.

Contrary to the district court's holding, Mr. Sepulveda need not cite a Supreme Court case explicitly holding that the instruction as set forth in *Heatherington* must be given at trial in Pennsylvania. Rather, *Winship* applies the clearly established federal law for the underlying due process claim and *Winship* and its progeny require federal courts to look to state law to determine the elements

of a charge. *See, e.g., Everett v. Beard*, 290 F.3d 500, 513-14 (3d Cir. 2002) (analyzing state law as it existed at the time of trial and finding deficient performance where counsel failed to object to a jury instruction that was erroneous under state law). The panel did not explain how this error in the district court's merits ruling was beyond debate. Certiorari should be granted to ensure that the district court's erroneous ruling is subject to meaningful appellate review.

D. Reasonable Jurists Would Debate Whether the Commonwealth's Use of False, Supposedly "Reconstructed" Portions of Mr. Sepulveda's Statement to Police Violated Mr. Sepulveda's Due Process Rights Under *Napue*.

At trial, the Commonwealth claimed to have "reconstructed" inaudible portions of a statement Mr. Sepulveda gave to the police shortly after the incident. The supposedly "reconstructed" portions of the transcript provided to the jury were false. Mr. Sepulveda alleged that the use of this false evidence to convict him of first-degree murder violated *Napue*.

The Pennsylvania Supreme Court held that this claim failed on the merits because Mr. Sepulveda did not demonstrate that the Commonwealth "*deliberately* falsified the transcript or *knowingly* introduced false evidence." App. 154a (emphasis added). The district court endorsed this conclusion as a reasonable application of *Napue*. App. 54a.

The district court's reasoning is contrary to this Court's precedent. Mr. Sepulveda need not prove that the Commonwealth *knew* that the evidence was false because the introduction of evidence that the Commonwealth *should have known* was false also violates the Fourteenth Amendment. *See United States v. Agurs*, 427

U.S. 97, 103 (1976) ("prosecution knew, or should have known" of the false evidence). This Court should grant certiorari to resolve the panel's apparent adoption of this flawed reasoning.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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Dated: May 6, 2024