***** CAPITAL CASE *****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN DON FOSTER,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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September 4, 2025

CAPITAL CASE

QUESTION PRESENTED

A prisoner seeking to appeal the denial of his federal habeas petition may only do so if "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). Notwithstanding this plain language, there is an entrenched divide amongst the federal circuit courts regarding the interpretation of this statutory provision and its intersection with the substantive standard governing habeas appeals. In the Third, Fourth, Seventh, and Ninth Circuits, a certificate of appealability must issue when a single judge concludes that the prisoner has made the threshold showing that reasonable jurists could debate the district court's resolution of a specified constitutional claim or find that the issue deserves encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Conversely, in the Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits, certificates of appealability are routinely denied even when a circuit judge on a panel votes to grant one. This lack of procedural uniformity amongst the circuits has resulted in the disparate treatment of prisoners like Petitioner, who was denied a certificate of appealability by the Eleventh Circuit despite a panel judge's determination that his ineffective-assistance-of-counsel claim met the standard for appellate review.

This Petition accordingly presents an important and recurring question for this Court to resolve:

Whether the Courts of Appeal may dismiss an appeal by a state prisoner on habeas review when a circuit judge votes to grant a certificate of appealability.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Kevin Don Foster, a death-sentenced Florida inmate, was the Petitioner/Appellant in the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit.

Respondent Secretary, Florida Department of Corrections, was the Respondent/Appellee in the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit.

LIST OF DIRECTLY RELATED PROCEEDINGS

In accordance with Supreme Court Rule 14.1(b)(iii), the following proceedings relate to the case at issue in this Petition:

Underlying Trial:

Twentieth Judicial Circuit Court in and for Lee County, Florida
State of Florida v. Kevin Don Foster, Case No. 1996-CF-1362B
Judgment Entered: June 17, 1998

Direct Appeal:

Florida Supreme Court, Case No. SC1960-93372
Kevin Don Foster v. State of Florida, 778 So. 2d 906 (Fla. 2000)
Judgment Entered: September 7, 2000
Rehearing Denied: January 22, 2001
Mandate Issued: February 26, 2001

Initial Postconviction Proceedings:

Twentieth Judicial Circuit Court in and for Lee County, Florida
State of Florida v. Kevin Don Foster, Case No. 1996-CF-1362B
Judgment Entered: July 5, 2011
Rehearing Denied: July 29, 2011

Florida Supreme Court, Case No. SC11-1761
Kevin Don Foster v. State of Florida, 132 So. 3d 40 (Fla. 2013)
Judgment Entered: October 17, 2013
Rehearing Denied: January 31, 2014
Mandate Issued: February 17, 2014

Petition for Extraordinary Relief, Writ of Prohibition, and Writ of Mandamus:

Florida Supreme Court, Case No. SC02-667
Kevin Don Foster v. State of Florida, 823 So. 2d 123 (Fla. 2002) (unpublished table decision)
Judgment Entered: July 11, 2002

First and Second Successive Postconviction Proceedings:

Twentieth Judicial Circuit Court in and for Lee County, Florida
State of Florida v. Kevin Don Foster, Case No. 1996-CF-1362B
Judgment Entered: April 21, 2016; April 27, 2017
Rehearing Denied: May 18, 2017

Florida Supreme Court, Case No. SC17-1141
Kevin Don Foster v. State of Florida, 235 So. 3d 294 (Fla. 2018)
Judgment Entered: January 29, 2018
Mandate Issued: February 14, 2018

Supreme Court of the United States, Case No. 18-5091
Kevin Don Foster v. State of Florida, 586 U.S. 882 (2018)
Judgment Entered: October 1, 2018

Third Successive Postconviction Proceedings:

Twentieth Judicial Circuit Court in and for Lee County, Florida
State of Florida v. Kevin Don Foster, Case No. 1996-CF-1362B
Judgment Entered: May 1, 2018

Florida Supreme Court, Case No. SC18-860
Kevin Don Foster v. State of Florida, 258 So. 3d 1248 (Fla. 2018)
Judgment Entered: December 6, 2018
Corrected Opinion Issued: December 13, 2018
Rehearing Denied: January 2, 2019
Mandate Issued: January 18, 2019

Supreme Court of the United States, Case No. 18-9252
Kevin Don Foster v. State of Florida, 140 S. Ct. 152 (2019)
Judgment Entered: October 7, 2019

Federal Habeas Proceedings:

United States District Court, Middle District of Florida, Case No. 2:14-cv-00597-JES-KCD
Kevin Don Foster v. Sec'y, Fla. Dep't of Corr., No. 2:14-cv-00597-JES-KCD, 2023 WL 7131841 (M.D. Fla. Oct. 30, 2023) (unreported)
Judgment Entered: Oct. 31, 2023
Motion to Alter or Amend Denied: August 9, 2024

United States Court of Appeals, Eleventh Circuit, Case No. 24-12953
Kevin Don Foster v. Sec'y, Fla. Dep't of Corr., No. 24-12953 (11th Cir. Mar. 21, 2025) (unpublished)
COA Denied: March 21, 2025
Motion for Reconsideration Denied: May 7, 2025

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Don Foster respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case or, alternatively, for an order granting a certificate of appealability.

CITATIONS TO OPINIONS AND ORDERS BELOW

The Eleventh Circuit's orders denying Petitioner's Application for Certificate of Appealability and motion for reconsideration are unpublished. (Pet. App. A, at 1a-19a; Pet. App. B, at 20a-22a) The opinion and order of the United States District Court for the Middle District of Florida denying habeas relief is unreported but available at 2023 WL 7131841. (Pet. App. C, at 23a-101a) The district court's order denying Petitioner's motion to alter or amend the judgment is unpublished. (Pet. App. D, at 102a-104a) The Florida Supreme Court's opinion affirming the denial of state postconviction relief is published and reported as *Kevin Don Foster v. State of Florida*, 132 So. 3d 40 (Fla. 2013). (Pet. App. G, at 202a-225a) The state circuit court's order denying postconviction relief is unreported. (Pet. App. H, at 226a-254a) The Florida Supreme Court's opinion affirming Petitioner's conviction and sentence on direct appeal is published and reported as *Kevin Don Foster v. State of Florida*, 778 So. 2d 906 (Fla. 2000). (Pet. App. I, at 255a-267a)

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its order denying Petitioner's Application for Certificate of Appealability on March 21, 2025, and denied Petitioner's Motion for Independent Reconsideration of Application for Certificate of Appealability on May 7, 2025. On July 23, 2025, Justice Thomas extended the time to file this Petition to and including September 4, 2025. *See* No. 25A93. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

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

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> * * *
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
> >
> > * * *
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing or the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Eleventh Circuit Rule 22-1(c) provides:

> An application to the court of appeals for a certificate of appealability may be considered by a single circuit judge. The denial of a certificate of appealability, whether by a single circuit

> judge or by a panel, may be the subject of a motion for reconsideration but may not be the subject of a petition for panel rehearing or petition for rehearing en banc.

Eleventh Circuit Rule 27-1(d) provides, in relevant part:

> Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding."

INTRODUCTION

Petitioner Kevin Don Foster was just 18 years old at the time of the murder in this case. His childhood was marred by instability, neglect, and exposure to violence, as he bounced around the country at the erratic whim of his mentally ill mother, who abandoned him for unpredictable periods of time and subjected him to 4 different father figures with varying degrees of violent tendencies. For Foster, growing up in this turbulent environment resulted in developmental delays, recurrent depression that escalated to suicide attempts, and manic episodes indicative of Bipolar disorder—all of which impaired his day-to-day functioning and judgment. Foster's trial counsel rendered ineffective assistance by failing to investigate and present this mitigation.

Rather than retain a competent, trained mitigation specialist—a standard and necessary practice in investigating a death penalty case—Foster's trial counsel instead relied on his mother, who insisted her son had no frailties, and a convicted felon/drug addicted paralegal who entered into a sexual relationship with her during the course of trial to shape the mitigation narrative. As a result of counsel's failure to conduct an independent investigation in accordance with professional norms, significant mitigation went uncovered, and Foster's jury had an incomplete and misleading understanding of his life, when it sentenced him to death by a mere 9–to–3 advisory recommendation. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Porter v. McCollum*, 558 U.S.

30 (2009).

At the evidentiary hearing during state postconviction proceedings, Foster elicited compelling testimony from several family members and mental health experts to support his claim that trial counsel rendered ineffective assistance at his penalty phase. He also introduced medical and school records rife with red flags that cried out for the independent investigation trial counsel failed to conduct. Notwithstanding the evidence Foster presented demonstrating both deficient performance and prejudice under this Court's decision in *Strickland v. Washington*, 466 U.S. 688 (1984), and its progeny, the state circuit court denied relief, (Pet. App. H, at 226a-254a), and the Florida Supreme Court affirmed, finding that "nothing presented by Foster undermines . . . confidence in the outcome of [his] penalty phase proceedings." *Foster v. State*, 132 So. 3d 40, 55, 57, 61 (Fla. 2013); (Pet. App. G, at 211a).

The district court, in turn, denied Foster's request for federal habeas corpus relief, finding that the Florida Supreme Court properly adjudicated Foster's ineffective-assistance-of-counsel claim under AEDPA in that it "weighed the mitigation evidence offered at the postconviction hearing and found no reasonable probability it would have tipped the balance of aggravating and mitigating circumstances if it had been presented at sentencing." (Pet. App. C, at 55a) The district court further concluded that Foster was not entitled to certificate of appealability (COA) because his petition did not make "a substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2). (Pet. App. C, at 100a)

A single Eleventh Circuit judge thereafter denied Foster's application for a COA wherein Foster contended that "jurists of reason could disagree with the district court's resolution of [his *Strickland*] claim or . . . conclude [at the very least that] the issue[] . . . [is] adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); (Pet. App. A, at 1a-18a)

In accordance with Eleventh Circuit procedure, Foster moved for reconsideration of

the order denying his application for a COA by a three-judge panel. *See* 11th Cir. R. 22-1(c). Foster's motion specifically maintained that he had made a "substantial showing" of the denial of his Sixth Amendment right to the effective assistance of counsel and that he was entitled to a COA under the "threshold inquiry" articulated by this Court. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); (Pet. App. F, at 187a-201a) One member of the reviewing panel, the Honorable Adalberto Jordan, agreed that Foster had met his burden and voted to "grant a COA on [his] ineffective assistance of counsel claim." (Pet. App. B, at 21a) However, despite Judge Jordan's vote, the Eleventh Circuit panel denied Foster's motion and dismissed his capital appeal. (Pet. App. B, at 21a)

This result defies the plain language of the statute governing COAs, which unambiguously states that a certificate may be issued by "*a* circuit justice or judge," 28 U.S.C. § 2253(c)(1) (emphasis added), and flouts the substantive standard for habeas appeals as a reasonable jurist could—*and did*—find the district court's resolution of Foster's constitutional claim debatable and adequate to warrant further proceedings. *See Shockley v. Vandergriff*, 145 S. Ct. 894, 897 (2025) (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari) ("When one or more jurists believes a claim has sufficient merit to proceed, that itself 'might be thought to indicate that reasonable minds could differ . . . on the resolution' of the relevant claim." quoting *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of certiorari) (alteration in original)). The panel order also reflects an alarming decline in COA grants by the Eleventh Circuit and is indicative of the court of appeals engaging in an improper merits analysis at this stage. *See Miller-El*, 537 U.S. at 337 ("[A] COA does not require showing that the appeal will succeed."); *Buck v. Davis*, 580 U.S. 100, 116 (2017) ("A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of

[the] claims,' and ask 'only if the District Court's decision was debatable." quoting *Miller-El*, 537 U.S. at 327, 348 (alterations in original)).

In the Third, Fourth, Seventh, or Ninth Circuits, Judge Jordan's vote would have meant that Foster's appeal could procced because these circuits require that a COA issue when *any* circuit judge votes to grant one. However, because Foster's case falls within the Eleventh Circuit's jurisdiction where COAs are routinely denied over a panel judge's dissent, he has been deprived of appellate review of his substantial ineffective-assistance-of-counsel claim. The Fifth, Sixth, Eighth, Tenth, and D.C. Circuits follow an analogous practice to the Eleventh Circuit, evincing an ongoing intractable divide amongst the courts of appeal over the interpretation and application of 28 U.S.C. § 2253(c) that will persist with grave consequence to habeas petitioners nationwide absent this Court's intervention, including those state prisoners sentenced to death like Foster.

Members of this Court have expressly recognized the need to resolve this "entrenched Circuit split over [such] an important question of statutory interpretation," *Shockley*, 145 S. Ct. at 897 (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari), and Foster's case presents an ideal vehicle to do so. This Petition should be granted.

STATEMENT OF THE CASE[1]

I. STATUTORY AND LEGAL BACKGROUND

A prisoner seeking to appeal the denial of his federal habeas petition may only do so if "a circuit justice or judge" issues a COA. 28 U.S.C. § 2253(c)(1); *see also* Fed. R. App. P. 22(b)(1) (implementing this statutory command and reiterating that a habeas petitioner "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate

[1] Citations to the record refer to the Appendix or the exhibits as submitted by the Respondent in the district court and utilize the pagination assigned by the court reporter. (Doc. 29, 93) All other citations shall be self-explanatory.

of appealability"). The standard for obtaining a COA, however, is lower than that needed to prevail on appeal and only requires that the prisoner make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Buck*, 580 U.S. at 115; *Miller-El*, 537 U.S. at 327; *Slack*, 529 U.S. at 484. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484).

Since its inception, this standard has remained a "threshold inquiry," *Slack*, 529 U.S. at 485, requiring a court to conduct a mere "overview of the claims in the habeas petition and [a] general assessment of their merits" *without* "full consideration of the factual or legal bases adduced in [their] support." *Miller-El*, 537 U.S. at 336; *see also Buck*, 580 U.S. at 115. This Court has specifically determined that the statute forbids a merits analysis at this stage. *Miller-El*, 537 U.S. at 336; *Buck*, 580 U.S. at 116. Thus, a petitioner need not show—nor must a court be convinced—that "the appeal will succeed" for a COA to issue. *Miller-El*, 537 U.S. at 337. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id.* at 338.

Notwithstanding the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. N. 104-132, 110 Stat. 1214 (1996), and its intent to streamline habeas proceedings, the requirement that petitioners seek a COA is not meant to foreclose appellate review in the federal system. *Holland v. Florida*, 560 U.S. 631, 648 (2010) (emphasizing that AEDPA's "basic purpose[]" was "to eliminate delays in the federal habeas review process . . . without undermining basic habeas corpus principles" (internal citations omitted)); *see also id.* at 649

("When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" quoting *Slack*, 529 U.S. at 483). In this vein, AEDPA's mandate that federal courts accord substantial deference to state-court factual determinations does not permit simply rubberstamping state-court action because "'[e]ven in [this] context[,] . . . deference does not imply abandonment or abdication of judicial review,' and does not by definition preclude relief.'" *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (first alteration in original) (quoting *Miller-El*, 537 U.S. at 340).

Moreover, this Court has long recognized that death penalty cases require unique and heightened constitutional protections to ensure courts reliably identify those defendants who are both guilty of a capital crime and for whom execution is the appropriate punishment. *Hall v. Florida*, 572 U.S. 701, 724 (2014); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Thus, while "[t]he unusual severity of death," *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring), does not warrant automatic issuance of a COA, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Mills v. Comm'r, Ala. Dep't of Corr.*, 102 F.4th 1235, 1241 (11th Cir. 2024) (Abudu, J., concurring) ("'[I]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures.'" quoting *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring)). "[A]ny doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)).

Against this backdrop, an entrenched divide nonetheless exists amongst the courts of appeals regarding the interpretation and application of the COA statute when a panel judge expressly votes that COA should issue in a case. This divide results in disparate circuit-dependent outcomes for habeas petitioners seeking appellate review of their constitutional claims.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

In May 1996, Petitioner Kevin Don Foster and co-defendants Christopher Black, Derek Shields, and Peter Magnotti were indicted with first-degree premediated murder for the death of high school band teacher Mark Schwebes in Lee County, Florida. Foster was only 18 years old at the time, as noted *supra*, and all of the co-defendants were also teenagers. The Lee County Public Defender's Office was appointed to represent Foster. (A1.1) Each of Foster's co-defendants entered into plea agreements on the condition that they testify against him at trial,[2] and a jury ultimately found Foster guilty of the first-degree murder charge. (A8. 1059)

A. Penalty Phase Facts and Mitigation Presented

Nearly a month after Foster's conviction, a single-day penalty phase took place in April 1998. While trial counsel called 25 witnesses who "presented a picture of Foster as a kind and caring person," *Foster v. State*, 778 So. 2d 906, 911 (Fla. 2000); (Pet. App. I, at 257a), their cursory testimony covered less than 100 pages of transcript. (A28. 1915-2034) The Florida Supreme Court summarized the mitigation case:

> May Ann Robinson, Foster's neighbor, testified that he once helped her start her car and offered to let her borrow a lawn mower. Robert Moore, another neighbor, testified that Foster was well mannered and a hard worker. Shirley Boyette, found Foster to be very caring, intelligent and well-mannered. Robert Fike, Foster's supervisor at a carpentry shop, and James Vorhees, his co-worker, found him to be a reliable worker.

[2] Shields and Black pled to life without parole, and Magnotti received a 32-year sentence. Christopher Burnett and Thomas Torrone, two additional co-defendants charged with lesser offenses, received probation.

> Vorhees also testified that Foster was very supportive to Vorhees' son who suffered from and eventually died of leukemia. Similarly, Raymond and Patricia Williams testified that Foster was very nice to their son who suffered from spinal bifida. Peter Albert, who is confined to a wheelchair, related how Foster had helped Albert's mother care for him after his wife died. Foster also helped Albert in numerous other ways, including preparing his meals, fixing things around the house, and helping Albert in and out of his swimming pool.
>
> There was additional testimony that described Foster's involvement with foreign exchange students. Foster was also known to have given positive advice to young children. Foster's sister, Kelly Foster, testified to how he obtained his GED after dropping out of high school and that he obtained a certificate for the completion of an "auto cad" program at a vocational-technical school. Finally, Foster's mother testified that he was born prematurely and suffered from allergies, and that Foster's father abandoned him a month after birth.
>
> On cross-examination, many of the witnesses who testified to Foster's kindness admitted that they had not been in contact with him for a number of years.

Foster, 778 So. 2d at 911-12; (Pet. App. I, at 257a). Foster's jury returned an advisory recommendation for death by a vote of 9–to–3. (A10. 1239) The jury made no factual findings.

The trial court thereafter sentenced Foster to death. (A12. 1475-86) In imposing Foster's sentence, the court found 2 aggravating circumstances: (1) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification. (A12. 1475-79) The court afforded each aggravator "great weight" and outright rejected or assigned each the 23 nonstatutory mitigators the Defense presented "very little weight individually and very little weight collectively." (A12. 1478-79, 1483) The court further rejected the lone statutory mitigating factor of Foster's age at the time of the offense (18), (A12. 1479-80), and described the superficial mitigation presentation by trial counsel as "run[ning] the gamut from the sublime to the ridiculous." (A12. 1483)

The Florida Supreme Court affirmed Foster's conviction and sentence on direct appeal,

Foster v. State, 778 So. 2d. 906 (Fla. 2000); (Pet. App. I, at 255a), and his case became final on April 22, 2001, when the time to petition this Court for a writ of certiorari expired.

B. State Postconviction Proceedings

Foster moved for postconviction relief in state court. (C19-20. 1022-1320) The circuit court summarily denied all claims except one: ineffective assistance of counsel at the penalty phase. (C21. 1477-78) By the time of the evidentiary hearing, lead trial counsel Robert Jacobs had died. Therefore, testimony about the mitigation investigation came from second-chair counsel Marquin Rinard, who considered himself "[a] glorified sounding board" and spent 85% of his time on guilt-phase preparation, (C28. 2236-37, 2249); Investigator Roberta Harsh, who was not involved in team meetings and did not initiate any investigation on her own, (C28. 2095); and James Wootton, a convicted felon who was hired by the Public Defender's Office after his release from prison and assigned to work on Foster's case as a paralegal "[i]n the loosest sense of the term."[3] (C28. 2236) No one investigator was assigned to the case from start to finish, and a mitigation specialist was never retained. (C28. 2235, 2237)

1. Facts Demonstrating Deficient Performance

Rinard was recruited to work on Foster's case about a month or two after his arrest, and his "duties were whatever Mr. Jacobs assigned to [him]." Rinard recalled that both Foster and his family cooperated with counsel. (C28. 2231-34) The defense "knew that [it] needed to do the best that [it] could to humanize Mr. Foster"; however, Rinard could not recall for certain what Jacobs looked for as evidence to support mitigation. (C28. 2250) Rinard was "sure that [they] talked about age" since Foster was 18 but could not remember having any evidence to support it. (C28. 2252, 2254) Rinard thought Jacobs obtained school records but

[3] Wootton had returned to prison on drug and robbery charges at the time of Foster's evidentiary hearing. Before he testified, the State disclosed that he attempted to get a detainer removed in exchange for favorable testimony against Foster. (C28. 2098)

was "not 100 percent sure" if they obtained Foster's medical records. (C28. 2248, 2255)

Rinard recalled that the investigator who first spoke with Foster did a brief intake interview and that there were many conversations and meetings with Foster's mother Ruby and sister Kelly. (C28. 2255-57) The defense team relied on Ruby for family history information, and she put them in contact with penalty phase witnesses. (C28. 2259-61) Rinard did not know whether anyone actually sought out independent information on Foster's social history; however, the mitigation witnesses the defense did speak with provided little negative background about the Foster family. Ruby resisted any attempts to discuss mental health issues because she "didn't want to engage in a discussion that showed a weakness or defect in Kevin." (C29. 2275, 2284)

Rinard recalled hearing about possible head injuries or concussions Foster suffered but did not investigate further. Rinard was unaware of any history of mental illness or suicide in Foster's family and never spoke to the State's investigator about Foster's demeanor when he shot himself in the stomach two years prior to the instant offense. (C28. 2261-63) Rinard could not say whether the defense team investigated any physical abuse of Foster or whether Foster observed any physical abuse of his mother. (C29. 2268) He did not seek an expert on the issue of organic brain damage and claimed he never noticed anything to indicate Foster suffered from mental health deficiencies. (C29. 2269, 2276) While Foster denied any head injuries or mental illnesses on his intake summary form, Rinard conceded that it would have been important to verify this through an independent source. (C29. 2283)

Psychiatrist Dr. Robert Wald was retained almost immediately upon Foster's arrest. Records indicate Dr. Wald met with Foster twice in May and June of 1996. At the time, Dr. Wald had no discovery. Rinard could not recall whether Dr. Wald made any relevant findings, but he never saw any documentation in the files about mental health issues. (C28. 2240-46)

Investigator Harsh testified that Jacobs was primarily responsible for the case. While

Harsh did anything he asked, she did not have any major duties and conducted no out-of-state investigation. Harsh explained that Wootton was really the "go-to guy on [the] case" and, "for all appearances," the unofficial liaison with the family. Wootton "would . . . give ideas and they'd run with it." Harsh's one assignment with Wootton was to run a timeline of the route the co-defendants said they drove the night of the crime. Harsh also testified that Jacobs had been having tremors for years at the time of Foster's case. (C28. 2084-91, 2095)

According to Wootten, he was brought on to Foster's case to control discovery using the Trial Scout program. Wootton's work on Foster's case did not begin until 1997—well after Foster was arrested—and he described the documents as "disorganized." (C28. 2110) Wootton saw Foster at the jail "two, three, four times at the most." He did not travel, and the only investigative work he did was creating the timeline with Harsh. Wootton sat in on meetings with the Foster family and fielded nonstop calls from Ruby. Ruby was in contact with Jacobs "every day, multiple times a day." She attended 50% of the team meetings and "voiced her opinion." "Every bit" of discovery was provided to her. Wootten confirmed that Ruby "supplied the names and addresses of friends and family" for the penalty phase. "She was constantly giving her opinion and what she thought was right and who we should go talk to and who we should see" and gave questions to the attorneys to ask witnesses. (C28. 2109-19, 2127)

Wootton testified that when Jacobs asked about mental health issues, Ruby would "get really irate." She insisted nothing was wrong with her child and that they not mention mental illness in front of her. (C28. 2124) Wootton believed that they had all school records and an abundance of medical records; however, no medical files, other than from Foster's self-inflicted gunshot wound, were present in the trial attorney files. (C28. 2125)

Wootton confirmed that Jacobs decided to present the "good kid" defense. Ruby contacted all of witnesses to build this theory, and the interviews occurred at the office or her home. With Kelly and Ruby, Wootton compiled a slideshow of photos depicting Foster as a

good kid with a good upbringing, (C28. 2126-29) The slides were published during Ruby's penalty phase testimony and consumed 85% of her direct examination. (A23. 2019-31)

Wootton denied falling asleep at counsel table and testified that he did not notice Jacobs suffering from tremors. Wootton further denied having a personal or sexual relationship with Ruby. (C28. 2135, 2140-42)

Kelly testified that the defense contacted her several weeks after her brother's arrest and asked her for "character references." While she provided them, Jacobs made her feel like she had nothing to contribute. Kelly noted that Ruby reviewed almost every piece of discovery, gave suggestions to the defense team, and went to Jacobs' office weekly. Kelly did not have much contact with Rinard and did not attend case meetings. She had some contact with Wootton and testified that he and her mother had a personal and sexual relationship that ended after the trial concluded. (C28. 2214-18, 2224-25)

Foster's biological father, Jack (Joe) Bates, Jr., testified that while he attended the trial, no one from the defense ever contacted him, let alone asked him about mitigating evidence. Joe introduced himself to Jacobs at trial and offered what he felt needed to be asked of witnesses, but he had no other encounter with the defense team. (C30. 2518, 2521)

Foster's aunt, Linda Albritton, testified that she received a few calls from Ruby and Kelly after Foster was arrested. She attended a deposition but was not told who set it up, and no one discussed mitigation. Linda got a letter in the mail indicating she may be called as a witness, but nothing happened. Foster's cousin Candy (Albritton) Green likewise did not speak to anyone from the legal team until she was deposed. Candy was not even notified of the deposition ahead of time. Most of the questions were about Foster's alibi, and she was not asked about family history or told what mitigation was. Candy never heard from the legal team again. Both Linda and Candy would have testified at trial. (C29. 2301-02, 2317-18)

Foster's paternal grandfather, Jack Bates, Sr., testified that he first heard Foster had

been arrested when Ruby called his wife, Irene. He never had any contact with the defense but would have testified if asked. (C29. 2407) While Kelly's biological father Ron Newberry was deposed and testified, he did not remember being told what mitigation was and what was helpful to Foster. (C29. 2426)

Foster presented these family members and multiple mental health experts at the postconviction hearing. Their testimony painted a vastly different picture of Foster's family history, upbringing, and mental health than what the jury heard at his penalty phase.

2. Facts Demonstrating Prejudice

Linda and Candy testified that mental health issues run in their family. Two of Ruby's sisters, Josephine and Ruth, suffered from severe paranoia so thick "you could cut it with a knife." Josephine eventually committed suicide by shooting herself in the head. Ruby's brother Billy is an alcoholic with anger issues, and Ruby's twin brother Roy struggles with depression. (C29. 2297-98, 2311)

Ruby was hyperactive and impulsive and married Ron Newberry (Husband #1) after graduating high school. (C29. 2414) She got pregnant with Kelly when Ron returned from Vietnam. Ron suffered from post-traumatic stress disorder, had a nervous breakdown while at work one day, and woke up in a straight-jacket. (C29. 2424-25; C28. 2172) When Kelly and Kevin spent weeks with him, he would have meltdowns, which upset them. (C28. 2172-73) Ruby and Ron divorced in 1976, (C29. 2414), and her father disowned her. (C29. 2295-96) Ruby had met Joe Bates, Jr. (Husband #2) through her brother-in-law. They dated for 6 months and eloped the day after Ruby's divorce from Ron was final. The first time Joe met Ruby's parents, her father threatened to kill them with a rifle. (C30. 2506-07)

Kevin was born through an emergency c-section on June 17, 1977. (C30. 2510) Northwest Texas Hospital records show he suffered from birth shock (now called perinatal asphyxia) and respiratory distress syndrome. Kevin had to be resuscitated twice, and it was

a week before he was weaned off the oxygen incubator and sent home. (C30. 2453; C33. 3000-3315) Kevin thereafter suffered from chronic health problems. Joe described him as uncontrollable. (C30. 2511) He was developmentally slow and abnormal, and his paternal grandmother thought he was autistic. (C30. 2464, 2467) Ruby, however, seemed completely unaware of Kevin's health issues. (C30. 2470) Her father refused to have any relationship with Kevin and told family members he should never have been born. (C30. 2466)

Joe and Ruby were married for less than 2 years. He divorced Ruby when she went to Dallas for 4 months and met Brian Burns (Husband #3). Joe did not approve of Ruby leaving the children for months at a time with Brian. (C30. 2512, 2514) Kelly remembered Joe "popp[ing] in every 3 or 4 years" until Kevin was 8 or 9. She described Joe as a "brutal man" with whom she and Kevin had no relationship. Joe went to prison at some point, and his parents, Jack and Irene Bates, were around more often. (C28. 2174-76) Jack felt Ruby "wasn't acting as a fit mother." (C29. 2407) There was no structure in the home; yet, at other times, Ruby was overly possessive.[4] (C29. 2409) Irene told psychologist Dr. Faye Sultan that Ruby was obsessed with her children and felt the unstable home environment led to depression in them. Kelly dragged her leg, which doctors attributed to a chaotic home life. (C30. 2466-67)

Dr. Sultan also spoke to Ruby's sister Pauline who noticed Kevin was developmentally delayed. He walked later than other children and had a crooked face. He had no expression and never initiated any physical or emotional connection. Ruby, however, believed he was totally normal. (C30. 2470-71)

Ruby was a person of extremes who went from being excitable to tearful very quickly. Kelly described Kevin and Ruby's relationship as overdependent. Because Ruby's presence

[4] Ruby later asked Joe if he would relinquish his parental rights so that John Foster (Husband #4) could adopt Kevin. Joe refused but learned the adoption went through without his approval in 1989. (C30. 2516)

in Kevin's life was erratic, ranging from periods of suffocating attention to utter absence, Kevin became too attached to her and grieved when she was gone. (C30. 2460-63)

Ruby met Brian a year after Kevin was born. They married quickly and moved from Texas to Arizona. Brian had mental disabilities with bouts of uncontrollable anger and violence. (C30. 2459-60) No one knew what would trigger an outburst. One night, Brian "broke the front windows of [their] rental house with his arms, tore up the house and . . . broke Ruby's nose." Both Kevin and Kelly were severely traumatized. (C28. 2180-81)

After school, Kevin and Kelly would walk to Ron Newberry's house. Brian would pick them up, and they would spend the night with him. Ruby was dating other men and left the children with Brian for long periods of time. (C30. 2460) Ron found it odd that she was leaving the children with Brian. (C30. 2420) Ruby divorced Brian in 1980 because of his physical abuse and mental issues that made him incapable of showing emotional support to the children. (C28. 2181-82) The family moved again from Amarillo to Missouri, where Ruby met John Foster (Husband #4) at a truck stop. Ruby went out on the road with John and left Kevin and Kelly again as they shuttled between ex-husband Ron, the Bates', or Brian. The children were young and missed their mother. After 2 years in Missouri, John moved the family to Florida to avoid paying child support to his ex-wife. (C28. 2184-87)

John worked sporadically and caused more turmoil and instability. (C28. 2189) After losing another house because of John's failure to keep a job, Ruby took the children back to Texas. Ruby's father, who suffered extreme paranoia, began stalking their home. He hated Kevin and "wanted him dead." In his eyes, Kevin was unacceptable and not his grandson. Kelly recalled playing on a chair with Kevin when her grandfather went crazy and told them he was going to kill their mother and beat them. Their grandfather's hatred affected Kevin; they knew he was unstable and feared him. (C28. 2193-94)

When Kelly was about to start high school and Kevin was in middle school, the family

moved back to Florida, and John and Ruby bought a pawn and gun shop. John was a Vietnam veteran and liked to watch violent movies about the war in front of the children. A few years after buying the pawn shop, John began having several affairs, and the family deteriorated. (C28. 2190, 2197-99) John was very critical of Kevin and called him a sissy. (C30. 2463) When Kelly and Kevin were in high school, they were constantly in the middle of their parents' fighting and "had scuffles" with John. Kevin had to pull John off his mother during violent encounters. (C28. 2199) Ruby confirmed to Dr. Sultan that both Brian and John had been physically and mentally abusive to her and the children. (C30. 2463)

Eventually, Brian moved to Florida and into their house while Ruby was still married to and living with John. Kevin was 15 or 16. He began escaping with his friends, started smoking, and acting rebellious. Kelly felt he was lost. (C28. 2202-03)

Throughout his life, Kevin was accident prone and hyper. (C28. 2210, 2212-13) When Kevin was 5 or 6, Kelly accidentally whacked him in the head with a baseball bat causing a concussion. In Texas, Kevin was playing on a mud-scraper when he fell and hit his head on a rock. The bottom of his skull split open. (C28. 2211) Kevin and his cousin Candy also fell when they jumped off a cliff. (C28. 2315; C29. 2318)

Candy recalled growing up with Kevin and Kelly in Texas. Ruby was there but not watching what her kids were doing. Most of the time, Kelly was in charge and acted like a mother. If Candy and Kevin were doing something wrong, they would get in trouble from Kelly. (C29. 2311-12, 2314) The dynamics were the same in Florida. Kelly was in charge, and Kevin did whatever he wanted while Ruby worked at the pawn shop. (C29. 2316-17)

Dr. Sultan learned from test scores in Texas and Florida that Kevin was verbally competent and read well but had motor difficulties. His nonverbal skills were deficient relative to his verbal ones. (C30. 2451) He had to repeat fifth grade. (C33. 3000-3315) Despite Kevin's high IQ scores, there were some learning difficulties or possible problems with his

brain; these were red flags indicating neurological testing was necessary. (C30. 2452)

By Kevin's first year at Riverdale High School, his grade-point average plummeted to 1.91; in tenth grade, it further dropped to 1.28. Around this time, Kevin and Kelly's friend Cody Voorhees became ill with leukemia. (C28. 2202-03) Kevin's girlfriend also broke up with him, which left him extremely depressed. (C30. 2455) In March 1994, Kevin shot himself. (C28. 2202-06) Lee County Hospital records show Kevin denied it was done on purpose; however, the entry wound had multiple powder burns, and police and mental health experts all believed it was a suicide attempt. (C33. 3000-3154; C39. 2335) In the yearbook, Kevin's friends wrote that he should try not to kill himself over the summer. (C30. 2455-57)

While Kevin was in the hospital for the gunshot wound, Cody died. Cody was like a brother to Kevin, and his death "[d]evastated him." Three days after his release, he jumped off a bridge into Caloosahatchee River and got a serious staph infection.[5] (C28. 2205-06, 2208) Kevin missed 53 days of school and was flunking, so he dropped out and got his GED. (C33. 3000-3315) At this time, Ruby and John continued their violent break-up. One time, John attacked Ruby in the bathtub, and Kevin had to physically pull him off her. (C28. 2209)

Kevin got a job at Bunting Construction but still lived at home. His paychecks were still being endorsed by his mother. (C33. 2961-99) He was still accident prone, as he stabbed himself at work, cut off the end of his finger with a saw, nailed his fingers together with a nail gun, had a one-inch square of glass in his foot, and got hit in the head with a metal door. (C26. 1967) Though Kevin lived at home, he was without supervision.

Dr. Sultan found physical and mental abuse in Kevin's background. His mother had been neglectful and over-nurturing at the same time. Both Kelly and Kevin suffered significant depression. Dr. Sultan believed several life circumstances were important factors

[5] Kevin denied trying to commit suicide so often to Dr. Sultan that she believed he was intentionally trying to harm himself. (C30. 2454-55)

in Kevin's development, including his reaction to the emotional instability in his life, his father's abandonment, and his mother's mental illness. Dr. Sultan was also concerned with Kevin's developmental delays and the overly dependent relationship with his mother. Dr. Sultan opined that Kevin also suffers from a mental illness. He experiences periods of grandiosity followed by manic episodes. During episodes where his is extremely agitated, Kevin is extremely labile and views himself as his mother does. There are other periods where Kevin seems depressed, sleeps a lot, does not want do anything, and thinks often of suicide. Kevin has experienced periods of extremes since childhood. (C30. 2470-75)

Dr. Sultan testified that Kevin was in the midst of a severe manic episode in the weeks leading up to the crime. Before then, he had no criminal history or history of violence. After listening to Kevin talk about that timeframe, Dr. Sultan opined that he was showing signs of a bipolar episode. Jail logs reflect that during the first 5 days after his arrest, Kevin did not leave his cell, bathe, or change his sheets; he did not respond to any external stimulation. Dr. Sultan ultimately diagnosed Kevin with Bipolar I disorder. Dr. Sultan further concluded that Kevin "was developmentally very young" at the time of the crime. His brain at age 18 was underdeveloped with respect to decision making and impulse control. As statutory mitigation, Dr. Sultan opined that Kevin "was under the influence of a serious mental illness and potentially an organic disability at the time of the offense." (C30. 2455-56, 2475-77, 2480, 2483)

Neuropsychologist Ernest Bordini evaluated Kevin in 2006 and found red flags that may have impacted his behavior. Because Kevin was anoxic at birth, frontal lobe deficits were to be expected, but Dr. Bordini was surprised to see such poor results on the Wisconsin Card Sorting Test from someone with Kevin's IQ. Kevin's verbal IQ tested at 137, but his nonverbal IQ was 105. Only 1 in 200 people have such a split, which is indicative of hemisphere dysfunction. (C29. 2326, 2341, 2347-48) Dr. Bordini further concluded that Kevin has deficits

in executive functioning, which is significant for social and occupational functioning and impacts judgment and emotional maturity. He also observed mild memory deficits and some patterns of right hemisphere difficulties. Dr. Bordini attributed the deficits to a combination of chronic anoxia/hypoxic encephalopathy and felt that Kevin's history of major recurrent depression may indicate Bipolar disorder. He also diagnosed possible antisocial personality disorder. Dr. Bordini believed that had Kevin been thoroughly tested at the time of the crime, his frontal lobe impairment would have been even worse. (C29. 2353-63)

Dr. Ruben Gur, an internationally recognized expert in brain imaging and neuropsychology, produced a map of Kevin's brain based on Dr. Bordini's raw data to illustrate the parts of the brain implicated by neuropsychological deficits. (C30. 2525-33; C32. 2902) Dr. Gur testified that one problem with diagnosing brain damage in someone like Kevin is that he is very smart; however, his performance IQ was indicative of brain damage. Kevin's performance on the Wisconsin Card Sorting Test is a classic sign of frontal lobe damage and impairment in the decision-making context. The neuroimaging algorithm showed frontal lobe damage worse on the left side than on the right and damage in both parietal areas. The image looked as if Kevin was hit from the back, pushing his brain forward and crashing against the orbital bones of the face. Dr. Gur concluded that Kevin's brain was not yet mature at the time of the crime; that he had executive functioning impairment; and that he suffers from perceptual organization impairment and bilateral frontal and parietal dysfunction. Dr. Gur testified that the science of his behavioral imaging is relied upon generally by members of his field and that this information was available at the time of trial. (C30. 2561-67, 2570-72)

Dr. Thomas Hyde, a medical doctor and expert in neurology and psychiatry, conducted a physical neurological exam. Kevin's cranial nerve examination was notable for his fairly dramatic facial asymmetry; he also "had a subtle finding of poor complex motor sequency in the hands bilaterally," indicative of significant brain damage or disease. Kevin's physical

evaluation was notable for high-average feet and facial asymmetry. His right leg is slightly longer than his left, and his left side never achieves the bulk of the right. Dr. Hyde's findings indicate right hemisphere dysfunction, which is important in understanding whether any neurological factors might have influenced Kevin's behavior. (C31. 2723, 2732-34).

Dr. Hyde also found Kevin's birth records important and indicative of developmental issues and further noted that Kevin developed a significant mood disorder in his teenage years with episodes of depression and hypomania. These conclusions derived primarily from Kevin's self-report, which is the industry standard, and supporting documentation of acute depression immediately following the offense. This was important in the context of the hypomanic symptoms Kevin reported in the days leading up to the crime. (C31. 2736-37; C35. 3397-3475) Dr. Hyde opined that Kevin's issues were the result of developmental and/or genetic factors. The multitude of minor closed-head injuries Kevin reportedly suffered could either reflect impulsive behavior or motor skill problems. Ruby told Dr. Hyde that she began premature labor 12 weeks before Kevin was born but took medication to stop it, which is a risk factor for having a child with some developmental anomalies. (C31. 2738-40)

In Dr. Hyde's experience, Kevin's gunshot wound raises red flags for an underlying mood disorder attributable to a tumultuous family background. The incident occurred during a time of great upheaval in Kevin's home and personal life, and gunshot wounds in adolescents typically deal with an extremity, not the abdomen. Kevin's right-hemisphere dysfunction also correlates to development of a mood disorder, and there is a history of mood disorders on his mother's side. Dr. Hyde was not surprised that Kevin met the DSM-IV diagnostic criteria for a mood disorder, most likely Bipolar. (C31. 2740-43) Dr. Hyde noted the discrepancy between Kevin's verbal and nonverbal IQ scores were indicative of right hemispheric dysfunction. (C31. 2745-46) Had he been retained at trial, Dr. Hyde would have told counsel about these issues of brain dysfunction and psychiatric disease. (C31. 2749)

The State's rebuttal at the hearing consisted of 3 mental health experts. Dr. Wald, the psychiatrist who evaluated Kevin before trial, testified that he had no independent recollection of Foster's case or what he did for the Defense. (C31. 2632) Dr. Leon Prockup, a neurologist, opined that Dr. Gur's behavioral map failed to pass scientific scrutiny; however, he pointed to no publication that found the map unscientific and did not contest it was based on Dr. Bordini's neuropsychological test results. Moreover, Dr. Prockup did not meet with Kevin and conceded that he had been retained a month or two before the hearing and was provided "[v]ery little information." (C30. 2591-95, 2599) The State also presented Dr. Michael Gamache, a psychologist who likewise never met Kevin. Rather, Dr. Gamache reviewed the test results from Drs. Bordini, Hyde, and Sultan and only disagreed with those that were favorable to mitigation. While he critiqued the defense experts' testing, Dr. Gamache conceded that "for the most part, the tests that they relied on are generally-accepted neuropsychological measures that have been around for some time," including at the time of trial. (C31. 2709-10)

Following the hearing, Foster moved to reopen the proceedings based on evidence that Wootton perjured himself. (C36. 3528-52) The court denied the motion but allowed the letters Wootton wrote to Foster's mother and postconviction counsel into the record as substantive evidence. (C36. 3672-73) In the letter Wootton wrote to Foster's mother, he told her that he "damn sure missed [her]" and that he "never intended to fall in love with [her]." (C35.3516, 3518) Wootton further referenced their intimate relationship, stating: "I suffer from a guilt that it was always you satisfying me—and I feel I didn't satisfy you. You are a good girl! [smiley face]." (C35. 3519) Wootton also expressed that "Counsel fucked up" Foster's case. (C35. 3517)

The state postconviction court ultimately denied relief on all facets of Foster's ineffective-assistance-of-counsel claim on July 5, 2011. (Pet. App. H, at 226a-254a)

In rejecting Foster's claim that counsel unreasonably abdicated their responsibility to prepare and present mitigation to his mother, the court found "[t]he testimony introduced at the hearing shows that Defendant and Mr. Jacobs made the decisions regarding the case, and that [Ruby] Foster merely provided contact information for possible penalty phase witnesses, lists of what she believed were inconsistencies in the evidence, or questions she believed should be asked of witnesses." (Pet. App. H, at 232a) The court found counsel was not ineffective for failing to call any of the family witnesses Foster presented in postconviction because the court found no reasonable probability their testimony would have outweighed the aggravating circumstances presented at trial. (Pet. App. H, at 237a) Moreover, Ruby and Kelly "had ample opportunity to inform the defense about any negative mitigating information, yet provided none," and no family members contacted by defense shared any either. (Pet. App. H, at 236a-237a) "In [this] circumstance, it was [therefore] not unreasonable for the defense to rely on an attempt to humanize [Foster] to the jury." (Pet. App. H, at 237a) The court additionally found postconviction testimony did not reveal "significant mitigation leads," and "[t]testimony [Foster] was born prematurely or did not have his father as a constant figure in his life would have been cumulative" to the penalty-phase evidence. (Pet. App. H, at 238a-239a)

In rejecting Foster's arguments concerning counsel's failure to present mental health mitigation, the court found the State's experts more credible than Drs. Bordini, Sultan, Gur, and Hyde because their testimony and/or opinions were speculative, limited, biased, or cumulative. (Pet. App. H, at 242a-246a) The court therefore found any contention of organic brain damage not credible and that Foster failed to demonstrate the pretrial evaluations he underwent "uncovered . . . any significant mental health mitigation, which trial counsel failed to present." (Pet. App. H, at 242a, 251a) The court specifically relied on Wootton's testimony that "had any potential mitigating mental health information been received, trial counsel

would have followed up on it," and cited "the denials of any mental health issues by [Foster] and his family." (Pet. App. H, at 251a-252a) As such, "counsel is not ineffective for relying on the utter lack of negative mitigating evidence and not investigating deeper." (Pet. App. H, at 252a)

On Foster's claim that his defense team was impaired, the court found Wootton and Rinard's testimony that "Jacobs was not trembling or confused to be more credible than those of other witnesses who were not in close proximity to Mr. Jacobs during the trial, or who have a motive for bias against Mr. Jacobs in favor of [Foster's] motion. (Pet. App. H, at 239a-240a) The court also pointed to Wootton's testimony refuting any suggestion he slept during the trial. (Pet. App. H, at 239a) While the court acknowledged Wootton's letter conflicted with his testimony about his relationship with Ruby, the court declined to "find that the contradicted testimony . . . had any probability of changing the outcome" and that the fact they had a relationship "does not change the substance of the rest of his testimony regarding [Foster's] case." (Pet. App. H, at 240a) The court additionally found Wootton's statement in the letter that "[c]ounsel fucked up" to be "less than credible." (Pet. App. H, at 240a)

On appeal, the Florida Supreme Court affirmed the denial of postconviction relief, finding that "nothing presented by Foster undermines . . . confidence in the outcome the [his] penalty phase proceedings" and that all of the circuit court's findings are supported by competent, substantial evidence. *Foster v. State*, 132 So. 3d 40, 54, 57, 61 (Fla. 2013); (Pet. App. G, at 211a). Therefore, the Florida Supreme Court stated it could not "conclude there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that counsel's deficiencies, if any, substantially impair confidence in the outcome of the proceeding." *Id.* at 61; (Pet. App. G, at 211a).

C. Federal Habeas Proceedings

Foster timely petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in

the United States District Court for the Middle District of Florida.[6] (Doc. 1) In Ground I of his petition, Foster maintained that he was denied the effective assistance of counsel at his penalty phase of his capital trial in contravention of *Strickland* and its progeny and that the Florida Supreme Court unreasonably applied clearly established federal law and made unreasonable determinations of fact in denying him relief.

The district court denied Foster's amended habeas petition on October 30, 2023. (Pet. App. C, at 23a) In addressing the penalty phase ineffectiveness claim, the district court found that "[t]he Florida Supreme Court's determination that Foster's trial counsel was not deficient is reasonable under *Strickland*" and that the court reasonably applied the "appropriate test [for prejudice] under *Strickland*." (Pet. App. C, at 53a-55a) In doing so, the district court block-quoted the Florida Supreme Court's prejudice analysis, which stated, *inter alia*, that "[t]he nature of the mitigation presented at the evidentiary hearing was not such that it would alter the balance of the aggravating and mitigating factors in any manner that undermines confidence in the result." (Pet. App. C, at 54a quoting *Foster*, 132 So. 3d at 61)

The district court further found that "Foster [was] not entitled to a certificate of appealability" on any grounds in his amended petition, (Pet. App. C, at 101a), and thereafter denied Foster's motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). (Pet. App. D, at 102a)

Foster timely filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit, (Doc. 111), and an application seeking a COA on his claim that his counsel was constitutionally ineffective at the penalty phase of his capital trial.[7] (Pet. App. E, at 105a)

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[6] Foster later amended his petition with leave of court after exhausting additional claims related to this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), changes in Florida's capital sentencing scheme, and newly discovered evidence establishing a national consensus against executing those within the late-adolescent class at the time of the offense. (Doc. 89)

[7] Foster also sought a COA on Ground II of his federal habeas petition, which alleged

To make the threshold showing required by § 2253(c), Foster averred that jurists of reason could debate the district court's resolution of this constitutional claim because it relied upon the Florida Supreme Court's unreasonable application of clearly established federal law and unreasonable determinations of fact; therefore, the deference normally mandated under AEDPA did not apply to Foster's claim and the district court should have reviewed it *de novo*.

A single Eleventh Circuit judge denied Foster's COA application on March 21, 2025. (Pet. App. A, at 1a) The order, issued by Chief Circuit Judge William Pryor, was 18 pages in length and found, *inter alia*, that "[r]easonable jurists would not debate the resolution of Foster's claims under the double deference of *Strickland v. Washington*, 466 U.S. 668 (1984), and section 2254(d)." (Pet. App. A, at 9a)

Foster sought reconsideration of the order denying his application for COA by a three-judge panel[8] pursuant to Eleventh Circuit Rule 22-1. (Pet. App. F, at 187a) The panel summarily denied Foster's motion over the dissent of Judge Adalberto Jordan, who "would [have] grant[ed] a COA on the ineffective assistance of counsel claim." (Pet. App. B, at 21a)

This Petition now follows.

REASONS FOR GRANTING THE WRIT

This case presents a straightforward, recurring conflict amongst the courts of appeal regarding the interplay of § 2253 and the necessary showing by a prisoner to be granted the right to appeal the denial of his federal habeas petition. This Court has long and repeatedly held that a prisoner is entitled to appeal in this posture if he makes a threshold showing "that 'jurists of reason could disagree with the district court's resolution of his constitutional

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that the trial court erred in denying his seventeen motions for change of venue that were filed due to the prejudicial publicity that infected the venire from which his jurors were chosen in violation of the Sixth, Eighth, and Fourteenth Amendments. (Pet. App. E., at 173a)

[8] The three-judge panel included Chief Circuit Judge Pryor who already voted to deny Foster's COA application.

claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 580 U.S. at 115 (quoting *Miller-El*, 537 U.S. at 327). Notwithstanding the fact that Congress plainly conditioned a habeas petitioner's ability to appeal on the vote of "a circuit justice or judge," 28 U.S.C. § 2253(c)(1), the courts of appeal are deeply split over whether this "threshold inquiry" for a COA is met when judges in fact dispute that a specified issue satisfies the standard for appellate review. *Slack*, 529 U.S. at 485.

Four circuits have interpreted this statutory provision to mean that a COA is required so long as *a single* circuit judge votes that one should issue; however, six circuits, including the Eleventh Circuit, adhere to an entirely different reading of the text and routinely deny a COA even when a circuit judge determines that the prisoner has made the requisite showing. This lack of procedural uniformity over a "jurisdictional prerequisite" is untenable—particularly in capital cases where the prisoner faces "the most irremediable and unfathomable of penalties." *Miller-El*, 537 U.S. at 336; *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

"[T]his important question of statutory interpretation" necessitates the Court's review. *Shockley*, 145 S. Ct. at 897 (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari). The question presented is of substantial legal and practical importance for federal habeas proceedings, and its resolution will determine whether an untold number of constitutional claims should be heard by appellate courts. The Eleventh Circuit's decision below wrongly denying a COA over the dissent of a circuit judge further entrenches the conflict. This case cleanly posits the issue to the Court, and the outcome of this Petition will impact not only Petitioner Foster, but also habeas litigants nationwide. Certiorari should be granted.

I. THE DECISION BELOW DEEPENS A CLEAR SPLIT AMONGST THE CIRCUITS

The courts of appeal are sharply divided over whether the vote of "a circuit justice or judge" requires a COA in federal habeas proceedings under the plain language of 28 U.S.C. § 2253. The Third, Fourth, Seventh, and Ninth Circuits have taken the proper textualist approach congruent with the purpose of the COA requirement and correctly answer this question in the affirmative.

The Third Circuit's local rules specifically provide that "[a]n application for a certificate of appealability will be referred to a panel of three judges," and "if any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. L.A.R. 22.3 (2011).

In almost verbatim language, the Fourth Circuit's local rules provide that "[a] request to grant or expand a certificate . . . shall be referred to a panel of three judges," and "[i]f any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue." 4th Cir. Loc. R. 22(a)(3) (2025). The Fourth Circuit's rules expressly recognize that "[t]he authority for a single judge to issue a certificate [of appealability] derives from § 2253." *Id.*

The Seventh Circuit has similarly interpreted its internal rules to require a COA so long as any "one of the judges to whom the application was referred . . . concludes . . . that the statutory criteria for a certificate have been met." *Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003) (interpreting Operating Procedure 1(a)(1) which addresses the number of judges necessary to determine motions). And, in the Ninth Circuit, local rules likewise dictate that the court may only deny an application to appeal if the panel unanimously agrees on that course of action. *See* 9th Cir. G. O. 6.2(b), 6.3(b), 6.3(g) (2024); *see also McGill v. Shinn*, 16 F.4th 666, 706 n.14 (9th Cir. 2021) (granting a COA notwithstanding the panel majority's

conclusion that the certificate was not warranted because the majority was "fully satisfied of the fair-mindedness of [its] dissenting colleague").

In contrast to this practice and straightforward interpretation of § 2253, the Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits deny applications to appeal even when a panel judge determines that a COA should be granted. *See, e.g.*, *Ricks v. Lumpkin*, 120 F.4th 1287 (5th Cir. 2024) (denying COA over reasoned dissent of Judge Stephen A. Higginson), *pet. for cert. pending*, *Ricks v. Guerrero*, No. 24-7038; *Crutsinger v. Davis*, 936 F.3d 265 (5th Cir. 2019) (denying COA over reasoned dissent of Judge James E. Graves, Jr.); *Wellborn v. Berghuis*, No. 17-2076, slip op. (6th Cir. Aug. 16, 2018) (denying COA over reasoned dissent of Judge Bernice Donald); *Rafidi v. United States*, No. 17-4272, slip op. (6th Cir. July 31, 2018) (denying COA over dissent of Judge Helene White); *Williams v. Kelley*, 858 F.3d 464 (8th Cir. 2017) (denying COA over dissent of Judge Jane Kelly); *United States v. Ellis*, 779 F. App'x 570 (10th Cir. 2019) (denying COA over reasoned dissent of Judge Robert E. Bacharach); *United States v. Miller*, 789 F. App'x 678 (10th Cir. 2019) (same); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234 (11th Cir. 2015) (denying COA over reasoned dissent of Judge Beverly B. Martin); *Hutchinson v. Sec'y, Fla. Dep't of Corr.*, No. 21-10508-P, slip op. (11th Cir. Apr. 29, 2021) (denying COA over reasoned dissent of Judge Adalberto Jordan); *Sneed v. Warden, Holman Corr. Facility*, No. 22-13328, slip op. (11th Cir. Nov. 26, 2024), *cert. denied sub nom.* No. 24-1034, 2025 WL 1787732, at *1 (June 30, 2025) (same); *Blount v. United States*, 860 F.3d 732 (D.C. Cir. 2017) (denying COA over reasoned dissent of Senior Judge Stephen Fain Williams).

Taking this position one step further, the Eighth Circuit will deny a COA when *multiple* circuit judges have voted that one should issue in a case. *See, e.g.*, *Johnson v. Vandergriff*, No. 23-2664, 2023 WL 4851623, at *1 (8th Cir. July 29, 2023) (vacating the

panel's order granting a COA and denying petitioner's application to appeal over separately reasoned dissents from *three* circuit judges), *cert. denied*, 143 S. Ct. 2551 (2023); *Shockley v. Crews*, No. 24-1024, 2024 WL 3262022, at *1 (8th Cir. Apr. 2, 2024) (Kelly, J., dissenting), *reh'g and reh'g en banc denied*, No. 24-1024, slip op. (June 7, 2024) (Kelly and Erickson, JJ., dissenting), *cert. denied sub nom. Shockley v. Vandergriff*, 145 S. Ct. 894 (2025) (Sotomayor, J., joined by Jackson, J., dissenting). This practice has drawn sharp scrutiny from several members of this Court as being "too demanding in assessing whether reasonable jurists could debate the merits of [a] habeas petition." *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of certiorari).

While this Court has vested discretion in the courts of appeal to determine their internal procedures for processing COA applications, Fed. R. App. P. 22(b)(2), the manner in which each circuit exercises this discretion cannot override the text of § 2253, which plainly conditions a habeas petitioner's right to appeal on the vote of "a circuit justice or judge." 28 U.S.C. § 2253(c)(1); *see also* Fed. R. App. P. 47(a)(1) (noting that "[a] local rule must be consistent with . . . Acts of Congress and rules adopted under 28 U.S.C. § 2072"). It is axiomatic that courts "cannot construe a statute in a way that negates its plain text," *Honeycutt v. United States*, 581 U.S. 443, 454 n.2 (2017), and Congress's use of an indefinite article and the word "judge" in its singular form here is instructive. *See Niz-Chavez v. Garland*, 593 U.S. 155, 162-63 (2021) ("Normally, indefinite articles (like 'a' or 'an') precede *countable* nouns. . . . Congress's decision to use the indefinite article 'a' thus supplies some evidence that it used the term . . . as a discrete, countable thing." (emphasis in original)). Had Congress intended to require the vote of multiple judges, a majority of a panel, or a majority of the court en banc to issue a COA, it would have said so in the statute as it has expressly done in other contexts. *See, e.g.*, 28 U.S.C. § 46(d) (establishing that only "[a] majority of the

number of judges authorized to constitute a court or panel thereof" may resolve a case or controversy); 28 U.S.C. § 46(c) (requiring that en banc review be "ordered by a majority of the circuit judges of the circuit who are in regular active service"); 52 U.S.C. § 10304(a) (providing that "[a]ny action under this section shall be heard and determined by a court of three judges"). Cases before this Court that involve questions of statutory interpretation "begin (and often end) with the presumption that Congress is careful in all its word choices," *Pulsifer v. United States*, 601 U.S. 124, 172 (2024) (Gorsuch, J., joined by Sotomayor and Jackson, JJ., dissenting), and this situation should be no different.

Allowing an appeal to proceed upon the vote of a single circuit judge is also consonant with the substantive standard governing habeas appeals, which squarely hinges on a threshold showing that "reasonable jurists could debate whether (or, for that matter, agree that) [a] petition should have been resolved in a different manner or that the issues presented [are] 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (quoting *Slack*, 529 U.S. at 484). In this vein, "[w]hen one or more jurists believes a claim has sufficient merit to proceed, that itself 'might be thought to indicate that reasonable minds could differ . . . on the resolution' of the relevant claim." *Shockley*, 145 S. Ct. at 896 (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari) (quoting *Johnson*, 145 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of certiorari). "To nevertheless maintain that [a prisoner] should be denied a COA because no reasonable jurist could debate the District Court's denial of his habeas petition defies common sense." *Johnson*, 145 S. Ct. at 2256 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of certiorari).

Notwithstanding the foregoing, an intractable divide persists amongst the courts of appeal over the interpretation and application of this statutory provision governing COAs. The Eleventh Circuit's decision denying Petitioner a COA on his ineffective-assistance-of-

counsel claim over a reasonable jurist's vote further perpetuates the conflict and leaves no doubt that the issue is ripe for this Court's resolution. Review is therefore warranted.

II. THE DECISION BELOW WAS WRONGLY DECIDED

The Eleventh Circuit panel's decision denying a COA below was wrongly decided because Petitioner presented sufficient facts to proceed further and a reasonable jurist in fact determined that Petitioner made a substantial showing of the denial of his Sixth Amendment right to the effective assistance of counsel at the penalty phase of his capital trial which should have warranted full briefing and review of his claim on the merits. (Pet. App. B, at 21a) The divided order in this case is patently wrong on the face of the COA statute, which unambiguously conditions the ability to appeal on the vote of "*a* circuit . . . judge," 28 U.S.C. § 2253(c)(1) (emphasis added), and contravenes the threshold standard governing habeas appeals as articulated by this Court. Petitioner faces "the gravest sanction our society may impose," *Hall*, 572 U.S. at 724, and certiorari is warranted to rectify the misapplication of federal law that has improperly deprived him of the appellate review to which he is entitled in this capital case.

A. Petitioner made a substantial showing of the denial of his Sixth Amendment right to the effective assistance of counsel

It is beyond dispute that a petitioner need only make a "substantial showing of the denial of a constitutional right" to obtain a COA. 28 U.S.C. § 2253(c)(2); *see also Buck*, 580 U.S. at 115; *Miller-El*, 537 U.S. at 327; *Slack*, 529 U.S. at 484. And, giving form to this statutory command, this Court has long held that "[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his [specified] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). Petitioner clearly satisfied his burden under this threshold standard

when a three-judge panel reviewed his application to appeal under Eleventh Circuit Rule 22-1(c), and Circuit Judge Adalberto Jordan voted to "grant a COA on [his] ineffective assistance of counsel claim." (Pet. App. B, at 21a)

The Eleventh Circuit panel's denial of a COA notwithstanding Judge Jordan's vote reflects a fundamentally improper interpretation of the COA statute that is antithetical to the substantive standard applicable at the COA stage. As several members of this Court have acutely recognized, "[w]hen one or more jurists believes a claim has sufficient merit to proceed, that itself 'might be thought to indicate that reasonable minds could differ . . . on the resolution' of the relevant claim." *Shockley*, 145 S. Ct. at 896 (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari) (alteration in original) (quoting *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of certiorari)). The fact that Petitioner's COA application here was "sufficiently weighty to engender [a] split opinion[]" demonstrates that reasonable jurists *did* differ when assessing the district court's denial of his ineffective-assistance-of-counsel claim. *Id.* Moreover, it directly undercuts Chief Circuit Judge Pryor's assertion that "[r]easonable jurists would not debate the resolution of [Petitioner's] claims under the double deference of *Strickland v. Washington*, 466 U.S. 668 (1984), and section 2254(d)." (Pet. App. A, at 9a)

Judge Jordan's determination that Petitioner made a "substantial showing" of the denial of his Sixth Amendment right to the effective assistance of counsel at his penalty phase is supported by controlling precedent from this Court recognizing the importance of counsel's duty to investigate a capital defendant's background and criticizing state courts, including the Florida Supreme Court, for failing to adequately weigh and consider mitigation presented in postconviction proceedings. *See Williams*, 529 U.S. at 392; *Wiggins*, 539 U.S. at 524-28; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter*, 558 U.S. at 39-44; *Sears v. Upton*, 561 U.S.

945, 946-56 (2010). It is also supported by the penalty phase and postconviction record in this case which establish that trial counsel did not conduct a reasonable investigation in accord with *Strickland* and its progeny and resultantly failed to uncover and present significant mitigation to Petitioner's jury.

As presented in his COA application, trial counsel's decisions in this case were not based upon a reasonable strategic decision but rather inattention, lack of preparation, and wholesale acquiescence to Petitioner's mother Ruby who decided that the "good kid" defense was the only acceptable penalty-phase theory. It was Ruby who conducted the investigation, contacted defense witnesses, provided witness lists and questions to be asked, and, in conjunction with James Wootton, developed the sanitized story presented to Petitioner's jury. Wootton was not a trained investigator but rather a convicted felon and paralegal "[i]n the loosest sense of the term," (C28. 2236), and engaged in a sexual relationship with Ruby prior to and during Petitioner's capital trial—a fact which he overtly lied about at the evidentiary hearing.

Any reasonable capital defense lawyer in this case would have recognized that he was not being fed accurate information from the client's mother who insisted that her son had *no* weaknesses or deficits. (C28. 2124) Yet here, counsel accepted the witnesses Petitioner's mother handed to him at face value when the records in his possession were rife with red flags that cried out for further independent investigation and "would have destroyed the benign conception" of Petitioner's upbringing and mental health. *Rompilla*, 545 U.S. at 391; *see also Wiggins*, 539 U.S. at 527 (assessing the reasonableness of trial counsel's investigation requires the court to consider "not only the quantum of evidence already known to counsel but also whether the known evidence would lead a reasonable attorney to investigate further").

At the postconviction hearing, Petitioner presented a wealth of compelling mitigation

that wholly negated any illusion he came from a stable home devoid of abuse and neglect and had no frailties. By way of example, Petitioner's records from the Northwest Texas Hospital show he suffered from birth shock (now called perinatal asphyxia) and respiratory distress syndrome when he was born and had to be resuscitated twice, which is a significant risk factor for brain damage. (C30. 2453; C33. 3000-3315) Petitioner's school records likewise reflect that he had serious academic difficulties, including repeating fifth grade. (C33. 3087-3154) When Petitioner underwent neuropsychological testing in 2006, results revealed that Petitioner has a rare verbal/nonverbal IQ split of greater than 20 points (137/105) which is indicative of brain hemispheric dysfunction. (C29. 2347-48) A map of Petitioner's brain created with the testing data showed frontal lobe damage worse on the left side than the right, as well as damage in the parietal areas on both sides. The image looked as if Petitioner was hit from the back and his brain had gone forward, crashing against the orbital bones of the face. (C30. 2567) Petitioner's medical and school records, in conjunction with neuropsychological testing conducted in postconviction, support the conclusion that Petitioner has frontal lobe and memory deficits and brain dysfunction that affect his ability to regulate behavior, judgment, decision-making, and emotions. (C29. 2359) These issues would have been more pronounced at the time of the crime when Petitioner was only 18 years old with an underdeveloped brain and experiencing a severe manic episode indicative of Bipolar disorder. (C30. 2384, 2475-76, 2480)

Testimony additionally showed Petitioner's mother was a person of extremes, who had an erratic presence in his life, ranging from periods of suffocating attention to utter absence. (C30. 2460-62) One family member described her as acting unfit at times given the lack of structure in the home. (C29. 2407) The four different father figures Petitioner's mother subjected him and his sister to also had varying degrees of violent tendencies. For instance, second husband Brian Burns was so explosive and unpredictable that he once "broke the

front windows of [their] rental house, tore up the house and . . . broke Ruby's nose." Both Petitioner and his sister were home at the time and severely traumatized. (C28. 2180-81) Later, when Petitioner was a teenager, fourth husband John Foster attacked Ruby when she was in the bathtub, and Petitioner had to physically pull him off her. (C28. 2209)

The evidence of Petitioner's chaotic upbringing and mental health issues highlighted above and otherwise included in his COA application would have changed the balance of mitigating and aggravating factors, and the fact that Foster presented 25 witnesses at his penalty phase does not preclude a finding of deficient performance or prejudice under *Strickland*. *See Sears*, 561 U.S. at 954 (emphasizing that both prongs of *Strickland* can be met where trial counsel presented "a superficially reasonable mitigation theory"); *see also, e.g.*, *Collier v. Turpin*, 177 F.3d 1184, 1200-04 (11th Cir. 1999) (finding counsel ineffective where they traveled out of state to interview witnesses, subpoenaed 14 of those interviewed and called 10 to testify but failed elicit all the mitigating information from them). Petitioner's "[c]ounsel presented no more of a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of [his] character and record,'" *Collier*, 177 F.3d at 1201-02 (quoting *Woodson*, 428 U.S. at 303), and deprived him of the individualized sentencing to which he is entitled. *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987); *see also Andrus v. Texas*, 590 U.S. 806, 815 (2020).

The 25 witnesses counsel presented at trial provided so little substance in support of defense counsel's efforts to humanize Petitioner, which fueled the State's cross examination. Their testimony lasted only minutes and consisted of isolated good deeds Petitioner performed, such as mowing the lawn, helping to start a car, or meeting people on a cruise and helping their disabled son. As support for how lacking the defense case was at trial, one need look no further than the trial court's Sentencing Order rejecting the mitigation as "sublime" and "ridiculous." (A12. 1483)

The additional mitigation evidence presented in postconviction changed the picture of Petitioner's case for life and cannot be "discount[ed] to irrelevance." *Porter*, 558 U.S. at 43. Indeed, the Eleventh Circuit has *granted relief in similar cases*, particularly where, as here, the Florida Supreme Court made unreasonable factual determinations in denying Petitioner's claim or unreasonably applied clearly establish federal law. *See, e.g.*, *Blanco v. Sec'y, Fla. Dep't of Corr.*, 943 F.2d 1477, 1500-03 (11th Cir. 1991); *Hardwick v. Crosby*, 320 F.3d 1127, 1162-89 (11th Cir. 2003); *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1270-78 (11th Cir. 2014); *Cooper v. Sec'y, Fla. Dep't of Corr.*, 646 F.3d 1328, 1349-56 (11th Cir. 2011); *Johnson v. Sec'y, Fla. Dep't of Corr.*, 643 F.3d 907, 936 (11th Cir. 2011). These cases provide additional support for Judge Jordan's determination that Petitioner made the requisite threshold showing at least entitling him to a COA. *See Buck*, 580 U.S. at 116 (emphasizing that "[t]he COA inquiry . . . is not coextensive with a merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claim" quoting *Miller-El*, 537 U.S. at 336).

"Appeals should proceed so long as they present a debatable issue," and Petitioner satisfied his burden below to have his ineffective-assistance-of-counsel claim heard on the merits. *Shockley*, 145 S. Ct. at 896 (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari). The Eleventh Circuit's order denying Petitioner a COA over Judge Jordan's dissent flouts the plain language of § 2253 and improperly deprived him of appellate review.

B. Petitioner's case provides a clean vehicle for this Court to address the circuit split

Petitioner's case squarely presents the issue of whether a COA can be denied notwithstanding a circuit judge's vote to grant one in a case. Under the facts presented herein, there is no question that Petitioner would have received a COA had he been

imprisoned in the Third, Fourth, Seventh, or Ninth Circuits given Judge Jordan's vote to grant a COA on his ineffective assistance of counsel claim.

The record on this issue is fully developed in Petitioner's case as Eleventh Circuit rules prohibit a petition for panel rehearing or a petition for rehearing en banc following the denial of a COA application. *See* 11th Cir. R. 22-1(c). The courts of appeal remain deeply divided on this issue, and this Court should intervene to resolve this straightforward question of statutory interpretation and establish procedural uniformity amongst the circuits.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND REQUIRES THIS COURT'S INTERVENTION

A COA is a "jurisdictional prerequisite" for any prisoner seeking to appeal the denial of his federal habeas petition. *Miller-El*, 537 U.S. at 336; 28 U.S.C. § 2253(c)(1). As such, resolution of the question of statutory interpretation presented by this case has significant ramifications for habeas litigants nationwide. Several members of this Court have indeed recognized its importance and already taken the exceptional step of dissenting from the denial of certiorari in cases directly implicating the issue. *See Shockley*, 145 S. Ct. 894 (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari); *Johnson*, 143 S. Ct. 2551 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting from denial of certiorari); *Jordan v. Fisher*, 576 U.S. 1071 (2015) (Sotomayor, J, joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). The entrenched nature of the split amongst the courts of appeal leaves no doubt that it will continually recur absent clear direction from this Court, and further percolation stands to harm not only habeas petitioners but also the integrity of the judicial system as a whole.[9] *See Rosales-Mireles v. United States*, 585 U.S. 129, 139-40 (2018) (emphasizing how "maintaining public perception of fairness and integrity in the

[9] The issue of whether a COA should be granted where circuit judges in fact disagree that the underlying claim warrants appellate review is also presented in *Ricks v. Guerrero*, No. 24-7038, which is pending before this Court.

judicial system [requires] that courts exhibit regard for fundamental rights and respect for prisoners 'as people'" quoting T. Tyler, Why People Obey the Law 164 (2006)).

Moreover, from a pragmatic perspective, "[p]roceeding to the merits with a full panel after a judge votes to grant a COA . . . promotes efficiency" and negates the need for additional rounds of litigation that routinely ensue after a divided COA denial from a federal circuit court. *Shockley*, 145 S. Ct. at 896 (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari). "[J]udicial resources are better spent simply considering the merits in the regular course" when a circuit judge determines that a habeas litigant satisfies the threshold standard for appellate review. *Id.*

At bottom, "[t]his Court has [long] emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . and steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnson*, 306 U.S. 19, 26 (1939)). AEDPA's intent to streamline habeas proceedings did not alter this precept, *Holland*, 560 U.S. at 648-49, and cannot subvert the COA requirement into an "insurmountable barrier to an appeal." *Johnson*, 143 S. Ct. at 2554 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of certiorari). This Court has previously granted certiorari to rectify a circuit's grave misapplication of the COA standard, *Buck*, 580 U.S. 100, and should once more do so here.

CONCLUSION

For the reasons set forth above, this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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