No. _______

October Term, 2024

In the
Supreme Court of the United States

Donald Sherman,

Petitioner,

v.

Jeremy Bean, Warden, *et al.*,

Respondents.

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

Petition for Writ of Certiorari

CAPITAL CASE

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QUESTIONS PRESENTED

(Capital Case)

At Sherman's capital sentencing, the State presented the testimony of Officer Gayland Hammack who testified to hearsay from a jailhouse informant, Michael Placencia, regarding an escape and solicitation to commit murder offense allegedly committed by Sherman at the jail awaiting trial. During his testimony, Hammack and a second jailhouse informant, Christine Kalter, testified the informants received no benefits in exchange for their cooperation with the State.

In state postconviction proceedings, Sherman proffered compelling evidence demonstrating that Hammack and the State secured an early release from custody for the Placencia, among other benefits, in exchange for his cooperation. Kalter also received undisclosed benefits. The Nevada Supreme Court, however, made a factual finding on appeal, without providing notice or an opportunity for factual development, that Sherman could not prove the benefits received by the informants were connected to their cooperation in Sherman's case.

The Ninth Circuit denied Sherman's request to expand the certificate of appealability (COA) to include his claim that the State failed to correct Hammack's and Kalter's false testimony, summarily concluding that the Nevada Supreme Court's factual finding was not objectively unreasonable under 28 U.S.C. § 2254(d)(2).

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The questions presented are:

1. Did the Ninth Circuit err in failing to address Sherman's argument that the state appellate courts factual findings made without notice, an opportunity to conduct discovery, or present evidence were objectively unreasonable in light of the evidence presented?

2. Does a request for a COA on an issue require a separate COA request for an argument that formal discovery should have been permitted on the issue as the First Circuit and Ninth Circuit held in Sherman's case, or is such a request already encompassed within the scope of a request for a COA on the substantive issue as the Fourth, Fifth, Ninth (intra-circuit conflict), and Eleventh Circuits have held?

LIST OF PARTIES

Petitioner Donald Sherman is an inmate confined at High Desert State Prison, in Clark County, Nevada. Respondent Jeremy Bean is the warden of High Desert State Prison, where Sherman is currently housed.

LIST OF RELATED PROCEEDINGS

State v. Sherman, Eighth Judicial District Court, Clark County, Nevada, Case No. C126969, Judgment of Conviction (April 21, 1997).

Sherman v. State, Nevada Supreme Court, Case No. 30328, Opinion Affirming Conviction and Sentence (965 P.2d 903 (*per curiam*) (October 27, 1998)).

Sherman v. State, United States Supreme Court, Case No. 98-8548, Certiorari Denied (526 U.S. 1122 (May 17, 1998)).

State v. Sherman, Eighth Judicial District Court, Clark County, Nevada, Case No. C126969, Findings of Fact, Conclusions of Law and Order (December 8, 2000).

Sherman v. State, Nevada Supreme Court, Case No. 37191, Opinion, Order of Affirmance (10 P.3d 1257 (July 9, 2002)).

Sherman v. State, Nevada Supreme Court, Case No. 47012, Opinion, Order of Reversal (unpublished) (210 P.3d 768 (January 9, 2007)).

Sherman v. State, Eighth Judicial District Court, Clark County, Nevada, Case No. C126969, Order Denying Petition for Writ of Habeas Corpus (October 19, 2007).

Sherman v. State, Nevada Supreme Court, Case No. 50563, Opinion, Order of Affirmance (unpublished) (367 P.3d 819 (May 17, 2010)).

Sherman v. McDaniel, United States District Court, Case No. CV-S-02-1349-LRH (VCF), Judgment in a Civil Case (December 17, 2015).

Sherman v. State, Eighth Judicial District Court, Clark County, Nevada, Case No. C126969, Findings of Fact, Conclusions of Law and Order (August 7, 2017).

Sherman v. State, Nevada Supreme Court, Case No. 73984, Opinion, Order of Affirmance (unpublished) (448 P.3d 551 (September 13, 2019)).

Sherman v. Gittere, Ninth Circuit Court of Appeals, Case No. 16-99000, Opinion (February 9, 2024).

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The Nevada Supreme Court made a dispositive factual finding in Sherman's case *sua sponte* that a jailhouse informants' benefits were not related to their cooperation with the State without providing notice or opportunity to reliably determine the facts. The evidentiary proffer made by Sherman only supported the contrary conclusion that the informants' benefits were connected to their cooperation with the State in Sherman's case. This Court has not hesitated to reject a factual finding made by a state appellate court as unreasonable when the court finds a document says something *vel non*. *E.g.*, *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). The Court has also found a state court decision unreasonable when it failed to consider the import of the petitioner's evidentiary proffer. *E.g.*, *Brumfield v. Cain*, 576 U.S. 305, 315–16 (2015).

The Nevada Supreme Court's decision did not acknowledge Sherman's evidentiary proffer or identify any evidence in the record to support its contrary finding. This Court has acknowledged that when there is "good reason to think" the petitioner will be able to prove a factual issue then there is "even greater cause to believe he might prove such a claim in a full evidentiary hearing." *Brumfield*, 576 U.S. at 321. The Ninth Circuit's failure to acknowledge Sherman's arguments under 28 U.S.C. § 2254(d)(2), assailing the reasonableness of the state court's factual finding made on appeal without any reliable method of determining the facts, is an egregious error that infects the validity of Sherman's capital sentence and demands correction. This is especially true when a petitioner, like Sherman, provides the state court with evidence to substantiate the meritorious nature of a claim or, at a minimum, to justify the need for factual development.

When this Court decided *Sumner v. Mata*, a circuit split existed whether factfinding performed by a state appellate court should receive a presumption of correctness under the federal habeas statute. 449 U.S. 539, 546 n.1 (1981). While the Court answered the question in the affirmative, it also imposed an obligation on federal courts to explain why they were not according a presumption of correctness to the findings made by a state court. *Id*. at 551. As the Court noted: "Such a statement tying the generalities of § 2254(d) to the particular facts of the case at hand will not, we think, unduly burden federal habeas courts even though it will prevent the use of the 'boilerplate' language to which we have previously adverted." *Id*. The Ninth Circuit's decision in Sherman's case lacked any reference to the state court record before sustaining the reasonableness of the Nevada Supreme Court's factual finding under section 2254(d)(2). Like the State, habeas petitioners should receive an acknowledgment of their arguments regarding the evidentiary proffer made to the state court and the reasonableness of the state's fact-finding procedure.

Moreover, this Court has acknowledged the limitations on appellate factfinding when a factual dispute turns "on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record." *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986). A finding of historical fact regarding whether a State witness received undisclosed benefits—in contravention of his trial testimony that he had received no such benefits—is precisely the type of finding normally suited for factual development in a trial court, not an appellate court. *DeMarco v. United States*, 415 U.S. 449 (1974) (*per curiam*) (reversing where court of appeals found prosecutor's remarks in witnesses' case were "deemed ambiguous and the question thought to be a 'close' one, concluded that no promises had been made to the witness prior to the witness' testimony at petitioner's trial"). While there may conceivably be cases where such a finding of historical fact can be made by an appellate court against the petitioner based on the state court record there has never been a suggestion that such is the case here.

OPINIONS BELOW AND JURISDICTION

The Ninth Circuit entered a published decision and unpublished memorandum affirming the district court's denial of relief on February 9, 2024. App. 2–52. A petition for rehearing was denied on August 5, 2024, App. 54, and an amended memorandum was issued the same day. App. 56–82. Justice Kagan extended the time to file a petition for a writ of certiorari until January 2, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2253(b)(2) provides, in pertinent part: "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

28 U.S.C. § 2254(d)(2) provides, in pertinent part: "An application for writ of habeas corpus on behalf of a person in state custody pursuant to the judgement of a

State court shall not be granted with respect to any claim adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . 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."

INTRODUCTION

A certificate of appealability should issue when a federal court's "application of AEDPA to petitioner's constitutional claims" and their resolution "was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). As this Court has recognized, "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* Applying this lenient standard, reasonable jurists could debate whether the Nevada Supreme Court's factual finding that the jailhouse informants' benefits were not related to their cooperation was an unreasonable determination of the facts in light of the evidence presented in state court proceedings. The Ninth Circuit erred by resolving Sherman's argument at the COA stage without acknowledging his arguments with respect to his evidentiary proffer in state court and the circumstances in which the state court's findings were made.

STATEMENT OF THE CASE

Sherman is in custody pursuant to a state court judgment of conviction and sentence of death in the Eighth Judicial District Court, Clark County, Nevada, Case No.C126969. Sherman was convicted of burglary, robbery, and first-degree murder in connection with the death of Lester Bauer, the step-father of his ex-girlfriend, Dianne Bauer. At sentencing, the jury found four aggravating circumstances:

Sherman was previously convicted of another murder, the murder was committed while under a sentence of imprisonment, the murder was committed while in the commission of a burglary, and the murder was committed while in the commission of a robbery.[1] The jury also found three mitigating circumstances: the murder was committed while Sherman was under the influence of extreme mental or emotional disturbance, the murder was committed while under the duress or under the domination of another person (Dianne Bauer), and any other mitigating circumstances. After weighing the aggravators and mitigators the jury imposed a sentence of death.

Following state appeals and federal habeas proceedings, Sherman raised several issues before the Ninth Circuit, all of which were denied. App. 2–82. In a published decision, the Ninth Circuit denied the claim upon which Sherman received a COA. App. 2–24. In an unpublished memorandum, the Ninth Circuit denied Sherman's request to expand the COA. App. 56–82. This petition concerns the Ninth Circuit's denial of Sherman's request to expand the COA to include his claims of prosecutorial misconduct at sentencing.

Sherman raises two questions before this Court, both of which involve jailhouse informants Michael Placencia and Christine Kalter and the State's presentation of non-statutory aggravating circumstances at his capital penalty hearing.

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[1] The Nevada Supreme Court found the burglary and robbery aggravating circumstances invalid in state postconviction proceedings, but found the error harmless. App. 89–92.

Placencia and Kalter purportedly learned of an alleged solicitation-to-commit-murder plot by Sherman while he was in jail awaiting trial. 9-ER-2447–2505.[2] The plot involved the murder of correctional officers to facilitate Sherman's escape from custody. *Id.* Placencia's hearsay statements were admitted during the penalty hearing through Las Vegas Metropolitan Police Officer Gayland Hammack, and Kalter testified. *Id.* The prosecutor relied on the alleged solicitation offense to argue Sherman posed a future danger to correctional staff and would commit murder again if not sentenced to death. 10-ER-2868–70.

The State committed extensive prosecutorial misconduct with respect to the jailhouse informants by failing to disclose impeachment information from their criminal histories and favorable treatment received for their cooperation and by failing to correct false and misleading testimony from Officer Hammack and Kalter. The Nevada Supreme Court addressed Sherman's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the merits in a reasoned decision, but failed to address his related claim under *Napue v. Illinois*, 360 U.S. 264 (1959). App. 86–88.

The Nevada Supreme Court resolved facts concerning undisclosed benefits received by the informants in a way that was objectively unreasonable in light of the evidence presented.

[2] Citations with this convention refer to the Excerpt of Records Sherman filed with his appeal before the Ninth Circuit.

A. The State was ordered to disclose exculpatory and impeachment information regarding the informants pretrial, but failed to do so.

Trial counsel filed pre-trial motions for discovery of information regarding penalty hearing witnesses, impeachment information from Placencia's and Kalter's criminal history, impeachment information from their pre-sentence reports, and information regarding the expectation of, or receipt of, benefits for their testimony. 3-ER-785–87; 3-ER-790–4-ER-791–93; 4-ER-795–807. The trial court granted the motions in pertinent part. 21-ER-6055–56.

Despite its constitutional disclosure obligations and the trial court's discovery order, the State failed to disclose significant exculpatory and impeachment information concerning Placencia and Kalter. In a letter to defense counsel, prosecutor David Roger represented "some of the State's witnesses have received benefits from the State or law enforcement." App. 104.[3] Roger disclosed Placencia received money from the Secret Witness program and that Kalter anticipated favorable consideration on her sentencing in a homicide matter. *Id.* Roger asserted he "was not going to provide [Kalter] with any benefits in exchange for her testimony." *Id.* Roger represented "this is the extent of the benefits provided to prosecution witnesses." App. 105. Despite assurances the State would provide "any further information" it became aware of regarding Placencia and Kalter, *id.*, the State failed to disclose significant impeachment information regarding the pair, which will be discussed below.

[3] 20-ER-5837.

B. At Sherman's trial, Officer Hammack testified that Placencia received no benefits for cooperating with the State.

By the time of Sherman's trial, Placencia had a history of serving as a career criminal informant, as well as a history of escape, failing to appear, and currying favor to avoid incarceration. 19-ER-5484–20-ER-5722. But the State released Placencia from custody approximately one month before trial, and later claimed he was unavailable. 20-ER-5670; 4-ER-883–85.

Placencia's "unavailability" permitted a Las Vegas Metropolitan Police Officer in the Intelligence Division, Gayland Hammack, to testify to Placencia's hearsay statements. Despite assisting Placencia in obtaining his freedom and unavailability, Hammack falsely testified during the penalty hearing that Placencia received no benefits in exchange for his cooperation:

> Q Now, did Mr. Placencia expect to get some money?
>
> A Money was never discussed with Mr. Placencia.
>
> Q Do you know whether or not he was ever given $300 because of his participation?
>
> A Yes, we did pay him $300
>
> Q Did he receive any other benefits because of his participation?
>
> A Not that I recall, no.

9-ER-2463.

Kalter testified about the alleged plot and falsely testified that she did not receive "any type of consideration" for her testimony. 9-ER-2505.

C. During postconviction proceedings, Sherman discovered that both Placencia and Kalter received benefits for testifying against him and that Hammack and Kalter testified falsely.

During federal habeas proceedings, Sherman discovered that both Placencia and Kalter received benefits for testifying against him and that Hammack and Kalter testified falsely at his trial. Sherman presented the following information to support his *Brady* and *Napue* claims during his second state postconviction proceedings initiated to exhaust his federal claims.

With respect to Placencia, the State failed to disclose that Hammack, in conjunction with the prosecutor's office, repeatedly contacted the justice court judge in Placencia's pending battery case to request that he be excused from a 90-day contempt of court sentence. App. 103, 128.[4] A note authored by the judge's secretary of Hammack's phone call read as follows:

> Sgt. Hammack 257-3234 (c) 379-5769 called again regarding Michael Placentia [sic] ID # 1212992 Case # 95M02649X[.] He requested last week you release this guy from a "COC" in a battery and you looked at the file and said no. He wants to see if he can change your mind.

App. 103. The case file also contained a sticky note which read: "Rel[ease] to File. Waiting for DA to work out release if any." *Id.*

Second, Sherman proffered a document from law enforcement showing all the details of Placencia's pending case were written on the report documenting his initial contact with authorities regarding the solicitation offense. App. 128. Handwriting on the document showed the case number of the pending charge:

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[4] 20-ER-5586; 20-ER-5582.

"95M02649X," the name of the judge: "Lippis," the judge's department number, the name "Anne," the judge's judicial assistant, her phone number "455-4380," and the date of the contempt of court sentence imposed against Placencia: "March 27 Aug 22." *Id*.

Third, Sherman discovered that the State violated the trial court's discovery order by not disclosing the existence of a felony conviction for Placencia. 19-ER-5516. And the State failed to disclose benefits Placencia received in three pending criminal cases involving the dismissal of charges, own recognizance releases, excusals from sentencing conditions, and failure to revoke probation based on the commission of new criminal offenses. 19-ER-5485–20-ER-5722.[5]

With respect to Kalter, contrary to the prosecutor's representations to defense counsel, Sherman discovered that Kalter had much more than a unilateral expectation that she would benefit at sentencing from her cooperation. Kalter was a confidential informant for LVMPD where she conducted controlled drug buys. 20-ER-5734–39, 5769, 5814–15. Second, Sherman discovered that Kalter did indeed receive benefits from the State. The State did not oppose Kalter's request for release from custody after she entered a guilty plea to manslaughter for poisoning her mother. 20-ER-5574–82. And when Kalter was released from custody she went back to work as a confidential informant for law enforcement. 20-ER-5834. When law

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[5] The transcript of a wiretapped phone call between Sherman and Placencia, which was admitted at trial, show that Placencia was primarily motivated by the existence of a deal. App. 106. ("I'm looking for a (deal), they said they were gonna offer me something, right?").

In the grand jury proceedings concerning the solicitation case, prosecutor Roger elicited false testimony from Placenica that he served his "whole term" in custody and did not receive benefits in exchange for his cooperation.

enforcement contacted Kalter for information about Sherman, they referenced her upcoming sentencing hearing. 20-ER-5824. All of this information existed before Kalter testified at Sherman's penalty hearing, but none of it was disclosed to the defense.

D. The Nevada Supreme Court made factual findings for the first time on appeal from the denial of Sherman's second state habeas proceeding.

The state district court denied Sherman's petition raising his *Brady* and *Napue* claims without addressing either issue. App. 94–99. The court also denied Sherman's motion for leave to conduct discovery from the prosecutor's office and law enforcement to prove his claims. App. 95.

On appeal from the denial, the Nevada Supreme Court recognized that "the State improperly withheld information concerning the informants' criminal histories," but separately addressed the evidence of benefits received by Placencia and Kalter. App. 86–88. According to the Nevada Supreme Court, "nothing in the documents Sherman submitted shows that any favorable treatment in the disposition of any pending criminal case against them was related to their cooperation in the investigation of Sherman's escape plot." App. 87.

This "finding" was invented by the Nevada Supreme Court and was not an argument made by the State in its answering brief. The Nevada Supreme Court did not acknowledge the *Napue* aspect of Sherman's claim in its reasoned decision. Sherman filed a petition for rehearing arguing the manner in which the court made the factual finding, without providing notice or any opportunity to present evidence, deprived him of his federal constitutional right to procedural due process. The petition for rehearing was denied without explanation. 1-ER-98.

E. The federal district court did not address the Nevada Supreme Court's factual findings on appeal or the *Napue* claims.

The federal district court denied the *Brady* claim, reasoning that no prejudice occurred. 1-ER-32– 36. The district court did not address Sherman's *Napue* claims about Placencia and Kalter. Nor did the court address Sherman's argument that the state court's factual findings were objectively unreasonable in light of the evidence presented in state court. The district court denied Sherman's motion for leave to conduct formal discovery five times: the first was before the state exhaustion proceeding, 1-ER-146–150; the second was when Sherman sought reconsideration, 1-ER-123; the third was when Sherman sought evidentiary development to demonstrate cause and prejudice, 1-ER-97; the fourth was when Sherman filed his reply to the State's answer to the petition, 1-ER-33–36, 1-ER-53–56 (denying request for discovery and evidentiary hearing); and the final one was in his motion to alter or amend the judgment. 1-ER-5–8 (denying motion to alter or amend judgment).

F. The Ninth Circuit also did not address the reasonableness of the Nevada Supreme Court's factual findings on appeal.

The Ninth Circuit rejected Sherman's *Brady* and *Napue* claims in an amended memorandum. App. 65–70.[6] In pertinent part, the Ninth Circuit panel deferred to the factual determination of the Nevada Supreme Court on the *Brady* claim without further explanation, holding: "The Nevada Supreme Court's determination that any favorable treatment received by Placencia or Kalter was not related to their cooperation against Sherman was not an unreasonable factual determination." App. 68. This single sentence was the court's only acknowledgment of Sherman's argument with respect to undisclosed benefits received by the jailhouse informant witnesses.

The panel manufactured the same reason for rejecting Sherman's *Napue* claim, even though neither the state court nor the federal district court addressed it. App. 70. And in a footnote, the panel noted Sherman's argument that he was erroneously denied formal discovery on these issues, but concluded "[t]he discovery issue is not properly raised." App. 70. While acknowledging Sherman raised the argument in his briefs, the Ninth Circuit concluded he failed to seek a separate COA with respect to the denial of formal discovery and therefore waived the argument. *Id*. In so doing, the panel did not address the several times Sherman

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[6] The Ninth Circuit resolved Sherman's appeal in a published opinion on the certified issue and an unpublished memorandum on the uncertified issues. App. 2–52. Sherman then filed a motion for rehearing, which the Ninth Circuit denied, but it resulted in the filing of an amended memorandum. App. 54–82. The amendments did not concern the section discussing the *Brady* and *Napue* claims.

sought formal discovery on these issues or the district court's orders denying discovery.

Sherman filed a petition for rehearing wherein he argued, in pertinent part, that the panel erred by failing to address his argument regarding the unreasonableness of the state court's finding that the benefits received by the jailhouse informants were not related to their cooperation with the State in Sherman's case. Sherman also argued the court failed to address his argument that the prosecutor committed misconduct by telling the jury in closing argument that Sherman would commit murder in prison if not sentenced to death. The Ninth Circuit thereafter issued an amended memorandum finding the latter issue harmless, App. 70–71, but failing to address the former issue regarding the unreasonableness of the state court's factual findings.

Due to the Nevada Supreme Court's factual finding, Sherman has never received consideration of his *Napue* claim by the state or federal courts.

REASONS FOR GRANTING THE PETITION

Certiorari review is warranted because the Ninth Circuit has entered a decision in conflict with published decisions of the Fourth, Fifth, Ninth, and Eleventh circuits on the important question whether a separate COA must be sought for factual development in addition to seeking a COA on the underlying substantive constitutional issue. SCR 10(a). The First Circuit has held a separate COA is required. This issue is important because the majority of cases where habeas petitioners receive adverse decisions is at the COA stage that determines whether they will receive appellate review of their constitutional claims.

Alternatively, summary reversal of the Ninth Circuit's decision is warranted based on the court's failure to acknowledge or address Sherman's arguments under 28 U.S.C. § 2254(d)(2). Specifically, the state court's decision was an unreasonable determination of the facts when Sherman's evidentiary proffer showed the jail house informants' benefits were related to their cooperation with the State and where the contrary findings were made on appeal without notice or any opportunity for factual development. This Court will summarily reverse the judgment of a lower court when an egregious error occurs in a capital case that infects of the validity of a petitioner's sentence, such as the case here.

I. A circuit and intra-circuit split exists with respect to whether requests for factual development are within the scope of a COA grant on a constitutional issue.

Sherman's case presents an open question with this Court: whether a request for a COA on an issue also encompasses requests for factual development related to that issue. Sherman argued before the state and federal courts that formal discovery should have been permitted on his claim of prosecutorial misconduct. The Ninth Circuit held that a separate COA request must be made specifically for formal discovery in addition to seeking a COA on the constitutional issue. App. 40. Because Sherman did not seek a separate COA to include the district court's denial of his request for formal discovery the Ninth Circuit held he waived the argument. *Id*. This Court's plenary review is warranted here because the Ninth Circuit's holding presents a split among the federal circuits with respect to whether a COA on an issue also includes a request for factual development or whether such an argument requires a separate COA request.

The First Circuit has held that a separate COA must be sought with respect to the denial of discovery in addition to receiving a COA on the same constitutional issue. In *Lee v. Corsini*, 777 F.3d 46, 62 (1st Cir. 2015), the federal court granted a COA on three constitutional issues. The court held, however, that the COA "did not extend to the denial of the motion for discovery" noting "this court was not at any time requested to issue a supplementary certificate." *Id*. at 62–63. The court therefore held "the issue is waived and we decline to address it." *Id*. at 63. As support for its holding, the court cited to *Peralta v. United States*, 597 F.3d 74 (1st Cir. 2010), a case where the federal court certified issues for review and separately certified whether the federal court's factual findings on the issues were erroneous. *Id*. at 83–84.

The Fourth, Fifth, Ninth, and Eleventh Circuits have held the grant of a COA on an issue includes whether factual development should have been permitted.[7] The Fifth Circuit recognized the issue was an open question in the circuit with published decisions going both ways. In *United States v. Lincks*, 82 F.4th 325 (5th Cir. 2023), the court took the "opportunity to clarify our circuit's law

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[7] In *Stevens v. Branker*, 570 F.3d 198 (4th Cir. 2009), the Fourth Circuit granted a COA on an issue and also reviewed whether the petitioner was "entitled to relief on the merits of his conflict claim, or alternatively, further discovery." *Id*. at 207, 213. There was no indication that a separate COA was sought. In *Kemp v. Ryan*, 638 F.3d 1245 (9th Cir. 2011), the Ninth Circuit held "the denial of discovery is encompassed within the grant of a certificate on the question of the admission of [the petitioner's] statements as to the two correctional officers." *Id*. *See also Koerner v. Grigas*, 328 F.3d 1039, 1049 n.3 (9th Cir. 2003) (noting "it is not arguments that are certified, it is issues and claims"). The Eleventh Circuit has held a COA on an issue encompasses subsidiary issues of factual development in a series of decisions. *See, e.g.*, *Cunningham v. United States*, 378 Fed. Appx. 955, 959 n.2 (11th Cir. 2010); *Gomez-Diaz v. United States*, 433 F.3d 788, 790, 794 (11th Cir. 2005); *Murray v. United States*, 145 F.3d 1249, 1250–51 (11th Cir. 1998).

on the need *vel non* for a COA on non-merits claims." *Id*. at 333 (noting the "statutory provision does not address evidentiary and other collateral rulings by the district court—do they require a COA for appealability?"). The court acknowledged "uncertainty" in the Fifth Circuit, *see id.* & n.11 (citing conflicting decisions), but ultimately concluded issues of factual development "are appealable as needed to resolve constitutional claims subject to COAs under § 2253(c)(2)." *Id*. at 333.

The Sixth Circuit has analyzed the issue and held a separate COA for factual development is not required and cited the other federal circuit courts of appeal which reached the same conclusion. In *Mammone v. Jenkins*, 49 F.4th 1026 (6th Cir. 2022), the court held a "petitioner need not obtain a separate COA to challenge discovery rulings that directly related to an issue on which [the petitioner] did obtain leave to appeal." *Id*. at 1058. After noting 28 U.S.C. § 2253(c) only speaks in terms of issues, the court stated "[n]othing in the statute suggests subsidiary questions—such as the right to obtain discovery to support a particular constitutional claim—need to be the subject of a separate certificate." *Id*. Finally, the court noted its decision "accords with our sister circuits," citing decisions from the Fifth, Ninth, and Eleventh Circuits. *Id*.

The Eighth and Tenth Circuits have arguable intra-circuit splits on this issue without acknowledging the tension between the two lines of authority. In *Newton v. Kemna*, 354 F.3d 776 (8th Cir. 2004), when discussing the scope of a COA, the court stated, "[w]e limit our appellate review to the claims specified in the certificate of appealability, *and related discovery decisions* made by the federal court." *Id*. at 779 (emphasis added). However, in *Hall v. Luebbers*, 296 F.3d 685 (8th Cir. 2002), the court's recitation of the procedural history suggested a separate COA was required for factual development. In that case, the district court certified sixteen issues for review. *Id*. at 691. The court then explained the COA "was later amended *to permit* Hall to appeal the denial of his requests for an evidentiary hearing, discovery, and leave to supplement the record." *Id*. (emphasis added).

The Tenth Circuit has an even more glaring intra-circuit split without acknowledging the inconsistency. In *Simpson v. Carpenter*, 912 F.3d 542 (10th Cir. 2018), the district court certified an issue of prosecutorial misconduct for review among others. *Id*. at 562. When analyzing the issue, the court noted, in "conjunction with his *Brady* claim," the petitioner "appeals the district court's denial of his motion for an evidentiary hearing and discovery." *Id*. at 575. The court thereafter reviewed the argument with respect to factual development without expressing concern regarding scope of the COA. *Id*. at 575–76. However, in *Lafferty v. Benzon*, 933 F.3d 1237 (10th Cir. 2019), the court held to the contrary. In that case, the petitioner received a COA on four claims, one of which was an ineffective assistance of trial counsel claim at sentencing. The petitioner argued with respect to the claim "that the district court erred in denying his request for discovery to depose his trial counsel and expansion of the record." *Id*. at 1245 n.2. However, with respect to the issue of factual development, the court concluded, "[t]o the extent that Lafferty seeks a *separate COA on these arguments*, we deny his request." *Id*. (emphasis added).

Plenary review from this Court is required to resolve these conflicting lines of authority. There is no indication this issue will benefit from further percolation in the lower courts. For circuits like the First Circuit that require a separate COA, the court does not recognize the inherent tension between its holding with respect to factual development and its separate acknowledgment that a COA on an issue necessarily includes procedural impediments to its consideration. *See Gaskins v. Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999).[8] The Eighth and Tenth Circuits both have intra-circuit splits without acknowledging them. And even circuits where the rule is clear have conflicting lines of authority in unpublished decisions such as the Sixth Circuit, *see, e.g.*, *Onunwor v. Moore*, 655 Fed. Appx. 369, 375 (6th Cir. 2016), and the Ninth Circuit's decision in Sherman's case. Even the Ninth Circuit has acknowledged uncertainty on this issue. *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) ("Although we are not certain we need to do so, out of abundance of caution we grant Pham's motion to expand the COA to encompass his Rule 6(a) claim."). That decisions granting or denying COAs are often unpublished further complicates the issue as those summary dispositions do not present an occasion to extensively analyze legal issues or conflicts with decisions in other federal circuit courts of appeal or intra-circuit conflicts. Plenary review is appropriate in such circumstances.

If the federal courts of appeal are so divided and uncertain it must also be the case that litigants need guidance. In non-capital cases, habeas petitioners are often

[8] The First Circuit's decision is in accord with this Court's later decision in *Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (holding COA should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedure ruling").

pro se and a large number of those cases are resolved adversely at the COA stage. COA practice should not be a trap for the unwary. The courts that require an additional COA for factual development do not explain the reason for such a rule as issues of fact development are closely related to the merits of the issue itself. The hyper technical COA requirement imposed by some federal courts on such subsidiary issues means that there are a large group of habeas petitioners who are being denied access to appellate review who may have otherwise received such consideration if their case was litigated in a different judicial district. Plenary review is required to bring clarity to an unclear point of law.

II. Alternatively, summary reversal of the judgment is appropriate.

This case is appropriate for summary reversal based on the Ninth Circuit's failure to consider the evidentiary proffer Sherman made in state court. *See Sumner*, 449 U.S. at 552 (Blackmun, J., concurring in the judgment). In the context of the denial of a certificate of probable cause, this Court has chastised federal courts for dismissing a "petitioner's application without making any examination of the record of the proceedings in the state courts, and instead simply rel[ying] on the facts and conclusions stated in the opinion" of the state court. *Jennings v. Ragen*, 358 U.S. 276, 276 (1959) (*per curiam*). A federal court must "first satisfy[ ] itself, by an appropriate examination of the state court record, that this was a proper case for dismissal of petitioner's application without a hearing." *Id*. Despite this clear command to review the state court record the Ninth Circuit has not always been faithful to it. *See, e.g.*, *Austad v. Risley*, 761 F.2d 1348, 1352 (9th Cir. 1985) (characterizing *Jennings* as a "four paragraph decision" where "the Court did not elaborate on the scope of an 'appropriate' examination or on what constituted the district court's 'satisfaction' in a 'proper case'").

Summary reversal of the judgment with instructions to consider the evidentiary proffer Sherman made in state court along with his arguments that the state court's factual finding was objectively unreasonable will accordingly serve an important purpose beyond this case. Whatever force *Austad* has with respect to cases where the relevant state evidentiary record is not filed in the federal court, it should be beyond dispute that an "appropriate examination" must include consideration of the evidentiary proffer Sherman made to the state courts that was also before the federal court. Summary reversal of the Ninth Circuit's judgment is therefore appropriate so the court can make an appropriate determination of Sherman's evidentiary proffer and consider his arguments with respect to the unreasonableness of the state court's fact-finding.

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Conclusion

For the foregoing reasons, Sherman requests that this Court grant his petition for writ of certiorari and reverse the judgment of the Ninth Circuit Court of Appeals. In the alternative, Sherman requests that this Court grant the petition and summarily reverse the judgment.

Dated this 2nd day of January, 2025.

Respectfully submitted,

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/s/ David Anthony
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