

*** CAPITAL CASE ***

No. _____

IN THE
Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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*** CAPITAL CASE ***

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit’s truncated no-prejudice analysis on Petitioner’s claim that counsel was ineffective during jury selection violated the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires courts to consider all of “counsel’s errors” and consider the “totality of the evidence” in assessing prejudice.
2. Whether the Eleventh Circuit violated the certificate of appealability (COA) standard when it denied Petitioner a COA on his state-court-record-based arguments under *Martinez v. Ryan*, 566 U.S. 1 (2012), because it is at least reasonably debatable whether such arguments survive *Shinn v. Ramirez*, 596 U.S. 366 (2022).
3. Whether the Eleventh Circuit overstepped the “reasonable jurists could debate” standard for obtaining a COA when it denied Petitioner a COA on his claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which Justices of this Court actually debated at an earlier stage of his case.

LIST OF DIRECTLY RELATED PROCEEDINGS

Direct Review

Caption: *Guardado v. State*
Court: Supreme Court of Florida
Docket: SC05-2035
Decided: June 28, 2007
Published: 967 So. 2d 108 (Fla. 2007)

State Collateral Review

Caption: *State v. Guardado*
Court: Circuit Court of the First Judicial Circuit, Walton County, Florida
Docket: 2004-CF-903
Decided: March 30, 2012 (Initial State Postconviction Motion)
Published: N/A

Caption: *Guardado v. State*
Court: Supreme Court of Florida
Docket: SC12-1040
Decided: April 16, 2015
Published: 176 So. 3d 886 (Fla. 2015)

Caption: *Guardado v. Jones*
Court: Supreme Court of Florida
Docket: SC17-389
Decided: May 11, 2017
Published: 226 So. 3d 213 (Fla. 2017) (State Habeas Petition Based on *Hurst*)

Caption: *State v. Guardado*
Court: Circuit Court of the First Judicial Circuit, Walton County, Florida
Docket: 2004-CF-903
Decided: September 28, 2017 (Motion to Vacate Based on *Hurst*)
Published: N/A

Caption: *Guardado v. State*
Court: Supreme Court of Florida
Docket: SC17-1903
Decided: March 8, 2018
Published: 238 So. 3d 162 (Fla. 2018)

Federal Habeas Review

Caption: *Guardado v. Sec’y, Fla. Dep’t of Corr.*
Court: United States District Court, Northern District of Florida
Docket: 4:15-cv-256
Decided: January 19, 2022
Published: N/A

Caption: *Guardado v. Sec’y, Fla. Dep’t of Corr.*
Court: United States Court of Appeals, Eleventh Circuit
Docket: 22-10957
Decided: August 12, 2024
Published: 112 F.4th 958 (11th Cir. 2024)

Certiorari Review

Caption: *Guardado v. Florida*
Court: Supreme Court of the United States
Docket: 07-8094
Decided: February 19, 2008
Published: 552 U.S. 1197 (Cert. Denied)

Caption: *Guardado v. Jones*
Court: Supreme Court of the United States
Docket: 17-7171
Decided: April 2, 2018
Published: 584 U.S. 922 (Cert. Denied; Sotomayor, J., dissenting)

Caption: *Guardado v. Florida*
Court: Supreme Court of the United States
Docket: 17–9284
Decided: November 13, 2018
Published: 586 U.S. 1004 (Cert. Denied; Thomas, J., concurring; Sotomayor, J., dissenting)

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Petitioner Jesse Guardado, a prisoner on Florida’s death row, petitions for a writ of certiorari to review the August 12, 2024, judgment of the Eleventh Circuit affirming the denial of 28 U.S.C. § 2254 relief. This petition also seeks review of the Eleventh Circuit’s partial denial of a certificate of appealability (COA) on June 7, 2022, and denial of Petitioner’s ensuing motion to expand the COA on July 27, 2022.

DECISIONS BELOW

The Eleventh Circuit’s published opinion is reported at 112 F.4th 958. It is also reprinted in the Appendix (App.) at 1a. The Eleventh Circuit’s prior orders regarding the COA are unpublished, but are available at App. 81a and 109a.

JURISDICTION

The Eleventh Circuit’s judgment was entered on August 12, 2024, and a petition for rehearing was denied on October 9, 2024. App. 78a. On December 30, 2024, Justice Thomas extended the time to file a certiorari petition until February 6, 2025. *See* No. 24A630. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2253(c) provides, in relevant part:

(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 the process issued by a State court . . .

(2) 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.

STATEMENT OF THE CASE

In 2004, Petitioner contacted local police and confessed to killing and robbing an elderly friend while high on crack cocaine. He declined a public defender and later entered a pro se guilty plea to murder and robbery in a Florida court. The State, having offered Petitioner nothing in exchange for the guilty plea, sought the death penalty. Petitioner accepted appointed counsel for the penalty phase.

The penalty phase was governed by Florida's former capital sentencing statute, which assigned the jury an "advisory" role. *See Hurst v. Florida*, 577 U.S. 92, 92 (2016). After an advisory-jury proceeding and judge-only mitigation hearing, Petitioner's judge found five aggravating factors and no statutory mitigators. The judge considered nonstatutory mitigation, but found that it did not outweigh the aggravation, and imposed a death sentence. The Florida Supreme Court affirmed on direct appeal, *Guardado v. State*, 965 So. 2d 108 (Fla. 2007), and upheld the initial denial of state postconviction relief, *Guardado v. State*, 176 So. 3d 886 (Fla. 2015).

In 2016, one month after this Court invalidated Florida's advisory jury scheme in *Hurst*, Petitioner filed a federal habeas petition under 28 U.S.C. § 2254 in the Northern District of Florida. The § 2254 petition argued, among other things,

that Petitioner's penalty-phase counsel was ineffective in two respects: (1) during jury selection; and (2) in the investigation and presentation of mitigation. The petition also argued that Petitioner's death sentence, the result of an advisory jury proceeding, violated both *Hurst* and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

The district court stayed the § 2254 petition to allow Petitioner to exhaust his *Hurst* and *Caldwell* arguments in state court. Petitioner filed a state habeas petition and a separate postconviction motion, ultimately resulting in two Florida Supreme Court opinions denying relief. In both decisions, the Florida Supreme Court recognized that *Hurst* applied retroactively to Petitioner's 2005 death sentence, because it became final after *Ring v. Arizona*, 536 U.S. 584 (2002), but applied a novel, per se harmless-error rule to deny relief. The Florida Supreme Court's harmless-error rule did not examine the individual circumstances of any particular case, but instead turned solely on whether the advisory jury's recommendation had been unanimous. The Florida Supreme Court did not address Petitioner's argument that *Caldwell* did not permit reliance on the vote of jurors who were told that their decision was advisory. *See Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017); *Guardado v. State*, 238 So. 3d 162, 164 (Fla. 2018).

This Court denied certiorari from both Florida Supreme Court decisions, with Justice Sotomayor dissenting both times. *Guardado v. Jones*, No. 17-7171, 138 S. Ct. 1131, 1132-34 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Guardado v. Florida*, No. 17-9284, 139 S. Ct. 477 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *see also Reynolds v. Florida*, No. 18-5181,

139 S. Ct. 1004, 1011-17 (2018) (Sotomayor, J., dissenting from the denial of certiorari) (addressing *Guardado* and similarly situated Florida cases).

In 2019, the district court lifted the stay of the federal habeas petition and ordered briefing on all claims. Petitioner’s jury-selection-ineffectiveness claim and *Caldwell* claim each tracked the arguments his counsel had presented to the state courts. However, Petitioner’s mitigation-ineffectiveness claim relied on, among other things, two powerful pieces of mitigation that appeared in the trial record but were not presented by state postconviction counsel. First, the trial record indicated, but postconviction counsel failed to investigate or present, Petitioner’s confinement as a juvenile at the Arthur G. Dozier School for Boys in Marianna, a notoriously abusive (and lethal) institution for children that was later shuttered by the federal government and has been the focus of numerous other investigations in recent years.¹ Second, the record contained red flags to multiple instances of rape and sexual molestation in Petitioner’s past, as both a child and adult. Petitioner argued that state postconviction counsel was ineffective, for purposes of *Martinez v. Ryan*, 566 U.S. 1 (2012), for failing to present those facts in support of the mitigation-ineffectiveness claim, and urged the district court to consider them under *Martinez*.

In 2022, the district court denied § 2254 relief and denied a certificate of appealability (COA). App. 112a-168a. As to the jury-selection-ineffectiveness claim,

¹ The horrors of Dozier also inspired the 2019 novel and 2024 film “Nickel Boys.” See Douglas Soule, ‘*Nickel Boys*,’ movie based on Marianna’s Dozier School, nominated for Best Picture Oscar, Tallahassee Democrat, available at, <https://www.tallahassee.com/story/news/local/2025/01/28/nickel-boys-movie-based-on-dozier-school-gets-oscar-nominations/77931344007/> (last accessed Feb. 5, 2025).

the district court ruled that the Florida Supreme Court’s decision—that there was no prejudice from counsel’s failure to probe the apparent biases of three jurors—was reasonable under § 2254(d). The district court found that the Florida Supreme Court’s decision on the mitigation-ineffectiveness claim was also reasonable, without analyzing Petitioner’s *Martinez* arguments. The district court rejected Petitioner’s *Caldwell* claim on the ground that “it was only *Hurst*—not *Caldwell* itself—that exposed the constitutional flaw in telling the jury that its decision would be advisory,” and *Hurst* was only retroactive to Petitioner in state court.

The Eleventh Circuit granted a COA on the jury-selection and mitigation-ineffectiveness issues only. And, as to the mitigation-ineffectiveness issue, the COA contained a caveat. It stated that Petitioner could argue his claim “only to the extent the particular legal theory and the specific factual foundation on which the mitigating evidence rests were raised and exhausted in the state courts.” App. 109a.

Petitioner moved for reconsideration of this restriction on the mitigation-ineffectiveness COA, which effectively barred him from making the *Martinez* argument he had relied on below, or from relying on the facts that he endured abuse at Dozier and sexual abuse as a child. App. 83a. Petitioner reiterated that he had proffered valid arguments under *Martinez* that were not addressed by the district court, and that *Shinn v. Ramirez*, 596 U.S. 366 (2022), did not impact his claim because the specific red flags to the Dozier and sex-abuse evidence that postconviction counsel failed to investigate were nonetheless elsewhere in the state-court record. Thus, 28 U.S.C. § 2254(e)(2) was not implicated. Petitioner also moved

to expand the COA to include the *Caldwell* issue, emphasizing that Justice Sotomayor had already demonstrated in this case that the issue was debatable by reasonable jurists. The Eleventh Circuit summarily denied expansion. App. 81a.

On August 12, 2024, the Eleventh Circuit affirmed the denial of the jury-selection and mitigation-ineffectiveness claims. App. 1a-77a; *Guardado*, 112 F.4th at 962, 984-95. As to jury selection, the Eleventh Circuit disagreed with the district court, holding that the Florida Supreme Court's decision was unreasonable under § 2254(d), because it applied a standard other than the governing *Strickland* standard. However, reviewing the claim de novo, the Eleventh Circuit found no prejudice from counsel's voir dire performance, and affirmed the district court's denial of relief. As to the (truncated) mitigation-ineffectiveness issue, the Eleventh Circuit agreed with the district court that the Florida Supreme Court's decision was reasonable and, like the district court, the panel did not address *Martinez*.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit correctly found that the Florida Supreme Court's decision was unreasonable under AEDPA, but its truncated prejudice analysis violated *Strickland* by failing to consider all of counsel's errors and their distorting effect on the voir dire record

A. The apparent biases of three jurors

Petitioner's sentencing trial was held in the 5,000-person small town of DeFuniak Springs, Florida, where the local murder dominated the news cycle. Many townspeople were exposed to widespread media coverage and gossip about the case. Multiple members of the venire had long-standing relationships with the deceased victim or law enforcement investigating the murder. But Petitioner's trial

counsel did not move for a change of venue. Nor did counsel demand individual voir dire questioning. Instead, even in the face of clear red flags, counsel elicited scant information from apparently biased jurors, exercised no consistent pattern of peremptory strikes, and allowed numerous objectionable venirepersons to be seated on Petitioner’s jury without challenge. As a result, more than a quarter of Petitioner’s jury had a high risk of bias against him. The Eleventh Circuit reviewed Petitioner’s jury-section-ineffectiveness claim de novo regarding three jurors in particular: Pamela Pennington, Earl Hall, and William Cornelius.²

Juror Pennington admitted to knowing the victim, Jackie Malone, for multiple years. Malone had helped Pennington’s son in business dealings and interacted with her on multiple occasions. Pennington stated that she thought Malone was “a very nice lady.” But trial counsel asked her only one question: whether she could set aside her feelings and conversations with Malone and base her decision on the law. Counsel did not elicit any details about her interactions with Malone or her feelings about the victim. Even when Pennington tried to elaborate on her relationship with the victim, trial counsel cut her off and began talking to other jurors instead. Counsel asked no other questions of Pennington, including what she heard about the crime, her views on drugs and addiction, or how her closeness with the victim influenced her medial consumption. Instead, counsel readily accepted Pennington, while striking other jurors who knew the victim.

² Trial counsel’s ineffectiveness during voir dire of a fourth juror, Donna Johns, who went on to serve as the foreperson of Petitioner’s jury, is discussed in Petitioner’s second ground for granting certiorari, see Section II, because the court determined that it was procedurally defaulted without addressing *Martinez*.

Juror Hall was a self-declared strong supporter of the death penalty. He also had personal relationships with multiple law-enforcement officers involved in Petitioner's case. Hall stated that he had been "close friend[s]" with Investigator Garrett for twenty-one years. Hall had also served on a federal jury that went to verdict, and Hall had personal experiences with the criminal system. His son was arrested for burglary and placed on probation. However, unlike Petitioner who was still on probation at the time of the crime, Hall's son had successfully completed his probationary period. And Hall had consumed media about Petitioner's case. Any reasonable counsel would have followed up on each of the topics mentioned. Yet counsel asked only one direct question of Hall: whether he would give Investigator Garrett's testimony more weight because of their relationship. Counsel did not ask anything more about his twenty-one-year relationship with the investigator. Nor did he ask about Hall's other admitted direct and family law enforcement ties, his experiences with his son's criminal history and discharge, his prior jury service, or what he heard in the media about Petitioner's case or from any other family members or law enforcement contacts. Instead, counsel readily accepted Juror Hall despite striking other jurors because of their law enforcement ties.

Juror Cornelius had two family members who were killed in a robbery-murder similar to Petitioner's crime. Those murders of his family members had gone unsolved for 25 years. Cornelius also worked as a general contractor on three federal prisons. But trial counsel did not ask any questions on either topic—the unsolved double-murder of Cornelius's family members or his work in prison

systems. Counsel again only elicited one direct answer from the juror: whether he thought a life sentence might be harsher than a death sentence. When Cornelius answered that he did, counsel probed him no further. Reasonable counsel would have followed up on any number of the topics mentioned, especially given that counsel exercised strikes against other jurors with personal or family experiences as crime victims. Instead, counsel accepted this juror.

As a result of counsel's inaction, Petitioner's jury was stacked with jurors who exhibited clear red flags for bias that were never explored. Reasonable counsel would have probed these issues to ensure that Petitioner's jury was not at risk of deciding his fate based on improper factors. But that did not happen here.

B. The Eleventh Circuit correctly found the Florida Supreme Court's prejudice analysis unreasonable under AEDPA before conducting de novo review

As to prejudice, the Eleventh Circuit got one thing right. The court of appeals correctly determined that the Florida Supreme Court's prejudice-only analysis was not entitled to AEDPA deference under § 2254(d)(1) because the state court had "unreasonably applied *Strickland*'s prejudice standard by substituting [a] heightened actual bias test for the reasonable probability test." App. 66a; *Guardado*, 112 F.4th at 990. Because the Florida Supreme Court had required Petitioner to meet the actual-bias test from *Carratelli v. State*, 961 So. 2d 312 (Fla.

2007), in order to succeed on the prejudice prong of his jury-selection *Strickland* claim, the Eleventh Circuit explained that it must review the claim de novo.³

Yet, in the Eleventh Circuit’s own prejudice-only analysis, it still failed to heed *Strickland*. Repeating the Florida Supreme Court’s mistake below, the Eleventh Circuit failed to analyze the totality of trial counsel’s errors in finding that Petitioner could not satisfy *Strickland* prejudice. While “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies,” it must consider the effect of *all* of counsel’s alleged errors in finding no prejudice. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). *Strickland* requires an assessment of “counsel’s *errors*” and consideration of “the totality of the evidence.” *Id.* at 695 (emphasis added). But the Eleventh Circuit failed to follow that mandate here.

Petitioner’s claim required the Eleventh Circuit to decide whether a reasonable attorney in trial counsel’s position would have performed differently regarding jurors Pennington, Hall, and Cornelius, including with respect to his failure to adequately probe their apparent biases; whether trial counsel’s use of peremptory strikes was reasonably consistent and strategic; and whether counsel’s deficient performance undermined confidence in Petitioner’s sentence. But the Eleventh Circuit considered only whether Petitioner “was prejudiced by counsel’s

³ The Florida Supreme Court’s substitution of the *Caratelli* standard for *Strickland* prejudice began long before Petitioner’s case. The Eleventh Circuit had previously left open the question of whether the Florida Supreme Court’s practice violated *Strickland*. See *Owen v. Fla. Dep’t of Corr.*, 686 F.3d 1181, 1201 (11th Cir. 2012). The panel answered that question in Petitioner’s case.

failure to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius.” App. 74a; *Guardado*, 112 F.4th at 994. It did not address the impact of counsel’s failure to reasonably question jurors and probe their apparent biases.

Because of counsel’s failure to conduct a reasonable voir dire and probe jurors’ apparent biases, Petitioner’s jury was stacked with individuals who had extensive ties to the victim and law enforcement, prior involvement in prison system, and personal or familial experiences with drug addiction. Additionally, a juror had family members who had been victims of alarmingly similar murders to the one to which Petitioner pleaded guilty. All of this likely tipped the balance in favor of death. But the Eleventh Circuit relied exclusively on the underdeveloped voir dire record without considering how it was distorted by trial counsel’s failures.

C. The Eleventh Circuit failed to consider the entirety of jury-selection deficient performance in its prejudice analysis

Petitioner’s *Strickland* claim was not limited to the argument that he was prejudiced *only* by trial counsel’s failure, on the record counsel developed, to remove jurors Pennington, Hall, and Cornelius.⁴ Rather, his claim included counsel’s unreasonable failure to probe the apparent biases of those jurors in order to support cause challenges as well as the failure to strategically exercise peremptory strikes to ensure a fair and impartial jury. *Strickland* required the court to assess whether any unreasonable failure to adequately voir dire jurors and probe their biases or to

⁴ Though it is worth noting that counsel left one peremptory strike unused and thus could have at minimum eliminated one of the problematic jurors. There is also no dispute that just one juror’s life vote was all that was needed for Petitioner’s post-*Ring* death sentence to have been vacated by the Florida courts after *Hurst*.

strategically exercise strikes resulted in prejudice. But the panel only addressed part of the claim—whether Petitioner was prejudiced by counsel’s deficiencies in making challenges on the record developed.

In its truncated analysis, the court concluded that “[Petitioner] has not shown that there was a substantial likelihood he’d receive a life sentence absent any error by trial counsel in failing to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius.” App. 66a; *Guardado*, 112 F.4th at 990. The court reasoned the “three jurors confirmed during individual voir dire that, despite their connections to the case, they would be fair if seated on the jury.” App. 75a; *Guardado*, 112 F.4th at 994.

While a juror may hold a sincere and well-intentioned belief about their ability to be impartial, this does not suffice to ensure a fair proceeding or alleviate counsel of its duty to probe that belief further. *See Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001) (“Among the most essential responsibilities of defense counsel is to protect his client’s constitutional right to a fair and impartial jury through questions that permit the intelligent exercise of challenges by counsel.”). Questions on voir dire must be sufficient to identify prospective jurors whose views would substantially impair them from performing the duties required of jurors. *Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992). A juror’s statement that they can be fair does not relieve reasonable counsel of the duty to ask questions to probe whether those assurances are reliable. Reasonable counsel, in the face of red flags, would probe further to determine whether the juror could actually be impartial. But the

Eleventh Circuit did not address this issue in evaluating whether trial counsel's failure to exercise peremptory strikes and make challenges for cause prejudiced the outcome in Petitioner's case. Instead, it discounted the apparent biases of the jurors merely because the jurors stated they could be fair.

For example, despite the court of appeals' acknowledgement of Juror Pennington's personal relationship with the victim and opinion that she was "very nice," the court still failed to address that trial counsel asked her only one question about whether she could base her decision on the law. App. 14a; *Guardado*, 112 F.4th at 967. The court did not address whether there was any prejudice from counsel's failure to follow-up on her relationship with the victim, her feelings about the victim, or from cutting her off when she tried to offer more information herself. The court also did not address any prejudice resulting from counsel's failure to question her about media exposure, drug addiction, or whether her relationship with the victim impacted her attention to widespread information about the crime. Instead, the court treated Pennington's bare assurance that she could be fair as dispositive of the prejudice inquiry, disregarding counsel's failure to exercise a peremptory strike or challenge her for cause. But the court wholly ignored the prejudice resulting from counsel's failure to gather information about Pennington that would have led to those actions.

When it analyzed Petitioner's allegations regarding Juror Hall, the Eleventh Circuit acknowledged Hall's relationships with Captain Sunday and Investigators Garrett and Lorenz and admitted that Hall and Garrett were close for over two

decades. But the court did not address Petitioner's allegations regarding counsel's failure to elicit any information on those relationships and how they might affect Hall's views of the evidence, despite counsel's assumptions about that impact being his purported reason for accepting the juror. The court similarly did not address the prejudice from counsel's failure to probe Hall about his son's burglary arrest and probation experience, what Hall had learned in the media about Petitioner's case, or Hall's prior jury service experience. Instead, the court again accepted Hall's answer that he could be fair to find that Petitioner did not prove prejudice.

The court likewise did not address the effect of counsel's failures in questioning Juror Cornelius. Despite Cornelius disclosing that he had family members murdered in a crime very similar to the one in this case, and that he had worked as a general contractor on three federal prisons, counsel failed to ask a single follow-up question on either topic. He asked only one unrelated question of the three-person juror group—whether they thought life might be a harsher punishment than death. Again, the court relied on the unprobed information from Cornelius to find no prejudice, treating his assurance he could be fair as dispositive.

Finally, the court did not address prejudice from counsel's deficiencies in failing to move for a change of venue or demand individual voir dire. It overlooked the broader context of jury selection for Petitioner's trial—the small-town, tight-knit community where the case was tried, the widespread town gossip and media coverage surrounding the case, and the extensive community ties between law enforcement, the victim, and numerous members of the venire.

While *Strickland* allows a court to assess prejudice without determining whether the deficient-performance prong has been met, it does not allow the Eleventh Circuit to do what it did here. At minimum, the court was required to consider the prejudice that would have resulted from each and every one of counsel's alleged deficiencies—individually or cumulatively—before disposing of his ineffectiveness claim. The court failed that function here.

D. The Eleventh Circuit failed to acknowledge, much less consider, the impact of counsel's deficient performance on the voir dire record

The *Strickland* issue before the panel was not only whether counsel was reasonable on the record he developed, but also whether his performance, in adequately questioning to probe jurors' apparent biases and exercising his peremptory strikes consistently and strategically, was reasonable. But because the court overlooked this critical aspect of Petitioner's deficient-performance argument, the court determined that the sparse record trial counsel developed was not sufficient to conclude that trial counsel's failures prejudiced Petitioner.

The Eleventh Circuit should not have limited its assessment to whether Petitioner was prejudiced on the plain face of the record. Instead, the *Strickland* prejudice assessment required the panel to consider whether trial counsel's performance, in terms of asking adequate questions to probe the jurors' apparent biases, unreasonably failed to develop a record of the jurors' true biases. Had counsel acted reasonably during jury selection, the jurors' apparent bias would have been laid bare, providing support for successful challenges for cause or allowing for

counsel to strategically use peremptory strikes against them. Each of the likely-biased jurors—and at the very least one—would have been prevented from sitting on the jury, fundamentally altering the landscape of jury selection.

The Eleventh Circuit’s failure to consider all of counsel’s deficiencies and their impacts when evaluating whether confidence in Petitioner’s death sentence was undermined cannot be reconciled with a proper *Strickland* inquiry.

E. This Court’s guidance is necessary to clarify the *Strickland* prejudice standard and its application in cases where counsel failed to reasonably question and develop a record of the risk of juror bias

This Court should clarify the *Strickland* analysis required and provide necessary guidance on the proper test for prejudice assessment of jury-ineffectiveness-claims, where counsel’s failure to adequately probe jurors’ biases results in a record lacking information that should have been used to support for-cause challenges and strategically exercise peremptory strikes. This is particularly important, here, where not only did the Eleventh Circuit engage in a flawed *Strickland* analysis, but Florida courts continue to use the improper actual-bias test in the *Strickland* jury-selection context, despite the Eleventh Circuit’s ruling. *See Nixon v. Florida*, No. 3D22-1833, 2025 WL 15232, at *25 (Fla. 3d DCA 2025) (Bokor, J. specially concurring) (agreeing with the outcome but expressing concern over the court’s application of *Carratelli*’s “actual bias” test in the *Strickland* context: “I believe we have a problem with our standard of proof for an ineffective assistance of counsel claim [that] should be revisited by our supreme court considering the holding of the Eleventh Circuit Court of Appeals in *Guardado*[.]”). Clearly,

confusion persists in state courts and this Court's clarification is needed to ensure that the correct standard confirmed by the Eleventh Circuit is consistently applied.

Similarly, this Court's clarification about *Strickland*'s requirement to analyze *all* of counsel's errors in deciding prejudice is needed. The Eleventh Circuit's failure to consider portions of Petitioner's ineffectiveness claim, combined with its reliance on jurors' bare assurances of fairness in the face of unexplored red flags showing heightened risk of bias cannot be tolerated. If the Eleventh Circuit's prejudice analysis stands, showing prejudice where trial counsel unreasonably failed to question jurors and develop a record probing jurors' biases will be virtually impossible. Toothless assurances of fairness from jurors, in the absence of reasonable probing, are not dispositive of juror bias that reasonable questioning would have uncovered and do not alleviate counsel of his duty to probe further.

Accepting the Eleventh Circuit's conclusion would produce a constitutionally intolerable result, particularly where Petitioner's ability to interview jurors and develop the record in both state and federal proceedings has been hamstrung by Florida's juror no-access rules. *See* Fla. R. Crim. Proc. 3.575 and Fla. Bar R. 4-3.5(4). But because the Eleventh Circuit ruled that the Florida Supreme Court's decision was unreasonable under § 2254(d)(1), a hearing is now permissible under the AEDPA and is the proper mechanism for assessing prejudice if the court determines the record is insufficient.

For these reasons, this Court should grant certiorari, confirm the Eleventh Circuit's ruling that "actual bias" does not apply, find that the Eleventh Circuit still

misapplied the *Strickland* prejudice standard, and remand for proceedings consistent with this Court's ruling.

II. The Eleventh Circuit violated the COA standard when it denied a COA on Petitioner's state-court-record-based arguments under *Martinez* because it is at least reasonably debatable whether such arguments survive *Shinn*

A. Background

In 2016, Petitioner filed his federal habeas petition arguing, among other claims, that his trial counsel was ineffective for failing to adequately investigate and present mitigation evidence and for failing to challenge for cause or peremptorily strike Juror Johns, the jury foreperson. Petitioner further argued that postconviction counsel had performed ineffectively under *Martinez* for failing to raise these claims in state court.

As with many others who seek habeas relief, Petitioner's primary *Martinez* argument was based on establishing postconviction ineffectiveness through new evidence presented to the district court. However, he alternatively argued that postconviction ineffectiveness could be established solely on the state-court record. The interpretation of *Martinez* that Petitioner had principally relied upon in district court continued to be the governing law throughout the COA briefing.

While Petitioner's COA application was pending, this Court decided *Shinn*, which held that unless a petitioner satisfies § 2254(e)(2), "a federal court may not . . . consider new evidence [] to assess cause and prejudice under *Martinez*." 596 U.S. at 389. Two weeks after this Court decided *Shinn*, the Eleventh Circuit partially granted a COA, but denied a COA as to the components of Petitioner's trial-

ineffectiveness claims that relied on *Martinez* to overcome procedural default. In his motion to reconsider or expand the COA, Petitioner emphasized that while his *Martinez* arguments that had relied on new evidence may no longer be viable after *Shinn*, he had consistently raised other *Martinez* arguments that were based on the state-court record alone, thus not implicating *Shinn* or § 2254(e)(2). Petitioner asked to be allowed to at least make those state-court-record-based arguments on appeal. The Eleventh Circuit denied Petitioner’s motion without explanation.

B. It is at least reasonably debatable for COA purposes whether *Martinez* still remains a viable pathway for state-court-record-based ineffectiveness claims after *Shinn*

This Court has reminded lower courts time and again that the COA standard amounts to a low bar. The inquiry is “threshold” and “not coextensive with a merits analysis.” *Buck v. Davis*, 580 U.S. 100, 115 (2017). It does not “require a showing that the appeal will succeed.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Under the COA standard, Petitioner’s state-court-record-based *Martinez* arguments regarding the powerful Dozier and sex-abuse mitigation should have been admitted into the appeal. Outside the Eleventh Circuit, numerous courts of appeals have indicated that *Martinez* arguments not implicating § 2254(e)(2) survive *Shinn*.

The Third, Fifth, Sixth, Eighth, and Ninth Circuits have all recognized that *Martinez* remains a live vehicle to excuse procedurally defaulted claims and that such claims can continue to satisfy the COA standard even after *Shinn*. See, e.g., *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 724 (3d. Cir. 2022); *Mullis v. Lumpkin*, 47 F.4th 380, 392 (5th Cir. 2022); *Rogers v. Mays*, 69 F.4th 381, 397

(6th Cir. 2023); *Black v. Falkenrath*, 93 F.4th 1107, 1109 (8th Cir. 2024); *Leeds v. Russell*, 75 F.4th 1009, 1016 n.2 (9th Cir. 2023) (analyzing record-based *Martinez* claims). But other circuits, including the Eleventh Circuit, have not expressed any such recognition, even when faced with individuals like Petitioner who present reasonably debatable *Martinez* claims that are grounded in the state-court record.

To excuse a procedurally defaulted claim under *Martinez*, a petitioner must show that his postconviction counsel was ineffective for failing to raise a “substantial” trial-ineffectiveness claim that has “some merit.” *Martinez*, 566 U.S. at 14. And, as this Court has repeatedly stated, the COA standard is a “threshold inquiry” that asks whether reasonable jurists could debate the resolution of the claim. *Miller-El*, 537 U.S. at 327. Thus, when a petitioner seeks a COA on a *Martinez* claim, the question is whether jurists of reason could find it debatable that the claim has “some merit.” Such a deferential standard weighs in favor of granting a COA in order to permit full consideration of the issues.

Recognizing that the continued vitality of *Martinez* after *Shinn* is reasonably debatable, five courts of appeals have granted COAs on *Martinez* claims that were grounded in the state-court record. For example, in *Mullis*, the Fifth Circuit granted a COA on a *Martinez* claim after “rel[ying] only on material that was presented to the state courts.” 47 F.4th at 392. At the outset, the court acknowledged that the petitioner’s claim presented a “close[] question” and that postconviction counsel did not “necessarily provide[] inadequate representation[.]” *Id.* at 391-92. After discussing positive and negative aspects of postconviction counsel’s performance,

the Fifth Circuit concluded that the petitioner “debatably received ineffective assistance of postconviction counsel.” *Id.* at 392. In analyzing the underlying trial-ineffectiveness claim, the court concluded that “the COA standard is met here for essentially the same reason it is satisfied regarding [postconviction counsel’s ineffectiveness]: It is plausible that [trial counsel] prejudicially fell below that standard and a more searching look is required to say for sure.” *Id.* at 393.

The Eleventh Circuit contravened the COA standard by conducting that “more searching look” at the COA stage. As Petitioner acknowledged in his COA expansion motion, *Shinn* rendered some aspects of his trial-ineffectiveness claims—those relying on evidence newly presented in federal court—no longer viable. However, the components of his claims that were grounded in the state-court record were unaffected by *Shinn* and remained intact. The Eleventh Circuit failed to explain how these arguments were not at least reasonably debatable under the doubly deferential COA and *Martinez* standards.

C. Petitioner’s *Martinez* issues were reasonably debatable and warranted a COA

Petitioner’s *Martinez* arguments satisfied the COA standard because reasonable jurists could debate whether he had presented claims that had “some merit.” As to the mitigation claim, the state-court record contained powerful red flags, including that Petitioner had been incarcerated as a juvenile at the Dozier school and had endured sexual abuse as a child. But the ineffectiveness of both trial and postconviction counsel meant that neither the jury nor the state courts ever considered this evidence when sentencing Petitioner to death.

Regarding the Dozier school, trial counsel was well-aware that Petitioner had been confined there as a child. In Petitioner’s recorded confession, which was played to the jury, he stated that he had been incarcerated at the “Marianna Boys School,” where he had to work in the slaughterhouse. Dr. James Larson, the psychologist trial counsel used as his sole penalty-phase witness, also briefly noted Petitioner’s Dozier incarceration in his seven-page psychological evaluation of Petitioner. However, trial counsel failed to question him about it when he testified. Nor did he take any steps to investigate Petitioner’s time at Dozier and what he may have experienced there, such as by requesting records or seeking out witnesses.⁵

Trial counsel likewise failed to pursue the many indications that Petitioner had suffered sexual abuse as a child. Dr. Larson’s report listed Petitioner’s being “sexually molested by a neighbor” as one of two “major traumas” in his life. NDFL-ECF 17-5 at 126. But just as with Dozier, counsel never followed up on this reference to sexual abuse to determine its extent and impact on Petitioner. Nor did

⁵ The horrific conditions at Dozier are now widely acknowledged, including by the state of Florida. The school was shut down in 2011 after a Department of Justice report found that the institution engaged in longstanding patterns of violence, abuse, and neglect towards the youth confined there. In 2017, the Florida legislature passed a bill formally apologizing to the victims who had attended Dozier. Most recently, in 2024, the Governor signed a bill creating a \$20 million-dollar fund for certain Dozier attendees to apply for compensation in recognition of the abuse they suffered. *See* “Dozier School for Boys and Okeechobee School Victim Compensation Program,” <https://www.myfloridalegal.com/DozierSchool> (last accessed Feb. 5, 2025). But even at the time of Petitioner’s trial, there was publicly available information regarding the abusive practices at Dozier. *See, e.g., Bobby M v. Chiles*, 907 F. Supp. 368, 369 (N.D. Fla. 1995) (discussing a class-action lawsuit filed in 1983 “alleging scores of unconstitutional practices [at Dozier]—including severe overcrowding and vicious punitive practices such as hogtying”).

he elicit testimony about it at the penalty phase. As a result, the jury never heard anything about it, and the judge read only the single sentence found in the report.

Rather than taking preliminary investigative steps such as gathering Petitioner's records or seeking out corroborative witnesses, trial counsel left Petitioner's Dozier experience and sexual abuse as bare factual assertions without further exploring their potential effect on Petitioner's life, development, and criminal history. In their place, trial counsel presented a penalty-phase case primarily consisting of Dr. Larson's testimony that Petitioner was, in essence, an ordinary person who "committed murder solely to obtain crack cocaine[.]" NDFL-ECF 17-14 at 32. Reasonable jurists could debate whether trial counsel was ineffective in failing to follow these red flags.

It is equally reasonably debatable whether postconviction counsel was ineffective for failing to raise these mitigation-ineffectiveness claims. Postconviction counsel's task in exhausting them was straightforward—it was the same path this Court laid out in *Rompilla v. Beard*: "identif[y] [the] likely avenues [counsel] could have followed in building a mitigation case." 545 U.S. 374, 382 (2005). The consequences of trial counsel's failure to follow the red flags about Dozier and sexual abuse were apparent on the face of the trial record. The threadbare nature of the mitigation case, coupled with trial counsel's failure to explore the major indicators of trauma and abuse present throughout the record, should have led to postconviction counsel raising a winning trial-ineffectiveness claim. Instead, his own mitigation presentation shared many of the same flaws as trial counsel's. His

lay witnesses, some of whom barely knew Petitioner, provided cumulative information, and his primary expert was so ill-prepared that the state court considered his testimony insufficient. *See Guardado*, 176 So. 3d at 893-96. Like trial counsel, postconviction counsel overlooked the red flags in the record of Petitioner's Dozier and sexual-abuse history.

Strikingly, the record shows that postconviction counsel was aware of Dozier's potential mitigating value. At a status conference, he alerted the court that he was missing records from Petitioner's juvenile incarcerations, which was particularly concerning given "the recent publicity over the last three or four years of problems that went on for young people who were placed [at] the Dozier School for Boys." But even armed with the knowledge that Dozier was a promising source of mitigating evidence, postconviction counsel mirrored trial counsel by failing to request Petitioner's Dozier records. Ultimately, no evidence of Petitioner's Dozier experience was presented at the state-court evidentiary hearing.

In attempting to litigate the mitigation-ineffectiveness claim, postconviction counsel repeated many of trial counsel's mistakes. The record showed that the mitigation case at trial centered on Petitioner's remorse and guilty plea, and very little else, a fact postconviction counsel highlighted at the evidentiary hearing. But while postconviction counsel recognized that the mitigation presentation at trial was ineffective, he overlooked the same red flags in the record that pointed towards more promising sources of mitigating evidence. At a minimum, Petitioner's arguments on these points were reasonably debatable. The Eleventh Circuit should

have followed this Court’s clear guidance on the “threshold” nature of the COA inquiry and granted a COA to permit full consideration of their merits.

Finally, the Eleventh Circuit’s failure to honor the COA standard on Petitioner’s *Martinez* arguments extended to his jury-selection-ineffectiveness claim—a quintessential state-court-record-based claim. In the COA proceedings, Petitioner argued that trial counsel’s deficiencies in questioning Juror Johns were not qualitatively different from his failures regarding Jurors Pennington, Hall, and Cornelius. Johns was strongly in favor of the death penalty and was a private investigator. She knew multiple investigators throughout the area, worked for 7-10 law firms in the area and did investigations for the state department and department of defense. She had a contract with the sheriff’s office in Petitioner’s prosecuting county doing background checks on potential employees. Johns was also a retired Air Force criminal investigator who conducted drug operations and investigated drug abuse. She stated that none of her experiences would prevent her from being fair and impartial, even though in the past she would have arrested someone like Petitioner. Trial counsel asked no follow-up questions on any of those topics, including her views on drug addiction or drug abusers, her investigative, military or law enforcement careers, and nothing about her experiences working with lawyers and in her present capacity as a private investigator.

It was at least reasonably debatable for COA purposes whether postconviction counsel’s failure to include Johns in the jury-selection-ineffectiveness argument in state court was ineffective and thus viable under *Martinez*. Because

the jury-selection issue was grounded in the trial record, *Shinn* should have posed no obstacle to the Eleventh Circuit including the Johns *Martinez* argument in the COA and allowing Petitioner to brief it on appeal. Because the Eleventh Circuit failed to uphold the COA standard regarding Petitioner's *Martinez* arguments on both his mitigation and jury-selection ineffectiveness claims, this Court should grant certiorari and remand to the Eleventh Circuit to apply the proper standard.

III. The Eleventh Circuit overstepped the “reasonable jurists could debate” standard for obtaining a COA when it denied Petitioner a COA on a *Caldwell* issue that Justices of this Court actually debated at an earlier stage of Petitioner’s case

A. Justices of this Court debated applying *Caldwell* to Petitioner

On April 2, 2018, this Court denied certiorari in Petitioner's case. *Guardado v. Jones*, No. 17-7171, 138 S. Ct. 1131 (2018). Petitioner's certiorari petition had sought review of the Florida Supreme Court's decision upholding his death sentence notwithstanding *Hurst*'s revelation that Florida's advisory-jury scheme was unconstitutional. The Florida Supreme Court applied *Hurst* retroactively to Petitioner, given that his sentence became final after *Ring*, but denied *Hurst* and *Caldwell* relief based on an automatic harmless-error rule it created for post-*Ring* cases where the advisory jury recommendation was unanimous. *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017). Justice Sotomayor dissented based on *Caldwell*, writing:

Reliance on those pre-*Hurst* recommendations, rendered after the juries repeatedly were instructed that their role was merely advisory, implicates *Caldwell*, where this Court recognized that “the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role,” in contravention of the Eighth Amendment.

Guardado, 138 S. Ct. at 1132-34 (Sotomayor, J., dissenting from the denial of certiorari). Justice Sotomayor emphasized that the Florida Supreme Court had refused to address *Caldwell* problems with death sentences like Petitioner's, urging this Court to "intervene in the face of this troubling situation." *Id.* at 1134.

In a subsequent decision, the Florida Supreme Court reaffirmed its harmless-error ruling, without any *Caldwell* analysis. *Guardado v. State*, 238 So. 3d 162 (Fla. 2018). This Court denied certiorari again, with Justice Sotomayor dissenting again. *Guardado v. Florida*, No. 17-9284, 139 S. Ct. 477 (2018).

At the same time this Court denied certiorari again in Petitioner's case, it also denied certiorari in five other cases where the Florida Supreme Court had applied its per se harmless-error rule without addressing *Caldwell*. Those collective denials elicited a statement from Justice Breyer, a concurrence from Justice Thomas, and a dissent from Justice Sotomayor. *Reynolds v. Florida*, No. 18-5181, 139 S. Ct. 1004, 1005-17 (2018). Justice Breyer's statement echoed Justice Sotomayor's call for this Court's review of whether, under *Caldwell*, "the Florida Supreme Court's harmless-error analysis violates the Eighth Amendment because it 'rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere.'" *Id.* at 1007. Justice Thomas's concurrence argued against Justice Breyer's Eighth Amendment concerns, referencing Petitioner's case specifically. *Id.* at 1009 & n.1.

After this Court’s denials of certiorari, Petitioner brought his *Caldwell* argument in federal habeas. In seeking to appeal the denial of relief in the Eleventh Circuit, Petitioner emphasized that Justices Thomas, Breyer, and Sotomayor had all weighed in on the question of granting certiorari on the *Caldwell* issue, making it at least debatable enough for a COA. But the Eleventh Circuit summarily denied a COA and Petitioner’s subsequent motion to expand the COA. App. 78a, 109a.

B. The Eleventh Circuit failed to recognize that reasonable jurists had already debated Petitioner’s *Caldwell* claim

A COA should issue if *reasonable jurists could debate the issue* or, separately, if the issue is adequate to deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) (emphasis added). A claim can be debatable by jurists of reason “even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338.

The Eleventh Circuit knew that Justices Breyer and Sotomayor had already debated the *Caldwell* issue and encouraged it to proceed to the Court’s merits docket. Justice Thomas’s concurrence did not address *Caldwell* directly, but dismissed concerns about Petitioner’s sentence specifically. *Reynolds*, 139 S. Ct. at 1009 n.1. Petitioner told the Eleventh Circuit about that debate and encouragement, in both his COA motion and motion to expand the COA, but the Eleventh Circuit denied a COA with no explanation. Under the correct threshold standard, the Eleventh Circuit should have recognized that reasonable jurists had already debated and encouraged the issue and granted a COA.

It is true that the *Caldwell* claim before the Eleventh Circuit was in a federal habeas posture, rather than a state postconviction posture. But that did not remove the underlying *Caldwell* issue from all reasonable debate. *Cf. Andrus v. Texas*, 142 S. Ct. 1866, 1880 (2022) (Sotomayor, Breyer, Kagan, JJ., dissenting from denial of certiorari) (“This Court’s failure to act does not mark the end of the road for Andrus He still may seek federal habeas review of the Court of Criminal Appeals’ ultimate denial of relief, a denial that plainly ‘was contrary to, or involved an unreasonable application of, clearly established’ precedents of this Court. 28 U.S.C. § 2254(d)(1).”); *Dunn v. Reeves*, 594 U.S. 731, 737, 744 & n.3 (2021) (Sotomayor, Kagan, JJ., dissenting) (dissenting in federal habeas after previously dissenting in state postconviction). The Florida Supreme Court’s application of its harmless-error rule to Petitioner, without addressing the *Caldwell* implications, was just as debatable under § 2254(d) as it was on certiorari review.

If the Eleventh Circuit relied on the district court’s retroactivity analysis, that analysis was itself at least reasonably debatable. The district court reasoned that “it was only *Hurst*—not *Caldwell* itself—that exposed the constitutional flaw in telling the jury that its decision would be advisory,” and that *Hurst* was only retroactive to Petitioner in state court, not in federal court. App. 161a. Essentially, the district court found that Petitioner was required to raise his *Caldwell* claim before *Hurst*, despite also finding that the *Caldwell* violation was not “exposed” until *Hurst*. Even granting the district court’s premise that *Hurst* cannot be raised

in federal habeas—a debatable issue itself⁶—that does not itself justify denying relief under *Caldwell*, a decision issued 30 years before Petitioner’s sentencing. Because reasonable jurists could debate the district court’s reasoning, the Eleventh Circuit should have granted a COA—even if it too had retroactivity concerns.

C. The Eleventh Circuit’s COA denial echoes a deep circuit split on whether a COA must issue when a court of appeals judge debates the issue

The Eleventh Circuit’s denial of a COA despite the debate in this Court echoes a circuit split on whether a COA must issue when a court of appeals judge finds the issue debatable. As described in the pending certiorari petition in *Shockley v. Vandergriff*, the circuits are divided 5 to 4 on that question. *See* No. 24-517 (Pet. for Cert. filed Nov. 4, 2024). In the Third, Fourth, Seventh, and Ninth Circuits, a COA must issue when at least one circuit judge votes to grant. But the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits will all deny a COA over the dissent of a colleague. The Eleventh Circuit regularly engages in this practice in capital cases. *See, e.g., Melton v. Sec’y, Fla. Dep’t of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir.

⁶ The district court relied on *McKinney v. Arizona*, 589 U.S. 139 (2020), which made a passing reference to *Ring* and *Hurst* not applying retroactively on collateral review in that case. But unlike in *McKinney*, Petitioner had already been afforded *Hurst* retroactivity as a matter of state law because he was sentenced after *Ring*, during what the Florida Supreme Court called a “fourteen-year delay in applying *Ring* to Florida.” *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). This left no comity concerns with the district court addressing the reasonableness of the Florida Supreme Court’s harmless-error ruling. And even if a separate federal retroactivity analysis was necessary, Petitioner has argued in this litigation that *Hurst* did not announce a new rule of constitutional law beyond *Ring*. Petitioner has consistently challenged his death sentence under *Ring* and *Caldwell* since the earliest opportunity, beginning with pretrial motions in the trial court and on direct appeal. Denying *Caldwell* relief now on the ground that *Hurst* is not retroactive to Petitioner was at least debatable enough for the Eleventh Circuit to grant a COA.

2015) (denying COA over dissent of Judge Beverly B. Martin); *Mann v. Palmer*, 713 F.3d 1306, 1317 (11th Cir. 2013) (Martin, J., concurring in part and dissenting in part); *Hutchinson v. Sec’y, Fla. Dep’t of Corr.*, No. 21-10508-P, slip op. at 4-6 (11th Cir. Apr. 29, 2021) (denying COA over Judge Adalberto Jordan’s dissent).

Justices of this Court have condemned the Eleventh Circuit’s practice as overstepping the COA standard, and in doing so made points that apply equally to the issue presented here, where a COA was denied despite a debate *in this Court* on the same issue in the same case. When a federal judge actually “debate[s] the merits of [a] habeas petition,” that “alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution” of the claim. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, Kagan, and Jackson, JJ., dissenting from the denial of certiorari) (quoting *Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, Ginsburg, and Kagan, JJ., dissenting from the denial of certiorari)) (emphasis in original). As where a circuit judge dissents, a COA should also issue when a Justice of this Court dissents. *See Johnson*, 143 S. Ct. at 2255-56 (“Put simply, it was beyond question that Johnson’s habeas claim was ‘reasonably debatable,’ because “*members of this Court*, the Eighth Circuit, and the Supreme Court of Missouri had already done so.”) (emphasis added). Petitioner was entitled to a COA if *any* reasonable jurists could debate the *Caldwell* issue. “Here, reasonable jurists can and do have that debate.” *Id.* at 2254.

CONCLUSION

The Court should grant the petition for a writ of certiorari and review the decisions of the Eleventh Circuit.

Respectfully submitted,

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