

DOCKET NO. _____

OCTOBER TERM 2024

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES GROVER BRANT
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY
GENERAL, STATE OF FLORIDA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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*Appointed by the United States Court of Appeals for the Eleventh Circuit pursuant to the Criminal Justice Act, 18 U.S.C. 3006A

QUESTIONS PRESENTED

1. Whether a federal circuit court is patently wrong in denying a Certificate of Appealability in a capital case where a state habeas petitioner identifies specific failings by trial counsel, offers overwhelming detailed mitigation discovered in collateral proceedings centrally relevant to the facts of the crime, and identifies objectively unreasonable applications of clearly established federal law by the state court.
2. Whether a state court's unreasonable application of this Court's *Strickland* prejudice standard in applying a piece-meal prejudice analysis to a claim- which necessarily diminishes the assessment of the weight of mitigation presented – presents a claim debatable among jurists of reason when four other federal circuits have held failure to assess prejudice in its totality is an unreasonable application of clearly established federal law.

RELATED PROCEEDINGS

Direct Appeal:

Florida Supreme Court

Charles Grover Brant v. State, No. SC07-2412 (November 12, 2009) (Opinion affirming judgment and sentence of death) (published at *Brant v. State*, 21 So. 3d 1276 (Fla. 2009)).

Relevant State Court Postconviction Proceedings:

Circuit Court in and for Hillsborough County, Florida,

Charles Grover Brant v. State, Case No.: 04-CF-12631 (Feb. 5, 2014) (Final Order Denying Motion to Vacate Judgment and Sentence); rehearing denied March 11, 2014. (unpublished)

Florida Supreme Court

Charles Grover Brant v. State, No. SC14-787 (June 30, 2016) (Opinion affirming denial of motion for post-conviction relief); rehearing denied August 23, 2016. (published at *Brant v. State*, 197 So. 3d 1051 (2016))

Federal Habeas Review

United States District Court (M.D. Fla.)

Charles Grover Brant v. Secretary, Department of Corrections, No. 8:16-cv-2601-KKM-JSS (March 27, 2023) (Order Deny Habeas Petition); rehearing denied, August 23, 2023. (unpublished)

United States Court of Appeals (11th Circuit)

Charles Grover Brant v. Secretary, Department of Corrections, Attorney General State of Florida No. 23-13124 (Feb. 29, 2024) (Denial of Certificate of Appealability); rehearing denied, April 10, 2024. (unpublished)

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Petitioner Charles Grover Brant respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of a single judge of the Court of Appeals denying Petitioner a Certificate of Appealability (“COA”) (App., *infra*, 2a – 31a) is unreported. The order of the three-judge panel denying COA on rehearing (App., *infra*, 32a – 33a) is unreported. The opinion of the district court denying Petitioner’s habeas petition (App., *infra*, 34a-68a) is unreported. The opinion of the district court denying rehearing (App., *infra*, 69a-73a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 10, 2024. The Honorable Clarence Thomas entered an order extending the due date for this Petition until August 8, 2024 (23A1164). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”

The Fifth Amendment to the United States Constitution provides in relevant part: “No person shall be . . . deprived of life [or] liberty . . ., without due process of law[.]”

The Eighth Amendment to the United States Constitution provides in relevant Part: “[C]ruel and unusual punishments [shall not be] inflicted.”

The Fourteenth Amendment to the United States Constitution provides in relevant part: “No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]

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

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the

ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

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

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

STATEMENT

This case arises from the circuit court’s denial of a COA by a single judge and then, on rehearing, by a three-judge panel.¹ Petitioner, a state inmate sentenced to death, raised meritorious issues of ineffective assistance of counsel which warranted the granting of a COA.

Petitioner, Charles Grover Brant (“Brant), a then- 39-year-old, devout Christian married father of two, with no prior criminal history, went on a methamphetamine-fueled-binge that raged out of control and resulted in the tragic rape-murder of his neighbor, Sara

¹ Eleventh Circuit Rule 22-1(c) permits a motion for reconsideration by a three-judge panel of a single judge’s denial of a COA. *See also* Fed. R. App. P. 27 (c) (“The court may review the actions of a single judge.”); 11th Cir. R. 27-1(d) (a single judge’s actions on a certificate for appealability is “subject to review by the court”).

Radfar. Petitioner's trial counsel's constitutionally deficient performance prejudiced Petitioner's case resulting in Petitioner receiving a sentence of death.

Petitioner challenged his judgment and sentence through collateral state court proceedings where he presented striking evidence his trial counsel failed to uncover, including that he was conceived in a rape during his mother's first marriage, was rejected by his purported father (his mother's husband), whose name he carries, and remained unwanted and unloved by his mother. Petitioner also presented detailed evidence that he was exposed to sudden and violent sexual assault in his home by his stepfather against his mother and half-sister, ² and prior to the murders his drug habit had become so severe that he was eating methamphetamine in his pancakes and drinking it in his coffee. Unrefuted expert testimony explained the damaging effect Petitioner's conception and childhood exposure to sexual violence had on his emotional and psychological development, why it is important for an expert to explain to the sentencer why childhood matters, that methamphetamine triggers hypersexuality and violence, and detailed that Petitioner had pockets of dead grey matter in his brain due to either his drug abuse, injury suffered *in utero*, or ingesting plaster as a young child. The sentencing judge heard none of this evidence.

The state post-conviction court denied his claims and, in so doing, made objectively unreasonable factual findings and legal error in misapplying *Strickland*,³ including by assessing prejudice in a piece-meal fashion rather than considering the totality of the

² At the penalty phase trial, there was cursory reference that Petitioner's stepfather had sexually abused or attempted to sexually abuse Petitioner's half-sister but no mention that the abuse occurred in the form of surprise rape, nor was their detailed testimony from Brant's mother about how Brant's stepfather raped her almost nightly while in a drunken rage.

³ *Strickland v. Washington*, 466 U.S. 668 (1984).

evidence presented in post-conviction and weighing it against the totality of evidence produced at trial. App., *infra*, 338a-456a, p. 96-104⁴ The Florida Supreme Court affirmed the denial of post-conviction relief, engaging in the same objectively unreasonable piecemeal analysis employed by the post-conviction court, by mixing the performance and prejudice prongs and unreasonably determining counsel made strategic choices when the record did not support such a finding. *Id.* at 287a-337a, p. 20-41

Petitioner timely filed his habeas petition with the district court, *id.* at 74a- 180a, accompanied by a memorandum of law. *Id.* at 181a-286a. In denying Petitioner’s habeas petition, the district court failed to squarely address Brant’s arguments and facts set out in his habeas petition. *Id.* 34a-68a. As to his claim of ineffective assistance of penalty phase counsel, the court held that any strategic decision was virtually unchallengeable, and the additional mitigating evidence was so minor as to be cumulative. The district court denied a COA. Brant then sought a COA from the Court of Appeals. A single judge on the Court of Appeals denied Brant a COA in a 34-page order.⁵ *Id.* 1a-31a. The single judge rejected Petitioner’s argument that the state court’s *Strickland* analysis was flawed. *Id.* at p. 28.. The single judge also essentially decided the merits of the appeal when adjudicating whether a COA should be granted. Brant moved for rehearing by a three-judge panel, which denied a COA in a two-page order. *Id.* 32a-33a.

To obtain a COA, a petitioner need only demonstrate a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(C)(2). “The only question” the lower court

⁴ Citations to the appendix will include the chronological number of the document page(s) in the appendix and the internal page number of the individual document if referenced.

⁵ The record in Petitioner’s case is 9,969 pages, the bulk of which contains documentary evidence and testimony presented in the two-week long collateral proceedings. His habeas petition, with detailed record cites, is 107 pages; his memorandum of law in support of his petition is 106 pages.

must answer is whether “jurists of reason could disagree with the district court's resolution of his constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). “When a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the merits, it is in essence deciding an appeal without jurisdiction.” *Id.* at 115. “The court below phrased its determination in proper terms—that jurists of reason would not debate that [Brant] should be denied relief, but it reached that conclusion only after essentially deciding the case on the merits.” *Buck* at 116 (internal citations omitted).

The Circuit Court here was objectively wrong in denying a COA, violating this Court’s precedent on limiting an appellate court to a threshold inquiry. More significantly, Petitioner made a substantial showing of the denial of his constitutional right to the effective assistance of counsel based on overwhelming facts presented in post-conviction and clearly established federal law. The Eleventh Circuit’s assessment of Petitioner’s argument that the state courts’ piece-meal analysis was an objectively unreasonable application of *Strickland*, impliedly deepened a split where this Court, and four other courts of appeal, have held that analysis of the *Strickland* prejudice prong requires assessing the totality of the evidence adduced at post-conviction against that introduced at trial, a necessarily cumulative endeavor. This Court should grant the writ and reverse and remand for further proceedings where Petitioner may seek full appellate review.

A. Background

This Court has recognized that the death penalty “differs from all other forms of criminal punishment, not in degree but in kind.” *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Death sentences carry with them a heightened “need for

reliability.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). This heightened reliability is achieved, in part, through the post-conviction process where counsel is required to robustly reinvestigate and present evidence on collateral review in state court, with review of constitutional claims in federal court.

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), Pub.L.No. 104-132, 110 Stat. 1214 (1996), revising the habeas statute first passed in 1867, the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867). The purpose of AEDPA was to expedite capital cases and limit the scope of habeas review. AEDPA bars federal appellate courts from hearing appeals from federal district courts’ denials of claims in habeas petitions unless a circuit judge issues a COA. 28 U.S.C. § 2253(c)(1). A COA should issue only if the applicant has made a substantial showing of the denial of a constitutional right. *Id.* at 2253(c)(2).

While the COA was a new statutory restriction on federal appellate courts’ ability to review district court denials of habeas relief, this Court affirmed that it was essentially a codification of the pre-AEDPA standard for appellate review found in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard remained essentially unchanged: 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.* at 484 (citing *Barefoot*, 463 U.S. at 893, n.4) This standard is a “threshold inquiry.” *Id.* at 485. This Court has emphasized that the COA inquiry “is not coextensive with a merits analysis.” *Buck*, 580 U.S. at 115.. The statute forbids using this threshold inquiry to “require full consideration of the factual or legal bases adduced in support of the claims.” *Miller-El*, 537 U.S. at 336..

The circuit court's denial of a COA was objectively wrong.

B. Facts and Procedural History

(1) Trial Proceedings

1. “Charles Grover Brant was convicted of first-degree murder, sexual battery, kidnapping, grand theft of a motor vehicle, and burglary with assault or battery arising from the 2004 strangulation of [his neighbor] Sara Radfar.” *Brant v. State*, 21 So. 3d 1276, 1277 (Fla. 2009) (“*Brant I*”). Brant pled guilty, waived a penalty phase jury and proceeded to a bench trial on penalty.

2. Radfar had been sexually assaulted and strangled; she was found naked in the bathtub with a dog leash around her neck and a plastic bag over her head. Brant tried to turn himself in, and, when arrested, readily confessed, admitting that he had raped her, placed a sock in her mouth and had repeatedly tried to strangle her with a stocking, an electrical cord and a dog leash. *Id.* at 1278. The sexual nature of the crime was shocking and a central feature of the State's case.

3. During the penalty phase proceedings, the prosecution called Brant's wife, Melissa McKinney, who testified about Brant's methamphetamine use in the six months prior to the murder. Brant would be up for four or five days in a row and became “obsessed” with sex.” *Id.* at 1279. In the two-year period leading up to the murder, Brant and McKinney engaged in rape fantasy role-play, where Brant would jump out and surprise attack her. *Id.* The role-play became “rougher” so that McKinney threatened Brant that she would call the police if he didn't stop. *Id.* The night before the murder, Brant, who McKinney believed was using methamphetamine, attacked her, placed her on the bed, bound her hands and tried to place a sock in her mouth. *Id.* She was able to get away. *Id.*

4. The defense presented the testimony of Crystal Coleman, Brant's mother, who testified generally that her family had a history of depression and other mental health conditions and that as a child, Brant would beat "his head against the floor." *Id.* at 1280. He also "ate plaster and fertilizer." *Id.* When Brant was around five, Crystal married Marvin Coleman. "Marvin, who drank heavily, would spank or whip Brant over trivial matters until he bled, would threaten Brant, and 'was very derogatory toward' Brant." *Id.* Marvin drank and was arrested in Baltimore for domestic violence. App., *infra*, 75a-180a, p.25. Crystal also stated that Marvin drank more when they moved to Florida and he would come home drunk and "mentally and physically torture me up until four or five in the morning, at which time I would take a shower and go to work and leave the house." *Id.*

5. Crystal also testified that Eddie Brant, Charles Brant's father, worked a lot of hours and had a low IQ. *Id.* at 24. Crystal said their marriage ended because her Aunt Jenny "took [Eddie Brant] away from me." *Brant 1*, at 482. This happened when Charles Brant was seven or eight weeks old. *Id.* at 483. Crystal attributed her problems after giving birth to being "snake bit." *Id.* at 483.

6. "Sherry Lee Brant-Coleman, Brant's older sister, similarly testified that Brant's stepfather was an alcoholic and 'a bully' to Brant. Sherry testified that Marvin singled Brant out from the other children for more criticism and physical abuse."⁶ *Id.*

7. Other witnesses testified that Brant attended Blue Ridge Bible College in 1990, that he had a drug problem that he sought help for, and that he was generally "a non-violent person, a good father" and a "good craftsman" who expressed deep remorse for his crime. *Id.*

⁶ In its summation of Sherry Lee Brant-Coleman's testimony, the Florida Supreme Court did not mention anything about the surprise sexual assault Sherry suffered from Marvin, most likely because it was only briefly mentioned and did not include any details.

8. The Defense presented expert testimony from Michael Scott Maher, M.D., a psychiatrist, who diagnosed Brant as suffering from severe methamphetamine dependence associated with psychotic episodes, sexual obsessive disorder, and chronic depression. *Id.* at 1280-81. Maher described Brant as a “lifestyle user of methamphetamine,” which “ultimately lead[] to psychosis,” experienced “at and around the time of the offense.” *Id.* at 1281.

9. Dr. Maher also testified that Brant showed a history of depression and relationship problems and that “Brant might suffer from abnormal brain functioning.” *Id.* “Dr. Maher explained that the twenty-five point difference between Brant's verbal and performance IQs was indicative of abnormal brain functioning[,]” and “a PET scan of Brant's brain showed four areas of suppressed glucose uptake that could indicate underactivity in . . . parts of the brain . . . important to impulse control and good judgment.” *Id.*

10. “Dr. Maher opined that Brant, while legally sane at the time of the sexual battery and murder, ‘had, as a result of mental disease, defect, a substantial impairment [] in his ability to conform his behavior to the requirements of the law.’” *Id.* at 1281-82.

11. The Defense also called Dr. Valerie McClain, a neuropsychologist, who diagnosed Brant with polysubstance abuse, depression and cognitive disorder. *Id.* at 1282. Dr. McClain also stated that Brant’s methamphetamine use prior to the murder would make him more likely to be impulsive and as a result “Brant’s capacity to conform his conduct to the law was substantially impaired.” *Id.*

12. The State called Dr. Donald R. Taylor, Jr., a forensic psychiatrist, who diagnosed Brant with substance dependence disorder, a learning disorder and sexual sadism. *Id.* at 1283. Dr. Taylor stated that “sexual sadism arises out of a genetic predisposition and

unhealthy childhood environment,” and “that Brant's childhood contained factors that can contribute to a diagnosis of sexual sadism.” *Id.*

13. “Dr. Taylor opined that Brant did have ‘a substantial impairment in his ability to conform his conduct with the requirements of the law’” as to the rape due to his sexual sadism and methamphetamine use, but as to the murder, “Brant was not ‘substantially’ impaired.” *Id.*

14. The trial court found two aggravating factors, the murder was “heinous, atrocious and cruel,” (“HAC”) and the murder was committed during a felony – sexual battery. *Id.*

15. The trial court found the following statutory and non-statutory mitigating factors:

[Statutory] (1) Brant had no significant history of prior criminal activity, given little weight; (2) Brant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, given moderate weight; and (3) Brant was thirty-nine years old at time of the offense, given little weight.

[Non-Statutory] (1) Brant is remorseful (little weight); (2) he cooperated with law enforcement officers, admitted the crimes, pleaded guilty, and waived a penalty-phase jury (moderate weight); (3) he has borderline verbal intelligence (little weight); (4) he has a family history of mental illness (little weight); (5) he is not a sociopath or psychopath and does not have antisocial personality disorder (little weight); (6) he has diminished impulse control and exhibits periods of psychosis due to methamphetamine abuse, recognized his drug dependence problem, sought help for his drug problem, and used methamphetamine before, during, and after the murder (moderate weight); (7) he has been diagnosed with chemical dependence and sexual obsessive disorder, and he has symptoms of attention deficit disorder (moderate weight); (8) he is a good father (little weight); (9) he is a good worker and craftsman (little weight); and (10) he has a reputation of being a nonviolent person (little weight).

Id. The Florida Supreme Court affirmed Brant’s conviction and sentence. *Id.* at 1289.

(2) State Post-Conviction Proceedings

(a) Deficient Performance

16. Brant timely filed a motion to challenge his convictions and sentences of death. The post-conviction court held an evidentiary hearing over the course of two weeks in which Brant presented extensive testimony in support of Claim 2 of his Habeas Petition that trial

counsel rendered ineffective assistance in the penalty phase portion of his trial by failing to investigate and present significant evidence in mitigation, including the fact that Brant himself was conceived in a rape.

17. Brant presented uncontradicted testimony that prevailing norms in Florida at the time of Brant's trial required counsel to investigate both parents of a capital defendant. App., *infra*, 338a-456a, p. 14-16. The mitigation investigation should include looking at the client's life prior to conception to the present day, including while he is incarcerated awaiting trial. *Id.* at 15. It is important to not rely on one parent for a family history. *Id.* This is true even if the father and the child never met. *Id.* at 16. It is also important not to rely solely on a capital defendant's mother. Mothers of capital defendants often want to hide their own deficiencies or keep family secrets. *Id.* Capital attorneys should seek "specialist experts" when needed, *id.* at 15. and investigate favorable prison behavior evidence and present such evidence if helpful. *Id.*

18. Trial counsel, Robert Fraser could not recall the mitigation theme in Brant's case. *Id.* at 16. His recollection was that there "really wasn't much mitigation to be found." *Id.* He conveyed that to Brant. *Id.* He thought there wasn't anything compelling about the mitigation. *Id.* Fraser only spoke to two, possibly three mitigation witnesses: Brant's ex-wife, Brant's mother, and maybe Brant's half-brother, Garrett Coleman. *Id.*

19. Fraser did not remember much of anything about Brant's father, Eddie Brant. He said at the hearing that it was the first time he had heard the name. *Id.* No one on the defense team spoke to Eddie Brant or anyone in West Virginia or Ohio (where Brant lived as a young child and where, Eddie Brant lived until he died about a year after Brant's arrest). *Id.* Fraser had no knowledge how Brant was conceived, other than that he imagined "he was conceived in the usual way." *Id.*

20. Fraser agreed that prevailing norms stress the importance of investigating a client's life from conception, or earlier, and understanding the client's family background from *both* sides. *Id.* Fraser conceded that as "a practical matter or maybe as a legal matter [contact with Brant's father] *should have been done, could have been done.*" *Id.* He did not offer a strategic reason for failing to investigate the paternal side of Brant's family.

21. Fraser said that he did nothing to investigate evidence to mitigate or ameliorate Brant's sexual fantasies other than relying on his two experts, Drs. Maher and McClain. *Id.* Fraser agreed that if he could have offered an explanation of the causes of Brant's rape fantasies that were beyond Brant's control, that testimony would not have conflicted with his mitigation theory. *Id.* 16-17.

22. Fraser stated that he did not consider Brant's methamphetamine addiction an important mitigating factor because Brant used "methamphetamine so he could work more, not because he was an addict." *Id.* at 16. When asked if his investigation about methamphetamine stopped there, Fraser said he *could not remember what his thought processes were.* *Id.* at 16-17.

23. When shown contents of his file, Fraser conceded that his file contained documentation referencing a conversation he had with Hillsborough County Circuit Judge Debra Behnke about Brant's case. Judge Behnke had suggested Fraser consult a methamphetamine expert and gave Fraser the names of two experts on methamphetamine addiction that she had heard lecture at a judicial conference. *Id.* at 17. Fraser's file indicated that Judge Behnke was "particularly impressed" with the experts' explanation of "how methamphetamine affects the brain." *Id.*

24. As a result of his conversation with Judge Behnke, Fraser sent a letter to Toni Maloney, his mitigation investigator, with the experts' CVs attached and asked her to

contact them. *Id.* Fraser thought he spoke to one of the experts and they said they couldn't appear for reasons he didn't remember. *Id.* He had no other explanation for why they weren't retained, and none was contained in his file. *Id.*

25. Fraser also agreed that it would have been helpful to find a person who had used methamphetamine with Brant within a week or two of the crime but waited until two months prior to the trial to ask his investigator to find such a witness. *Id.* No such witness was presented at trial.

26. Fraser also identified prison adjustment as a mitigating factor and asked Maloney to find a prison expert. *Id.* As far as Fraser knew, Maloney never contacted a prison expert. *Id.*

27. Maloney did not talk to any out of state lay witnesses. *Id.* at 18. Maloney did not have any contact with Eddie Brant or his widow, Mary Kay Brant. *Id.* Maloney admitted that a mitigation investigation should include obtaining information about the client's father, even if he is deceased. *Id.*

28. Maloney admitted she was asked to find a prison expert. *Id.* Maloney claimed she contacted "James Aiken out of North Carolina," *id.*, but admitted that there were no notes in her file documenting any contact with Aiken. *Id.* She does not know why Aiken was not retained or what his opinion was regarding Brant's adjustment to prison. *Id.* Mr. Aiken testified he had no recollection of ever being contacted about this case prior to post-conviction counsel contacting him. *Id.* at 44.

29. As to the methamphetamine issue, Maloney stated that Fraser asked her to contact two experts, Dr. Khadejian and Dr. Piasecki. *Id.* at 18. Maloney stated that she spoke to both experts and Kahdejian told her he did not do forensic work. *Id.* Piasecki sent a CV and fee schedule. Maloney did not know why Fraser did not retain her. *Id.* She was not asked to try and contact any other experts regarding methamphetamine. *Id.*

30. Dr. Maher testified at post-conviction that he was asked to evaluate Brant “with regard to general issues of medical and psychiatric relevance related to the charges against him primarily related to mitigation ... [including] competency to proceed and sanity at the time of the offense.” *Id.* at 19. The only lay witness/family member he spoke to was Brant’s wife, Melissa McKinney. *Id.* .

31. Maher was asked at trial about Brant’s methamphetamine use and how it affected him at the time of the crime. *Id.* Maher stated that he had “general experience as a physician” and “some specific knowledge” as a psychiatrist on “amphetamine use” but that he does not have special credentials in the area of substance abuse. *Id.* Maher “made it clear” to Fraser that he lacked “specialized” knowledge and that he thought the case was “very much about amphetamine abuse and its effect on the brain,” and suggested Fraser should find another expert with more familiarity with methamphetamine for this case. *Id.* .

(b)Prejudice

32. Three close family members (Brant’s purported father’s widow, and his paternal aunt and maternal uncle) testified that they knew Eddie wasn’t Brant’s father and had known so for many years. Mary Kay Brant, Eddie Brant’s widow, first learned that Charles Brant had been convicted of murder in a letter from post-conviction counsel on July 22, 2011. *Id.* at 27. She spoke to the post-conviction investigator by phone on August 3, 2011. Mary Kay promptly said, *without being asked*: “Ed is not the biological father of [Brant].” *Id.* No one from the defense trial team tried to contact her or Eddie. *Id.* She and Brant lived in Uniontown, Ohio for 30 years. Eddie Brant died about a year after the crime on March 18, 2005. *Id.*

33. Eddie talked about Sherry and kept a big picture of Sherry on his dresser all the time. *Id.* He never talked about Chuck and never wanted pictures of Chuck out. *Id.* Eddie told Mary Kay early on in their relationship that Chuck was not his son. *Id.* Eddie thought

Chuck's father was their next-door neighbor in the twin-plex he and Crystal had lived in in Ohio. He never said the man's name. *Id.*

34. Annice Crookshanks, Eddie Brant's younger sister and Brant's paternal aunt, "was 13, 14 or 15" when Brant was born. *Id.* at 28. She remembered her "mother getting a call [on New Year's Eve] to come to Ohio and pick up [Brant]." *Id.* All Annice knew at the time was that Crystal was in the hospital. *Id.* She later learned that Crystal had been in a mental hospital having suffered a nervous breakdown after giving birth to Brant. *Id.* A few years after that, when she was 17 or so, she learned that Eddie was not Brant's father. *Id.* She never knew who Brant's father was. *Id.* "Everybody" in her family knew that Eddie was not Brant's father. *Id.*

35. Jerry Crane, Crystal's brother and Brant's maternal uncle, was "pretty sure" that Eddie was not Chuck's father. *Id.* Aunt Jenny told him that Eddie wasn't the father. *Id.* Crane had known this fact for a long time.

36. Crystal testified to the following about the rape. It happened in Akron, Ohio where Eddie worked at a gas station owned by Aunt Jenny and her husband. *Id.* Crystal and Eddie lived in a duplex. Another couple lived on the other side of the duplex. *Id.* The man had spoken to Crystal before and brought her the newspaper. *Id.* One day, while Sherry was napping, the man knocked on the door with the newspaper. *Id.* Crystal let him in, they chatted a bit and then:

[H]e pushed me back on [the couch]. It shocked me. He pushed me back on that. And then he was holding me down. He put his hand on my neck, he cut off my breathing. I couldn't breathe. And he rapes me. He rapes me. I don't know how long it took. I don't know how long it took. And he raped me. And then he just got out. I don't know what he said and he left.

37. She took a shower, scrubbed herself and cried. Crystal didn't call the police and didn't tell Eddie. She was afraid and didn't think anyone would believe her. *Id.* "Nobody

believed you back then. Nobody believed you. It's not like nowadays." *Id.* Crystal was "ashamed," and blamed herself. *Id.*

38. Shortly after, she realized she was pregnant and felt the baby was a result of the rape because she and Eddie had been using condoms. *Id.* at 29.

39. Crystal chain smoked and drank coffee throughout the pregnancy. *Id.* "I quadrupled smoking." *Id.* She paced and cried all the time. *Id.* Aunt Jenny confronted her and Crystal told her she had been raped and was afraid to tell Eddie. *Id.* Aunt Jenny offered to tell Eddie for her. *Id.* at 1498. Shortly after that Eddie came to talk to her but showed no empathy. *Id.*

40. After she gave birth to Brant, she made the nurses take him out of the room. *Id.* She felt "nothing" for him. *Id.* "I just didn't have any feelings for him. Only feelings I felt was I'm responsible, I have to take care of him, that's what I felt." *Id.* Eight weeks later, Crystal suffered a nervous breakdown and was sent to a mental hospital where she endured six shock treatments. *Id.* Crystal testified that she never loved her son.

41. Crystal agreed that if trial counsel had confronted her with the fact that multiple people in West Virginia and Ohio knew that Eddie was not Chuck's father, she would have told trial counsel the truth. *Id.* *She also affirmed she would have testified to that at trial in 2007. Id.*

42. Crystal and Jerry Crane described a childhood of horrific abuse and neglect. Their father treated her mother badly, "like a monster actually." *Id.* at 30-31. When Crystal was young, her mother and father drank daily, including drinking aftershave and rubbing alcohol when they ran out of money. She only saw her father sober a few times. *Id.*

43. Crystal had a pet cat that she loved dearly. *Id.* at 31. When she was eight or nine years old, her father took a gun and shot her cat and the cat ran underneath the house. *Id.*

“And he told me if I were to get it out from underneath the house that he would take it to the doctor. And I called the kitty out and he buried the kitty live in front of me.” *Id.*

44. Crystal and Jerry Crane described a car accident where their drunk father crashed resulting in their mother being badly injured. Crystal and Jerry said their father checked their mother, Delphia, out of the hospital against the doctors’ orders. *Id.* Delphia had a broken hip and leg and couldn’t walk. *Id.* She would lay in bed a lot and then Lawrence would force her to get up and then would start beating her. He knocked her into the heater which burnt “a perfect pitchfork on her face.” *Id.* Her father said it was the mark of the devil. *Id.* After that, Delphia would drag herself around, but Crystal was unsure how she ate or survived during that time because her father would leave for weeks at a time. *Id.* She and Jerry were not getting baths and went to school dirty and hungry. *Id.*

45. While her mother was still crippled and unable to walk, her father tried to “get rid of her” by laying “her on the railroad for the train to run over her.” *Id.*

46. At trial she was asked about Marvin and stated that he mentally and physically tortured her until 4 or 5 a.m. *Id.* at 32. She was never asked to describe what actually happened. *Id.* In post-conviction she described it. Marvin would drink at a bar until about 2 a.m. and then he would come home. Crystal would “shake” and “pray” when she heard him pulling up in the driveway. *Id.* Marvin would demand food and then accuse her of being unfaithful. *Id.* He held knives to her throat to make her admit she had done “things.” *Id.* The tirades always ended with sex, but Crystal never told him “No” because she was afraid he would beat her or kill her and the kids. *Id.*

47. Marvin sexually abused Sherry, *id.* at 33,, including acting out a rape scenario with her under the pretense he was helping her.⁷ He attacked her by surprise - in her bed while Crystal was in the hospital after giving birth to Garret [Brant's half-brother], when she was sleeping while her mother was out of the home working, and exposed himself to her and aggressively attacked her in the kitchen, although she was able to get away from him that time. *Id.* She didn't tell her mother because she was afraid it would "break her heart." *Id.*

48. Nita Meszaros, Marvin's first wife, married Marvin in 1964 when she was 18 years old and divorced him in 1969. Nita's testimony corroborated the description of the abuse and degradation that Marvin imposed on Crystal. *Id.* at 33.

49. In describing his jealousy, Meszaros said that as a young woman she would occasionally get a yeast infection and Marvin would "smell at her privates and say, 'Ain't nobody smells like that if they're not out cheating or doing something.'" *Id.* He once tied her to the bed so she couldn't leave to go visit her mother and spread flour on the steps and walkway so he could see if she left. *Id.*

50. He would come home drunk and demand that she cook for him. When she refused, he would "smack [her] around." *Id.* One night, shortly after she had left him, he entered her house after a night of drinking while she was sleeping. He grabbed her by her crotch, said the men in the bar had been telling him he wasn't "man enough to keep [his] wife," and then beat her "really bad." *Id.* Marvin ended up in a mental institution during their divorce. *Id.* The psychiatrist warned her that Marvin could end up killing her. *Id.*

⁷ At trial she testified at trial that Marvin molested her, but she was not asked to describe the nature of the attacks.

51. Dawn Masters is the daughter of Meszaros and Marvin. She is three years younger than Brant, her stepbrother. *Id.* When she was 15, she reconnected with Marvin's family. *Id.* That summer, she flew to Florida to meet Marvin and stay with the family. *Id.* at 34.

52. During the trip, she became ill and was diagnosed with mononucleosis. Her throat was sore, so she had a bowl of chicken noodle soup. She left the dirty bowl in the sink. When Marvin saw it, he became enraged and smacked and shoved Crystal around the kitchen. *Id.* The fight seemed to go on all night, it was "really violent," and she was "scared." *Id.* Garrett was home, watching "cartoons nonchalantly" as if it was, "no big deal." *Id.*

53. The next morning, Dawn apologized to Crystal. Crystal just said, "Honey, it's not your fault. Your Dad is just under a lot of stress right now. It's going to be okay." *Id.* And then Crystal "put on these big, dark sunglasses like an owl and wore them over her face and went on to work like it was no big deal." *Id.*

54. Bryan Coggins met Brant when Coggins was 16 or 17 years old. *Id.* at 35. Brant took Coggins in as a son, and Coggins looked to Brant as a father. Coggins stopped spending time with Brant shortly before the murder because Brant's drug use escalated. *Id.* Brant was using crystal meth on an "everyday basis," starting in the morning by drinking "it in his coffee," and eating it in "his pancakes." *Id.*

55. The MRI of Brant's brain demonstrated a decreased volume in the left side of the limbic system and basal ganglia, the temporal lobe, and the anterior and postular insula. *Id.* at 2097-2100. In addition, Brant has reduced volume in the back of the frontal lobe, a "quite dramatic difference between the left and the right entorhinal area part of the temporal lobe." *Id.* at 2099. Dr. Ruben Gur, an internationally recognized expert in brain

imaging, explained that it is “*very rare to see such a difference between the left and the right.*” *Id.*

56. Gur’s review of Brant’s PET showed a striking abnormality in his hippocampus of almost 15 standard deviations below normal. *Id.* at 37-38.

57. Brant has *moderate to severe brain damage and pockets of dead gray matter tissue in his brain.* *Id.* The damage is in regions that are important in regulating behavior so that the damage in the emotional brain that is designed to motivate pleasure seeking and the damage to the frontal lobe that is designed to control pleasure seeking behavior, suffer from a “combination of lesions and deficits and abnormalities” that made it difficult for Brant to conform his conduct to the requirements of the law. *Id.* at 38-39. The addition of the methamphetamine use, “spun his brain out of control.” *Id.*

58. Dr. William Alexander Morton is a psychopharmacologist whose focus is the study of the effects of prescribed drugs and drugs of abuse. *Id.* at 39. Dr. Morton explained that there are several important considerations in the medical-legal arena when assessing an individual who has been using methamphetamine prior to and/or during a crime, the first of which is that methamphetamine is known to lead to violence. *Id.* Information about its violent effect has been widely documented and known since the 1930s. *Id.*

59. Methamphetamine damages people’s brains. *Id.* Methamphetamine is one of the most powerful stimulants and acts on the brain in a very powerful way. *Id.*

60. In reviewing the testimony in Brant’s case, he was struck by how the experts talked about methamphetamine “the same way they might talk about Motrin, [that] everybody knows what methamphetamine is.” *Id.* They failed to explain the power of the drug. *Id.* They also failed to explain how the drug increases sex drive. *Id.* People who take methamphetamine frequently have a three to four times higher amount of sexual activity

than what is considered normal. *Id.* People addicted to methamphetamine “may have sex 30, 40, 50 times a month.” *Id.*

61. From a psychopharmacological point of view, Brant’s brain damage, the kindled pathways of unusual sexual functioning, and his methamphetamine addiction, all contributed to this offense. *Id.* at 40.

62. Dr. Mark Cunningham is a nationally recognized forensic psychologist with a focus on capital cases. Cunningham explained that it is critically important that the sentencing judge or jury has an understanding of the relationship of damaging or impairing factors to choice and moral culpability. *Id.* at 40. It is vitally important that the jury be educated on why they should care, or even consider, whether a capital defendant had a difficult childhood. *Id.* It is to remind jurors of what they know about their own children – that childhood is “profoundly important.” *Id.* Children are “delicate” and childhood trauma can leave an “indelible imprint on them.” *Id.* “So the task for defense counsel is to illuminate” the defendant’s background and childhood with “the best available science that is essentially consistent with what jurors are thinking about their own kids but are unlikely to apply to a [capital] defendant.” *Id.*

63. Cunningham described what Crystal had told him about the rape. He explained that “there are so many disturbing implications from this. First, that [Brant’s] genetic heritage from his father is from a rapist with all the personality issues that involves.” *Id.* at 42. It also implicates research that suggests there is a genetic link to sex offending and it also “speaks volumes” about Crystal’s mental health problems during pregnancy and after giving birth and, her inability to bond with Brant at a critical stage of his development. *Id.* This information provides an important understanding of the trial testimony about

Crystal's breakdown and shock therapy and why Eddie Brant abandoned Brant and disappeared from his life. *Id.*

64. Another important factor is Crystal's failure to bond to Brant and the sequential care Brant received in infancy. An infant's lack of a chance to bond to a single caregiver who is nurturing is a psychological injury to a child that is profound in nature, even though the child will have no memory of it. *Id.* Primary attachment disorder has significant and lasting effects and impairs a child's ability to empathize in adulthood. *Id.* There is also a nexus between disrupted attachment and sexual offending. *Id.*

65. In addition, the sequential damage Crystal suffered as a result of her own traumatic childhood left Crystal injured so that she comes into parenting as an injured person, and then goes about parenting with diminished capability to be a good, nurturing parent. *Id.*

66. Dr. Cunningham also explained that Marvin's behavior, of raping Crystal and attacking Sherry sexually "by surprise," affected Brant's sexual development and was so "injurious," that we would wonder how could anyone "develop a healthy sexuality in this climate." *Id.* at 43. In Brant's case, not only is there a lack of healthy emotional and psychological development due to abuse and neglect, but "additional pieces that get added to aggression and eroticism include[ing] the brain abnormality ... and methamphetamine dependence." *Id.*

67. James Aiken is a nationally respected expert on prisons and prison adjustment. Because Brant is a sex offender he is vulnerable in prison, but Brant showed that he was trustworthy inmate, who gained trustee status in a Pod (e.g. group setting) and had, "only two altercations when he was standing charges as a sex offender. That tells me something. . . . [H]e is evidently doing something correct in order to avoid trouble," *Id.* at 44. In addition, people with mental illness do well in a structured prison environment. Aiken saw Brant as

a compliant inmate who accepts his circumstances and gained the trust of the staff. *Id.*

Aiken opined that Brant can be housed and securely managed in the Florida Department of Corrections for the remainder of his life without causing an undue risk of harm to staff, inmates, or the community. *Id.*

68. Dr. Cunningham explained that even if future dangerousness is not a specific aggravating factor that sentencers are required to find before rendering a death verdict, research suggests *that it is always an issue of consideration for the jury*. *Id.* “It’s the elephant in the room.” *Id.* Jurors overestimate the likelihood of a defendant committing another homicide in prison by up to 250-fold. *Id.* The actual rate of homicide is 1%-5%, but studies show that jurors believe it is 50%. *Id.* That’s why it is important that, when available, evidence of positive prison adjustment be presented to the sentencer. Cunningham opined that “there is very little likelihood that [Brant] would commit serious violence [if] confined for life in the Florida Department of Corrections.” *Id.*

(3) Florida Supreme Court

69. The Florida Supreme Court denied Brant’s claim. The court held that counsel did not perform “deficiently in failing to discover the circumstances of Brant’s conception,” because “counsel had no reason to believe that Eddie was not Brant’s father,” and “counsel cannot be expected to verify paternity through other family members or DNA testing.” *Brant v. State*, 197 So. 3d 1051, 1067 (2016) (“*Brant II*”) (App., *infra*, 287a, p. 22) The court also determined Brant was not prejudiced because he was not aware that he was conceived during a rape.” *Id.* As to the failure to contact a specialist expert on the effects of methamphetamine, the state court held counsel was not deficient because Dr. Morton’s testimony was essentially cumulative. *Id.* at 22-23. As to the failure to present positive prison adjustment testimony, the court found that in light of the aggravating circumstances

“there was no reasonable probability that Brant would have received a life sentence” had this piece of evidence been presented. *Id.* at 29-30. As to the failure to present additional mitigating evidence, the state court found that counsel did conduct a reasonable investigation and confidence is not undermined. *Id.* at 41.

(4) District Court

70. The district court, in denying the habeas petition determined that the state court’s determination that counsel did not perform deficiently was reasonable “because all three grounds allege strategic errors, which are virtually unchallengeable” App. 34a-68a, p24. “To show deficient performance, a petitioner must show that no competent counsel would have made such a choice.” *Id.* The district court further found that because trial counsel was so experienced, “the state court reasonably applied appropriate deference.” *Id.* at 25-26. As to prejudice, the district court held that “Brant cannot obtain relief under §2254(d) based on what ‘could have been discovered.’” *Id.*

(5) Court of Appeals

71. In arguing for a COA, Brant asserted that reasonable jurists could disagree with the district court’s assessment because the district court failed to squarely engage in Petitioner’s argument that the Florida Supreme Court not only made unreasonable determinations of facts in light of the state court record but also misapplied *Strickland* when it failed to assess the mitigation presented in post-conviction *as a whole* when assessing *prejudice*, and unreasonably determined counsel made unassailable strategic decisions when the testimony in post-conviction established counsel’s failures were due to inadvertence and neglect rather than reasoned strategic judgment.

72. The circuit court’s denial of a COA followed a similar structure to that of the district court, assessing each sub-claim piece-meal and wholly failing to address this Court’s

holdings on the assessment of deficient performance and prejudice argued in Brant’s application for COA. (App., *infra* 19a -27a.) The circuit court appeared to reach the merits while citing the legal standard for COA. And the circuit court created or deepened a circuit split when it held that it was reasonable for the Florida Supreme Court to fail to assess the mitigating evidence in its entirety when assessing prejudice. (App., *infra* 27a-28a).

REASONS FOR GRANTING THE WRIT

A. The decision directly conflicts with this Court’s decisions on granting a COA

The standard for issuing a COA is well-settled. *See Buck*, 580 U.S. at 115 (2017); *Miller-El*, 537 U.S. at, 327 (2003); *Slack*, 529 U.S. at 484. An Appellant need only demonstrate a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(C)(2). “The only question” the lower court must answer is whether “jurists of reason could disagree with the district court’s resolution of his constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck*, 580 U.S. at 115 (2017) (quoting *Miller-El*, 537 U.S. at 336).

Since its inception, this Court has held that the standard has remained a “threshold inquiry,” *Slack*, 529 U.S. at 485, requiring the court to conduct only an “overview” of the claims and a “general assessment of their merits.” *Miller-El*, 537 U.S. at 336. The threshold inquiry “should be decided *without* ‘the full consideration of the factual or legal bases adduced in support of the claims.’” *Buck*, 580 U.S. at 115 (quoting *Miller-El*, 537 U.S. at 336) (emphasis added). In fact, this Court has specifically determined that the statute forbids such an inquiry. *Miller-El*, 537 U.S. at 336. Thus, a petitioner need not show—nor must the court be convinced—that “the appeal will succeed” for a COA to issue; nor should a court decline to issue a COA merely because the Court “believes the applicant will not demonstrate an entitlement to relief.” *Id.* at 337.

Writing for the majority in *Buck*, Justice Roberts reiterated that the appellate court need only answer whether the “claim is reasonably debatable.” 580 U.S. at 101. While the determination that a petitioner’s claim is not debatable “necessarily means” the claim is not meritorious, “the converse is not true.” *Id.* at 116. Just because a petitioner fails to show his claim will win, this Court noted, “does not logically mean he failed to make a preliminary showing that his claim was debatable.” *Id.* Such an inquiry is “too heavy a burden [. . .] at the COA stage.” *Id.* at 117. “The COA inquiry, we have emphasized, is not coextensive with a merits analysis.” 580 U.S. at 115.

Notwithstanding AEDPA and its requirement of deference to factual findings of state court judges, courts are not permitted to simply rubber stamp state court action. Indeed, “[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,’ and ‘does not by definition preclude relief.”’ *Brumfield v. Cain*, 576 U.S. 305 (2015) (quoting *Miller-El*, 537 U.S. at 340). The purpose of the COA is to “facilitate, not frustrate, fulsome review of potentially meritorious claims.” *McGee v. McFadden*, 139 S. Ct. 2608 (MEM) (2019) (Sotomayor, J., dissenting on denial of cert).

This Court has repeatedly recognized that death penalty cases require unique and heightened constitutional protections to ensure that courts reliably identify those defendants who are both guilty of a capital crime and for whom execution is the appropriate punishment. *Hall v. Florida*, 572 U.S. 701, 724 (2014) (Because “the death penalty is the gravest our society may impose,” capital defendants must have a fair opportunity to show that the constitution prohibits their execution.”); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (Court’s consideration of capital cases has been characterized by “heightened concern for fairness and accuracy”); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O’Connor, J., concurring) (“[T]his Court has gone to extraordinary measures to ensure that the prisoner

sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.”); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (need for heightened reliability in sentencing determination). While the severity of the penalty is not by itself sufficient to warrant the automatic issuance of a COA, “[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause.” *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

In recognizing the need for heightened reliability in capital cases and that AEDPA does not preclude review, this Court has corrected the United States Court of Appeals for the Fifth Circuit four times for failing to grant a COA in a capital case. Since the reaffirmation of the legal standard in *Slack* in 2000, this Court has criticized and overruled the Fifth Circuit’s denial of a COA in *Miller El*, *Banks v. Dretke*, 540 U.S. 668 (2004), *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Buck*. The Fifth Circuit is an outlier in its application of the COA standard in capital cases.

A review of the applications for COA filed in the Fifth Circuit between January 1, 2020 and present reveals that the circuit is disposing of capital cases via COA denials at a rate of over 65%, numbers drastically higher than in any other time since the reinstatement of the death penalty following *Furman*. A review of the Eleventh Circuit’s docket within the same time frame indicates that court is following suit and becoming an outlier of its own. In the last four years, the Eleventh Circuit has disposed of capital cases via COA denials in approximately 40% of cases.⁸ The shift in the Eleventh Circuit’s review of capital

⁸ The data considers applications for COA’s in properly filed appeals for which this Court’s decision on the COA is dispositive and does not include State initiated appeals in which a COA is not required, litigation under warrant, interlocutory appeals, cases rendered moot, or improperly filed appeals.

cases over the last fifteen years is remarkable. Between 2008-2019, the Eleventh Circuit disposed of capital cases via COA denials in approximately 11% of cases, a rate that was higher than all other circuits except the Fifth Circuit. These numbers are particularly disturbing when viewed in conjunction with data of overall disposition of capital cases in the Eleventh Circuit in the last three years. Of the approximately 61 capital cases disposed of between January 1, 2020 and present,⁹ the Eleventh Circuit has granted relief to a capital defendant in only 2. Notably, the decline in the Eleventh Circuit's willingness to review state court action is not borne of data or research showing death penalty convictions and sentences are more reliable now. Indeed, the numbers suggest that the court's jurisprudence has shifted in a manner that trends towards outlier status with the Fifth Circuit.

Brant established a sufficient showing of the denial of a constitutional right to meet the threshold requirements to obtain a COA on the claim that his counsel's deficient performance prejudiced his death penalty trial. Brant alleged specific facts demonstrating that his counsel failed to investigate an entire half of his family, not for a strategic reason, but out of inadvertence and neglect. Brant also identified documents in trial counsel's file that showed counsel – and his own expert - identified the need for specialist experts in the effects of methamphetamine and positive prison adjustment, but simply failed to follow through. The evidence postconviction counsel uncovered was not merely cumulative but shocking and compelling, and relevant to the central fact of the case, that the murder involved sexual violence.

⁹ This data excludes the same categories noted *supra*, note 1; however, this data also considers cases in which the district court granted relief and the State or Government appealed.

“An ineffective assistance of counsel claim has two components: A petitioner must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel’s representation ‘fell below an *objective standard of reasonableness*.’” *Strickland* at 687-688 (internal citations omitted) (emphasis added). The proper measure of an attorney’s performance remains “simply reasonableness under prevailing norms.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court *must* consider the reasonableness of the investigation said to support that strategy. “[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. * * * * A decision not to investigate thus ‘must be directly assessed for reasonableness in all the circumstances.’” *Wiggins*, 539 U.S. at 533 (internal citations and quotations omitted).

To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland* at 694. In explaining how it reached this standard, this Court stated:

An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Id. at 694-695. This Court further explained that some of counsel’s errors will affect inferences drawn from the evidence in different ways – some will be “trivial” and some will

be “pervasive.” *Id.* at 695-96. This Court further clarified, that in making the prejudice determination, “a court hearing an ineffectiveness claim *must* consider the *totality of the evidence* before the judge or jury.” *Id.* at 695 (emphasis added).

This Court has reaffirmed this legal standard multiple times. In *(Terry) Williams v. Taylor*, 529 U.S. 362, 395 (2000), this Court found that the state trial judge, unlike the Virginia Supreme Court, had stated the correct prejudice standard and properly concluded that “the entire post-conviction record, viewed as a whole and cumulative of mitigation evidence presented originally,” justifies a new sentencing. *Id.* at 398-99. The state trial court’s “predictive judgment rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.” *Id.* at 397. The Virginia State Supreme Court, however, conducted an unreasonable prejudice determination “insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation.” *Id.* at 397-98. “[W]e evaluate the totality of the evidence- ‘both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*’” *Wiggins* at 536 (emphasis in original) (quoting *Williams*, 529 U.S. at 397-98). “Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.” *Id.* at 537. This Court further concluded that the available mitigating evidence, “taken as a whole,” might have made a difference in the jury’s assessment. *Id.* at 538.

Reasonable jurists could agree, or disagree for that matter, that the district court’s assessment of Brant’s claim was debatable or wrong, particularly where, as here, 1) the state courts either found isolated deficient performance or failed to address it based against

prevailing norms or specific testimony in the record, and 2) this Court, and other federal circuit courts, have held that the *Strickland* prejudice analyses *must be assessed cumulatively*, considering the trial record and the post-conviction record as a whole.

In denying Brant's claims, the Florida Supreme Court held that the failure to discover or present evidence about the rape that resulted in Crystal's pregnancy with Brant, was neither deficient performance nor did it prejudice Brant because "counsel cannot be expected to verify paternity through other family members and DNA testing [,]" and "any mitigating value of the circumstances of his conception would be negligible at best." *Brant v. State*, 197 So. 3d at 1067. The court also held that counsel "did not perform deficiently" because any testimony by Dr. Morton about methamphetamine was "cumulative." *Id.* at 1069. Likewise, the court rejected the failure to present a prison adjustment expert because Brant failed to establish prejudice "in light of the aggravating circumstances [,]" and thus there was no reasonable probability that Brant would receive a life sentence "had positive prison testimony been presented[.]" *Id.* at 1070 - 71. As to the failure to present the PET scan and details about Brant's brain damage, the court found Fraser made a reasoned strategic decision considering the memo in his file, and presenting the PET would not have created a reasonable probability of a new trial." *Id.* at 1073-74. As to the background evidence presented about Brant's childhood with Marvin, the details of Crystal's childhood, Brant's exposure to Marvin's rapes of his mother and sister, Brant's ingesting of methamphetamine in his pancakes, and other testimony, the Florida Supreme Court found that trial counsel did not perform deficiently and their "confidence in the outcome [was] not undermined by the few pieces of non-cumulative evidence." *Id.* at 1074-75.

In this analyses, not only did the state court mix the performance and prejudice prongs, but the court unreasonably discounted mitigation and gave unreasonable weight to

trial counsel's superficially reasonable mitigation theory. This Court has “found deficiency and prejudice in cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.” *Sears v. Upton*, 561 U.S. 945 (2010) (citing *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (remorse and cooperation with police); *Rompilla v. Beard*, 545 U.S. 374, 378 (2005) (residual doubt); *Porter v. McCollum*, 558 U.S. 30, 42 (2009) (per curiam) (“The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough—or even cursory—investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating.”)

This Court explained that “[w]e certainly have never held that counsel’s effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.” *Sears* at 955). “To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing fact-specific analysis that the [court] failed to undertake below. . . . “To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence[.]” *Sears*, at 952.

Moreover, even where, as here, some of the subject matter of the trial and post-conviction evidence overlaps to some degree, prejudice may be established under *Strickland* where trial counsel fails to adequately describe the nature and extent of abuse the petitioner suffered. *See Wiggins* at 535-36 (2003) (finding deficiency and prejudice “[g]iven both the *nature and extent* of the abuse petitioner suffered”) (emphasis added); *Williams*,

529 U.S. at 398 (finding prejudice based on counsel’s omission of “*graphic description* of [the petitioner’s] childhood” including “documents . . . that *dramatically described* mistreatment, abuse, and neglect”) (emphasis added).

Applying that standard in *Cooper v. Secretary, DOC*, 646 F.3d 1328 (11th Cir. 2011), the Eleventh Circuit stated:

In the penalty phase of a trial, the major requirement is that the sentence be individualized by focusing on the particularized characteristics of the individual. Therefore, it is unreasonable to discount to irrelevance the evidence of [a defendant’s] abusive childhood. Background and character evidence is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse.

Id. at 1354. (internal quotations and citations omitted) (finding prejudice despite overwhelming evidence of guilt in a triple murder case). See *Williams v. Allen*, 542 F.3d 1326, 1329, 1342 (11th Cir. 2008) (even though petitioner’s mother testified at trial that the petitioner was subject to physical abuse as a child, the post-conviction investigation revealed “a vastly different picture of [the petitioner’s] background than that created by [the] abbreviated [trial] testimony); *Johnson v. Secretary of DOC*, 643 F.3d 907, 936 (11th Cir. 2011) (“The description, details, and depth of abuse in Johnson’s background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told.”); *Foust v. Houk*, 655 F.3d 524, 539-40 (6th Cir. 2011) (trial testimony was that petitioner’s home was not “well kept,” that his mother did not clean the home, and that the children had head lice; post-conviction evidence depicted the squalor and chaos of the home in more vivid detail, and as a result, “[p]assing references at the mitigation hearing . . . in no way conveyed the abysmal condition” of the home); *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008) (finding deficient performance where “the [trial] testimony only scratched the surface of Johnson’s horrific childhood.”); *Jermyn v. Horn*, 266

F.3d 257, 271, 310 (3d Cir. 2001) (where the defense presented evidence of petitioner’s mental illness and dysfunctional relationship with his parents, relief was granted because of unrepresented “strong and specific testimony about a horrific home life” and additional testimony that “would have strengthened the evidence pertaining to Jermyn’s mental illness . . .”).

Against this backdrop, Brant asserted to the district court that the Florida Supreme Court made legal errors in assessing his claims which rendered its performance and prejudice analyses fundamentally flawed. Brant argued that the Florida Supreme Court unreasonably applied the *Strickland prejudice standard* in failing to weigh and assess the weight of the additional mitigation evidence *as a whole* and failing to assess counsel’s performance under an objective standard of reasonableness as presented through uncontroverted testimony and trial counsel’s own admissions of prevailing norms and his inadvertence and neglect.

But the district court held that Brant could not prevail because “[S]trategic choices . . . are virtually unchallengeable.” (App. A infra..) The district court’s determination that strategic choices are essentially unchallengeable is debatable among jurists of reason because it minimizes or unduly disregards *Strickland’s* admonition that a court must assess the *reasonableness of a decision to limit an investigation on the facts of the case viewed against prevailing norms*. Jurists of reason could debate whether the district court got it right in this analyses in light of this Court’s precedent and the Eleventh Circuit’s own precedent.

The district court criticized Brant’s critique of trial counsel as “alluding to best practices,” and noted that trial counsel were experienced. *Id.* The district court misapprehended Brant’s evidence of deficient performance, conflating it with his evidence establishing prejudice when the court said, “To prove that his attorneys’ investigation was

deficient, Brant presented the testimony of more than forty witnesses who testified about what could have been discovered.” *Id.* * 11. Reasonable jurists could likewise debate whether the district court got this part of the analyses right as well. The district court also unreasonably agreed with the state court’s discounting of Brant’s mitigation, finding it cumulative and reducing it to irrelevance.

Giving the Florida Supreme Court AEDPA deference, the district court affirmed. *Id.* The district court did not address Brant’s argument that AEDPA should not apply because the state courts misapplied the *Strickland* standard or his arguments that the state courts’ determinations about performance and prejudice were not supported by the state court record and were a misapplication of clearly established federal law.

The district court’s determination that Brant failed to establish that trial counsel rendered deficient performance is also debatable among jurists of reason based on the state court record. Brant demonstrated that his counsel unreasonably failed to investigate an entire half of his family – his father’s side – and in so doing failed to discover, among other compelling facts, that he was the product of a rape and had been abandoned by his father and never loved by his mother. Brant also showed that trial counsel’s own memos in their file identified the need for particularized experts on methamphetamine’s effects on the human brain and Brant’s adjustment to incarceration but simply, through inadvertence and neglect, failed to do so.

The circuit court’s assessment of the district court’s order in denying a COA was patently wrong. The circuit court defended the district court’s reliance on older circuit court case law as “precedents merely [used] to illustrate how difficult it is to prove ineffective assistance of counsel when challenging a lawyer’s strategic judgment.” (App., *infra*, 20a) The court also stated that, “in] any event, the question at this juncture is not whether the district court’s opinion is well written; it is whether Brant has made a substantial showing

of a constitutional right. And, on that issue, I am convinced there is no ground for debate.” *Id.* But the circuit court did not assess the facts in the record showing that trial counsel offered no strategic reason for failing to investigate Brant’s father and conceded prevailing norms required him to do so.

The circuit court found that the state courts’ assessment of Brant’s claim was reasonable by reciting the Florida Supreme Court’s decision and analysis as to each subclaim, recognizing the district court’s finding and then agreeing with the findings. (App., *infra*, 21a -28a). In so doing, the circuit court was essentially engaging in a merits analyses and then simply adding the COA standard. (App., *infra*, 22a).

The circuit court did not appear to engage in the record below or meaningfully grapple with Brant’s arguments. On an argument that involved more than a thousand pages in the state court record, was summarized in 50 pages in the Habeas Petition, (App., *infra*, p. 14 to 55) and comprised 55 pages in Brant’s Memorandum of Law (App., *infra*, p. 13 to 68), the circuit court disposed of Brant’s claim in its entirety in 8 pages (App., *infra*, p.. 20a-28a). The circuit court did not squarely address Brant’s argument that the state court’s deficient performance determination was inconsistent with *Strickland*’s admonition that strategy choices must be determined under an objective standard of reasonableness. The circuit court dismissed Brant’s argument about the unreasonableness of the state court’s prejudice assessment and the district court’s conclusions:

One final point. Brant spends much of his application for a certificate of appealability arguing that the Supreme Court of Florida should not have separately analyzed each of Brant’s separate allegations about mitigating evidence. This argument misunderstands *Strickland*. *Strickland* directs reviewing courts to evaluate the totality of counsel’s errors in evaluating deficient performance and the totality of those errors in assessing prejudice. But nothing in *Strickland* requires that a state supreme court declare that deficient performance exists either overall or not at all. See *Mungin v. Secretary, Florida Department of Corrections*, 89 F. 4th [1308], at 1317-18 [(11th Cir. 2024)] (affirming where the Supreme Court of Florida had split apart subclaims and then split its analysis along performance and prejudice

lines). And perhaps, more to the point, nothing in the Supreme Court's case law tells lower courts how to write their opinions in the light of a habeas petitioner's arguments. Here, Brant's penalty phase arguments do not lend themselves to a combined deficient performance analysis because they allege separate failings on the part of trial counsel – for example, there is no connection between trial counsel's failure to hire a prison-adjustment expert and their failure to find out that Brant was allegedly conceived by rape. In any event, no fair-minded jurist would debate whether the state courts were reasonable in concluding that Brant's counsel were not ineffective, even if some jurists would have written the claim differently.

(App., *infra*, 27a-28a).

In so doing, the single judge's determination that the claim was not debatable was patently wrong. Here, the state court either found isolated deficient performance or failed to address it based against prevailing norms or specific testimony in the record, and 2) this Court, and other federal circuit courts, have held that the *Strickland* **prejudice analysis must be assessed cumulatively**, considering the trial record and the post-conviction record as a whole. *Williams*, 529 U.S. at 397-99; *Wiggins v. Smith*, 539 U.S. at 536.

Brant made a substantial showing of the denial of a constitutional right that is debatable among jurists of reason.

B. The circuit court's opinion determining that it was reasonable for the state court to address prejudice piece-meal creates a circuit split and conflicts with this Court's precedent.

As shown, *supra*, p. 38, the circuit court held that it was reasonable for the Florida Supreme Court to assess prejudice in individual subclaims rather than as a whole. This Court, and four other circuit courts of appeal, have found that a prejudice analyses that fails to consider the new mitigating evidence *as a whole* is an unreasonable application of clearly established federal law. Under *Strickland*, 466 U.S. at 687, a court views the "totality of the evidence," keeping in mind that "[s]ome errors [] have ... a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture...." *Id.* at 695-96.

The Fifth, Sixth, Seventh and Tenth circuits have all held that a court unreasonably applies federal law when it assesses prejudice by weighing each claim individually. Additional mitigation presented in post-conviction presented in mitigation must be assessed in the aggregate, not one by one. *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding that the court should examine cumulative effect of errors committed by counsel across both the trial and sentencing); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006) (unreasonable application of *Strickland* because the state court weighed each error individually when the “cumulative effect” of the errors required reversal. Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality.”) *Id.* at 1030; *Cook v. Foster*, 948 F.3d 896, 901 (7th Cir. 2020) (“We then turn to the question of prejudice, which we assess by evaluating the trial as a whole, not one slip at a time.”); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999) (“Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense.”); *Cargle v Mullin*, 317 F3d 1196, 1212 (10th Cir. 2003) (“However, our decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from all of counsel's deficient performance--as *Strickland* directs it to be.”) ; *Fisher v. Gibson*, 282 F.3d 1283, 1307-11 (10th Cir. 2002) (assessing prejudice from counsel's "numerous shortcomings [and] omissions," and holding "these errors" had a "devastating impact on the defense").

The circuit court’s opinion dismissing Brant’s argument adds to a circuit split between the Eleventh Circuit and four other courts of appeal. A circuit split on the application of the law is, at the very least, an issue debatable among jurists of reason. As is a determination that conflicts with this Court’s precedent.

Additionally, a circuit split creates uncertainty in the law and raises the risk, which is untenable in capital cases, that a defendant will be treated differently depending on which federal circuit his case happens to lie. This Court should not allow this wrongful determination to remain the law of the Eleventh Circuit. The circuit court's denial of a COA in this capital case, with its extensive post-conviction record establishing deficient performance and prejudice, was plainly wrong.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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