No. _____

In the Supreme Court of the United States

CHRISTOPHER LEE PRICE, Petitioner,

v.

KIM T. THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS

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

PETITION FOR A WRIT OF CERTIORARI

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—CAPITAL CASE—

QUESTIONS PRESENTED

Petitioner was sentenced to death after a perfunctory penalty phase for which his trial counsel completely failed to conduct an adequate investigation of mitigating evidence. Counsel failed to hire a mental health expert to explore the effects on Petitioner of years of abuse, although the trial court had, at counsels specific request, authorized funds for that purpose. And counsel failed to investigate mitigation testimony from family and friends, putting on only petitioner's unprepared mother, who, because of her own role in the abuse, minimized the extent of petitioner's suffering. Still, the State garnered only the minimum jury vote of 10-2 in favor of death. On post-conviction review, the state court held, without conducting an evidentiary hearing, that Petitioner had not established a constitutional claim of ineffective assistance of counsel. This petition presents the following questions on which the circuits are divided:

1. Whether, when the state court failed to consider the cumulative prejudicial effect of many, related inadequacies of trial counsel because it unreasonably concluded that one of counsel's failures did not constitute deficient performance, the federal habeas court should review the prejudice prong of the petitioner's claim *de novo*, and without being limited to the state habeas record.

2. Whether the court of appeals' *sua sponte* affirmance on the basis of a non-jurisdictional and curable pleading deficiency that was waived by the State is consistent with *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012).

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were Petitioner Christopher Lee Price and Richard F. Allen, the then-Commissioner of the Alabama Department of Corrections. Kim T. Thomas, the current Commissioner of the Alabama Department of Corrections, has replaced Allen as the named Respondent for purposes of this petition for a writ of certiorari.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Lee Price respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 679 F.3d 1315.

JURISDICTION

The court of appeals issued its initial opinion on March 30, 2012, and petitioner filed a timely petition for rehearing. The court of appeals issued an amended opinion on May 10, 2012. Petitioner timely filed a petition for rehearing, which the court of appeals denied on July 3, 2012. (App. 281a.) On September 20, 2012, Justice Thomas extended the time to file a petition for certiorari up to and including October 31, 2012. On October 22, 2012, Justice Thomas further extended the time to file up to and including November 21, 2012. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, set out in full in the appendix to the petition (App. 547a), provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATUTORY PROVISIONS INVOLVED

Section 2254(d)(1) of Title 28 of the United States Code, set out in full in the appendix to the petition (App. 547a), provides in pertinent part: "An application for a writ of habeas corpus * * * shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Section 2254(e)(2) of Title 28 of the United States Code, set out in full in the appendix to the petition (App. 547a-548a), provides in pertinent part: "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that (A) the claim relies on (i) a new rule of constitutional law made retroactive to cases on collateral review * * * ; or (ii) a factual predicate that could not have been previously discovered through the exercise of diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional errors, no reasonable factfinder would have found the applicant guilty of the underlying offense."

FEDERAL RULES INVOLVED

Rule 2(c)(2) of the Rules Governing Section 2254 Cases, set out in full in the appendix to the petition (App. 548a), provides in pertinent part: "The petition must * * * state the facts supporting each ground [for relief]."

STATEMENT OF THE CASE

Capital defense counsel has an "overarching duty to advocate the defense cause" and "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984). Petitioner's trial counsel utterly failed to discharge that duty. With Petitioner's life in her hands, trial counsel failed to perform a minimally competent investigation into Petitioner's background and life history, notwithstanding that she was generally aware that Petitioner—a 19-year-old high school senior who had never before engaged in violence—came from a troubled family. (RE-B.14-17.[1]) Whereas a competent investigation would have led to the discovery and presentation of profound mitigation evidence, trial counsel's deficient performance resulted in a mitigation case that can only be described as threadbare: trial counsel called only one witness, Petitioner's mother, whose conflicted testimony lasted less than twenty minutes. (R.XVII.895-905.) And yet, despite trial counsel's woefully deficient performance, the jury recommended death by a vote of 10-to-2 (R.XVII.942), the minimum vote allowed under Alabama law, underscoring the weakness of the State's aggravation case.

Petitioner subsequently sought relief from his death sentence in Alabama state court. Though he

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[1] Citations to RE.___.___ refer to the tab and page number two-volume Record Excerpts that Petitioner filed in the court of appeals. Citations to R.___.___.___ refer to the volume, tab (where applicable), and page number multi-volume state court record, which includes the transcript of Petitioner's trial.

raised a colorable claim of ineffective assistance of counsel (R.XI.39.1-12), the state court refused to provide him an evidentiary hearing at which he could prove the facts in support of his claim (App. 350a-364a). Instead, the state court concluded, solely on the basis of Petitioner's post-conviction pleading, that Petitioner could not satisfy this Court's two-prong test for ineffective assistance of counsel (*Id.*). The state court, however, never actually applied the prejudice analysis that *Strickland* dictates; instead, it considered the prejudicial effect of only one portion of trial counsel's unprofessional errors, leaving out of the prejudice assessment entirely a critical and clearly deficient failing.

With his state court efforts short-circuited, Petitioner asked the federal courts to provide him with the evidentiary hearing that the state courts had unreasonably denied him. (RE.B.6-19.) The federal district court denied his request (App. 20a), and the court of appeals affirmed (App. 1a). Petitioner now brings this petition for certiorari, which raises two discrete, yet related, questions on which the lower courts are divided.

A. Petitioner's Capital Murder Conviction

On December 22, 1991, Petitioner, a nineteen year-old high school senior with no significant criminal history, agreed to help Kelvin Coleman, an older individual with a felony record, rob the home of Bill Lynn. Mr. Lynn was fatally stabbed during an altercation on his lawn with one of the intruders. (RE.D.5) Petitioner and Coleman were charged with capital murder. (R.I.A.2.) Petitioner was provided court-appointed counsel.

Petitioner and Coleman were granted separate trials; Petitioner's trial was the first to proceed.[2] At 2:20 p.m. on Friday, February 6, 1993, after four days of evidence, the jury found Petitioner guilty. (R.XVII.892.) The trial judge ordered the penalty phase to begin immediately. (R.XVII.893.) Petitioner's trial counsel did not ask the judge for a weekend continuance, notwithstanding that, as described below, she was wholly unprepared to put on a mitigation case.

B. Petitioner is Sentenced to Death After a Half-Hour Penalty Phase

Petitioner's trial counsel had completely failed to prepare for the penalty phase. Without any strategic basis (reasonable or otherwise), trial counsel neglected to, *inter alia*, (1) investigate Petitioner's background for potential mitigation evidence; (2) speak prior to trial with Petitioner's family members, friends, and schoolteachers; of (3) retain a mental health expert, despite her previous acknowledgement that a mental health report was essential to presenting a mitigation case. (R.X1.39.1-12.) Four months before trial, after receiving a report from a State-retained psychologist confirming that Petitioner was competent to stand trial and not legally insane, trial counsel had moved for state funds to retain an independent mental health expert. (RE.B.7, 11, 18-19.) Trial counsel stated in her motion that an independent mental health expert was "necessary for [Petitioner] to have effective assistance of counsel" and "to present mitigating circumstances" at a potential penalty phase. (R.I.A.67.) The court granted the motion (*id.*), yet, inexplicably, trial counsel

[2] Coleman did not testify at Petitioner's trial; he later pled guilty in exchange for a sentence of life without parole.

failed to put the funds to use (RE.B.18).

Trial counsel's total lack of preparation left her completely flat footed. The trial record makes clear that trial counsel was minimally aware of Petitioner's unfortunate upbringing and that her chosen mitigation strategy was to focus on this fact. (R.XVII.895-905.) But, because she had failed to undertake any investigation into Petitioner's background, she was incapable of competently executing that strategy. The only mitigation witness that trial counsel called was Petitioner's mother, Judy Files.[3] (*Id.*) Trial counsel had not previously interviewed Mrs. Files, nor had she prepared Mrs. Files to testify. (R.XI.39.3.) Even more critically, trial counsel was unaware that Mrs. Files had physically and mentally abused Petitioner throughout his life and had allowed several men with whom she had romantic relationships to routinely physically, sexually, and emotionally abuse Petitioner as well. (*Id.*; RE-B.14-17.)

Not surprisingly, given her utter lack of preparation, trial counsel stumbled through an unfocused ten minute direct examination that consisted primarily of Mrs. Files, in response to highly leading questions, giving terse and vague descriptions of isolated instances in which either Petitioner's biological father or Mrs. Files boyfriends had physically and verbally abused Petitioner. (R.XVII.895-905.) This

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[3] At the outset of the penalty phase, the State advised the trial court that it would not be presenting any witnesses or additional evidence at the penalty phase. (R.XVII.893-94.) Because Petitioner's conviction rendered him *per se* death eligible, under Alabama law, the State was not required to prove any additional aggravators at the penalty phase.

testimony focused exclusively on abuse that occurred when Petitioner was a small child and failed to reflect the reality that Petitioner had been exposed to far greater abuse for a far longer period of time.[4] (R.XI.39.3) The effect of Mrs. Files' incomplete testimony was further diminished when Mrs. Files claimed that these isolated instances of abuse *had no long term effect on Petitioner*, that Petitioner's biological father was in fact a "good daddy" and "good as gold," and that any abuse Petitioner suffered "just blacked his eyes sometimes and just bruised him, that's all." (R.XVII.897-898, 907.)

Because of counsel's deficient failure to prepare for the penalty phase, she did not know how incredibly incomplete, misleading, and ultimately detrimental Mrs. Files's testimony would be. Had counsel competently prepared for the penalty phase, she would have learned that Petitioner's childhood and adolescence was far more horrific than Mrs. Files' testimony described. (R.XI.39.3) Moreover, counsel would have learned that, contrary to Mrs. Files' self-serving testimony, Petitioner's history of abuse had caused profound psychological trauma that had a connection to his crime of conviction. (R.XI.39.4.) Counsel would also have learned that Petitioner had many redeeming qualities that Mrs. Files had not offered from the stand, such as his extraordinary artistic ability, his success in school, his loving relationship with his girlfriend, and his good reputation

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[4] On federal habeas review, the Eleventh Circuit described Mrs. File's testimony as "consist[ing] of her non-descript and minimally detailed responses to the often leading questions posed by [Petitioner's] trial counsel."

amongst peers and schoolteachers. (R.XI.39.3-4.)

After Mrs. Files finished testifying, the State gave a brief closing argument during which the prosecutor focused the victims multiple lacerations (R.XVII.909-10) and then claimed, without drawing any objection from the defense, that a death sentence was "the only way" to "assure" that Petitioner did not have "any opportunity" to kill again in Fayette County (R.XVII.911)—a baseless argument, but one to which Petitioner's trial counsel had effectively opened the door by failing to provide the jury with a complete and accurate portrait of Petitioner's character and life history. Trial counsel then delegated the defense's penalty phase closing argument to her second chair, a recent law school graduate who had not previously addressed the jury and proceeded to give a rambling and timid five-minute closing statement. (R.XVII.913-915.)

A mere thirty minutes after the penalty phase began, the parties rested. (R.XVII.915.) At 6:20 p.m. on Friday, February 6, 1993, after just over two hours of deliberation, the jury returned with a recommendation that Petitioner be sentenced to death, a recommendation that the trial judge agreed to follow. (R.XVII.942.) The jury's vote was 10-to-2, the bare minimum vote allowed under Alabama law. (*Id.*) Had just one more juror voted in favor of a sentence of life without parole, the jury could not have returned a recommendation of death.

C. State Habeas Proceedings

1. Proceedings in the Fayette County Circuit Court

On May 23, 2000, Petitioner timely filed in the

Fayette County circuit court a post-conviction petition ("Rule 32 petition") that claimed, among other grounds for relief, he had been prejudicially deprived of his Sixth Amendment right to effective assistance of counsel at the penalty phase. (R.XI.39.1-35.)

In support of his claim, Petitioner's Rule 32 petition alleged that, had his trial counsel performed a minimally competent investigation into his background and retained the mental health expert she recognized was essential to preparing a mitigation case, she would have discovered, *inter alia*, (1) "a detailed history of dislocation, abuse and neglect that far exceeded the terse, incomplete description provided by Mrs. Files at [the penalty phase]" (R.XI.39.3); (2) "that the abuse and neglect that [Petitioner] had suffered from an early age at the hands of his father and mother had a direct and specific * * * link" to his out-of-character decision to participate in the robbery that resulted in Mr. Lynn's death (R.XI.3-4); and (3) that Petitioner was a good student who was well-liked by his peers and schoolteachers and had never before engaged in any sort of violent activity (R.XI.39.4). Petitioner further alleged that this mitigation evidence could have been presented through Petitioner's grandparents, aunts, uncles, cousins, friends, schoolteachers, and a mental health expert. (R.XI.39.3.) Petitioner asked the Fayette County circuit court to hold an evidentiary hearing at which he could prove these allegations. (R.XI.39.35.)

On April 1, 2002, the Fayette County circuit court dismissed Petitioner's Rule 32 petition without providing Petitioner an evidentiary hearing or taking evidence through some other means. The circuit court adopted in full the 61-page proposed memorandum

order that the State had submitted along with its motion to dismiss. (App. 343a-406a.)

2. Petitioner's Appeal to the Alabama Court of Criminal Appeals

Petitioner timely appealed the circuit court's order to the Alabama Court of Criminal Appeals ("ACCA"). On May 30, 2003, the ACCA issued a written opinion affirming the circuit court's dismissal order. (App. 282a-342a.) The ACCA began by addressing trial counsel's failure to contact Petitioner's extended family members, friends, and schoolteachers. The ACCA held that, even if trial counsel's performance had been deficient in this regard, it "'[could not] see how the evidence that [Petitioner] argues should have been elicited at the penalty phase would have had any impact on his sentence.'" (App. 314a-315a; see also *id.* 321a.) The ACCA then turned to trial counsel's failure to retain a mental health expert. The ACCA held that, because it would have been reasonable for trial counsel to have decided to "allow the jury to draw its own conclusions regarding the circumstances of Petitioner's childhood without opening the door" to evidence that a State-retained psychologist had deemed Petitioner legally sane and competent to stand trial, trial counsel's failure in this regard was not deficient performance.[5] (App. 335a-

[5] The ACCA did not purport to be fact finding. Instead, the ACCA appeared to have adopted a legal presumption that counsel's failure to investigate was not deficient performance so long as the court could hypothesize some tactical reason why trial counsel might not have chosen to present the testimony of the mental health expert that she never even sought to retain. (App. 337a-38a.) That approach is contrary to this Court's precedents., See *Wiggins* v. *Smith*, 539 U.S. 510, 533 (2003) ("'[S]trategic

336a, 338a.) The ACCA did not address whether trial counsel's failure to retain a mental health expert had prejudiced Petitioner, either in isolation or when considered in combination with counsel's failure to contact Petitioner's extended family members, friends, and schoolteachers.[6] (App. 338a.)

D. Federal District Court Habeas Proceedings

Petitioner timely filed in the United States District Court for the Northern District of Alabama a federal habeas corpus petition ("habeas petition"). Petitioner's habeas petition claimed that the ACCA's decision affirming the Fayette County circuit court's dismissal of his ineffective assistance of counsel claim solely on the basis of the pleadings and without an evidentiary hearing was "contrary to" and an "unreasonable application of" *Strickland* and *Terry Williams* v. *Taylor*, 529 U.S. 362 (2000). Petitioner asked the district court to hold a federal evidentiary hearing.

In both its answer and its motion to dismiss Petitioner's habeas petition, the State argued that ACCA's decision was not in any respect "contrary to" or an "unreasonable application of" *Strickland* and *Terry Williams*, and thus that Petitioner could not satisfy Section 2254(d)(1). The State also argued that

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choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" (quoting *Strickland*)).

[6] The Alabama Supreme Court subsequently declined Petitioner's request for discretionary review (App. 545a), leaving the ACCA's decision as the last state court opinion to adjudicate Petitioner's ineffective assistance of counsel claim.

the allegations in Petitioner's federal habeas petition were insufficiently specific with respect to *certain* grounds for relief (grounds not at issue in this petition), though the State made no such objection with Petitioner's claim that his trial counsel's failure to perform a mitigation investigation constituted prejudicial ineffective assistance of counsel.[7] (Compare RE.C.22, 24, 26, 29 with RE.C.16-17.)

The district court ultimately agreed with the State's Section 2254(d)(1) argument. The district court issued an order dismissing Petitioner's habeas petition and denying Petitioner's request for a federal evidentiary hearing. (App. 84a.)

E. Petitioner's Appeal to the Eleventh Circuit

Petitioner timely appealed to United States Court of Appeals for the Eleventh Circuit, which issued a certificate of appealability on, *inter alia*, the question of whether the district court erred in denying Petitioner's request for a federal evidentiary hearing. In its respondent's brief and at oral argument, the State continued to press the argument it had pressed below—namely, that the ACCA's decision was neither "contrary to" nor an "unreasonable application of" *Strickland* and *Terry Williams*. As in the district court, the State did not argue on appeal that Petitioner had failed to satisfy the pleading requirements of Rule

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[7] The State did, however, argue in the district court and on appeal that Petitioner had procedurally defaulted his ineffectiveness assistance claim. The district court accepted this argument (App. 83a-84a), but while Petitioner's appeal was pending, the Eleventh Circuit issued a precedential decision that effectively foreclosed the State's argument. See *Borden* v. *Allen*, 646 F.3d 785, 812 (11th Cir. 2011).

2(c)(2) with respect to his penalty phase ineffectiveness claim, either as it related to trial counsel's failure to retain a mental health expert or otherwise.

On May 10, 2012, the court of appeals affirmed the district court's dismissal of Petitioner's ineffective assistance claim without an evidentiary hearing, although it did not adopt the district court's reasoning.

In analyzing Petitioner's ineffective assistance claim, the court of appeals generally placed trial counsel's deficient failures into two "buckets." In the first bucket, the court of appeals placed trial counsel's failure to contact Petitioner's extended family members, friends, and schoolteachers. In the second bucket, the court of appeals placed trial counsel's failure to retain a mental health expert who could have examined Petitioner, assisted trial counsel with her preparation for the penalty phase, and provided expert mitigation testimony at the penalty phase. (App. 14a-16a.) The court of appeals likely chose this mode of analysis because the ACCA had done so as well. As the court of appeals noted, the ACCA had resolved the first bucket exclusively on *Strickland*'s prejudice prong and the second bucket exclusively on *Strickland*'s deficient performance prong. (App. 14a-15a & n.8.)

1. The Court of Appeals' Holding Regarding Trial Counsel's Failure to Retain a Mental Health Expert

The court of appeals first addressed trial counsel's failure to retain a mental health expert, an issue that the ACCA had resolved solely on the deficient performance prong of the *Strickland* test. The court declined to rely on the ACCA's holding that trial

counsel's failure to retain a mental health expert was not deficient (App. 14a), implicitly acknowledging that that the ACCA's adjudication of the performance prong constituted an "unreasonable application of" and was "contrary to" *Strickland* and *Terry Williams* and, thus, that Petitioner had satisfied the threshold requirements of 28 U.S.C. § 2254(d)(1). The court moved directly to the prejudice prong, recognizing that, because the ACCA "did not consider whether Petitioner was prejudiced by his trial counsel's failure to retain a mental health expert," the federal court's prejudice prong analysis must be *de novo* and "without AEDPA's added deference."[8] (App. 15a & n.8.)

Although the court's prejudice prong analysis was not constrained by Section 2254(d)(1)'s deferential standard of review, the court of appeals nevertheless dismissed Petitioner's claim on the ground that it failed to allege with adequate specificity what testimony a mental health expert would have offered in mitigation. According to the court of appeals, the habeas petition "offered no more than a conclusory assertion that a mental-health expert could have testified to a connection between the abuse [Petitioner] suffered * * * and his subsequent actions" (App. 16a), which is

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[8] See *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005) (holding that "[b]ecause the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*" (internal citations omitted)).

inadequate to satisfy the heightened federal habeas pleading requirements. See Rule 2(c)(2) of the Rules Governing Section 2254 Cases. The court of appeals' holding in this regard was entirely *sua sponte*: the State had not raised the federal pleading deficiency issue in either the district court or on appeal. The court of appeals suggested that, absent the purported pleading deficiency, Petitioner might well have prevailed on appeal. The court specifically stated that "this would be a different case" had Petitioner's federal habeas petition alleged with greater particularly "what specifically a mental health expert would have said about [Petitioner's] mental status." (App. 16a n.9.)

2. The Court of Appeals' Holding Regarding Trial Counsel's Failure to Contact Petitioner's Extended Family Members, Friends, and Schoolteachers

The court of appeals next addressed trial counsel's failure to contact Petitioner's extended family members, friends, and schoolteachers. Contrary to what Petitioner had argued, the court determined that the prejudice prong of this subportion of Petitioner's ineffective assistance of counsel claim was subject to AEDPA's deferential standard of review because the ACCA had adjudicated the merits of that issue. (App. 14a.) The court concluded that it was not "unreasonable" for the ACCA to conclude, without an evidentiary hearing, that Petitioner was not prejudiced by his trial counsel's failure to contact his extended family members, friends, and schoolteachers. The court held that, "[a]lthough [Petitioner] allege[d in his Rule 32 petition] that his family members would have testified to more specific instances of abuse than did his mother," the Rule 32 petition "does not give any

indication of their nature or number such that we could say a jury that learned about these instances would have recommended a life sentence * * * ." (App. 16a.) The court recognized that Petitioner "was not required [under Alabama law] to allege facts in his [Rule 32] petition that would have been equivalent to the type of proof that one would expect [to adduce] in an evidentiary hearing," but it determined that this Court's recent decision in *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011), bound it to "review the merits of [this portion of Petitioner's] claim given the allegations in his Rule 32 Petition, because the state court ruled on his claim without the benefit of an evidentiary hearing."[9] (App. 16a-17a n.9.)

3. The Court of Appeals' Cumulative Prejudice Assessment

To the extent the court of appeals considered the cumulative prejudicial effect of the two interrelated aspects of trial counsel's deficient performance, it appears to have done so only under a deferential AEDPA review (App. 16a-17a n.9), notwithstanding that the ACCA had never considered whether Petitioner was prejudiced by trial counsel's failure to retain a mental health expert and, thus, had never performed the cumulative prejudice analysis that *Strickland* and its progeny require. The court of appeals held that it "[could not] say that the state appellate court's application of *Strickland*'s prejudice

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[9] *Pinholster* was decided over three months after Petitioner's appeal was submitted. The court of appeals did not ask for post-argument briefing on the impact of *Pinholster* on Petitioner's case, nor did the State submit any letter briefing on the issue pursuant to Federal Rule of Appellate Procedure 28(j).

standard was unreasonable." (App. 14a.)

F. The Court of Appeals' Summary Denial of Petitioner's Motion for Panel Rehearing and Petition for Rehearing *En Banc*

Petitioner timely filed a rehearing petition. The petition specifically pointed out that the court of appeals violated the mandate of the Court's then six-week old decision in *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012), by ruling *sua sponte* that Petitioner's federal habeas petition was not sufficiently specific in describing the mitigation evidence that a mental expert would have provided. The court of appeals summarily denied without explanation Petitioner's rehearing request. (App. 281a.)

REASONS FOR GRANTING THE PETITION

The court of appeals' decision affirms the dismissal of Petitioner's habeas petition despite the fact that no court has *ever* conducted a *de novo* review of the prejudice Petitioner suffered as a consequence of his trial counsel's utterly unprepared performance during the 30-minute death penalty phase. The court of appeals implicitly acknowledged (by refusing to rely on it) that the state court made an unreasonable application of settled federal law when it concluded that trial counsel's failure to hire a mental health expert, despite being provided funds for that purpose, was not constitutionally deficient. The court of appeals nonetheless affirmed the dismissal of Petitioner's habeas petition. The court of appeals reached that result only by deferring to the state court's prejudice analysis in two distinct ways, even though the state court had never asked (much less resolved) the relevant constitutional question of the combined

prejudicial effect of all of trial counsel's related errors. First, the court of appeals applied a deferential standard of review, asking whether "the state appellate court's application of *Strickland*'s prejudice standard was unreasonable." (App. 14a.) Second, based on the understanding that Petitioner's case was governed by *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), the court limited its review to the allegations contained in Petitioner's state court habeas petition. (App. 14a-16a & n.9) As a consequence, no court (state or federal) has *ever* conducted a full and independent review of the prejudice Petitioner suffered from the combined effect of his counsel's multiple errors at sentencing, which is the relevant constitutional inquiry. In light of the fact that the jury was only one vote shy of rejecting the death penalty for Petitioner, there is every reason to believe that a court considering the full scope of counsel's errors without deference to the initial state proceeding would conclude that Petitioner had raised "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The petition presents a critical threshold question on which the courts of appeal are divided concerning the proper scope of federal review under AEDPA when the state court addressed the prejudicial effect of only some of multiple, interrelated deficiencies on the part of trial counsel. *Strickland* and its progeny make clear that, where trial counsel committed multiple, interrelated instances of deficient performance impacting the same phase of the proceeding (in this case, the penalty phase), a court reviewing the petitioner's ineffective assistance of

counsel claim must assess the cumulative impact of all those instances of deficient performance. But the Court has left unresolved what method of review the federal court should apply when a state court unreasonably failed to recognize one aspect of counsel's deficient performance and therefore never made a ruling on the merits regarding the combined prejudicial effect of all the related errors.

There is a division among courts of appeals on that question. The Tenth Circuit recognizes that, in such circumstances, there is no relevant state decision on the merits to which to defer, and a federal habeas court should consider the cumulative prejudicial effect of all errors applying *de novo* review. Similarly, the Fourth Circuit has said that, when the state court did not conduct a review of all the appropriate evidence, its ruling does not qualify as an adjudication on the merits, and the federal reviewing court is not limited to the state court record. By contrast, in assessing *Strickland* prejudice, the Eleventh Circuit here applied a mixture of deferential AEDPA review, limited to the state court record, to those aspects of counsel's deficient performance the state court had recognized and *de novo* review to the aspect of prejudice the state court had not addressed. The Eleventh Circuit's approach wrongly affords deference, even though there has been no adjudication on the merits on the cumulative prejudice question. This latter issue—what constitutes an "adjudication on the merits"—was expressly left undecided by this Court in *Pinholster*, 131 S. Ct. at 1401 n.10. Because of the often outcome determinative effect of the standard of review (and record under review), the Court should grant the petition to resolve that conflict among the circuits.

I. WHERE THE STATE COURT FAILED TO ASSESS THE CUMULATIVE IMPACT OF TRIAL COUNSEL'S NUMEROUS, RELATED ERRORS, THE FEDERAL HABEAS COURT SHOULD UNDERTAKE *DE NOVO* REVIEW OF CUMULATIVE PREJUDICE, NOT LIMITED TO THE STATE HABEAS RECORD

In *Pinholster*, the Court held that, when reviewing a habeas claim that the state court adjudicated on the merits, the federal court's review under Section 2254(d)(1) is constrained both by the deferential standard of review the federal court must apply and by being "limited to the record in existence at that same time * * * before the state court." 131 S. Ct. at 1398-99. Despite the central role the "adjudication on the merits" concept plays in AEDPA's application, the Court did not give a definitive definition in *Pinholster* of when a claim has been "adjudicated on the merits." *Id.* at 1401 n.10.

The courts of appeals are divided on the question whether a state court ruling constitutes an "adjudication on the merits" and what standard of federal review applies when the state court's judgment is based on a less than full consideration of all the evidence and factors bearing on the petitioner's claim. The Tenth Circuit, for example, takes the view that deference (and limitation to the state habeas record) is required only when the state court has decided "the 'substance' of the claim, which means to 'apply controlling legal principles to the facts bearing upon [the] constitutional claim.'" *Wilson* v. *Workman*, 577 F.3d 1284, 1293 (2009) (en banc) (McConnell, J.) (quoting *Picard* v. *Connor*, 404 U.S. 270, 277 (1971)). Where "[n]o court will have yet evaluated the evidence" of counsel's ineffectiveness (because the

state court refused to accept it), "there is no prior evaluation of the claim that would deserve the kind of deference AEDPA provides." *Ibid.* In Petitioner's case, by contrast, the court of appeals applied two versions of deference (both standard of review and limiting its inquiry to the state habeas record) to one component of the state court's prejudice inquiry (App. 14a-16a & n.9), even though the state court had never undertaken the constitutionally required prejudice inquiry looking at all of trial counsel's errors collectively (App. 314a-315a, 335a-336a, 338a).

Because the standard of review that a federal habeas court utilizes in analyzing the prejudice question—*de novo*, deferential AEDPA review, or, as in Petitioner's case, a mixture of the two—is very often outcome determinative to a petitioner's ineffective assistance of counsel claim. The Court should grant a writ of certiorari here in order to resolve that disputed question.

A. Although the Circuits are Split, Under the Better View, When the State Court Fails to Review All of the Evidence Relevant to the Claim, Section 2254(d) Does Not Apply

1. As noted, the Tenth Circuit has held that if the state court "dispose[s] of a claim without considering the fact supporting it [that] is not a decision on the merits." *Wilson*, 577 F.3d at 1293. In *Wilson*, the Tenth Circuit held that the state court's resolution of an ineffective assistance of counsel claim was not an "adjudication on the merits," because the court did not consider all of the evidence of ineffectiveness available to the court. *Ibid.* ("an

ineffectiveness claim has not been adjudicated on the merits when the state court failed to consider the evidence on which the defendant based his claim"). Similarly, in *Cargle* v. *Mullin*, 317 F.3d 1196 (2003), the Tenth Circuit held that where the state court failed to assess the cumulative effect of interrelated instances of deficient performance, then, by definition, there is "no state [prejudice prong] decision" to which the federal court can defer, leaving the federal court to review the prejudice issue entirely *de novo*. *Id.* at 1212. As the Tenth Circuit observed, "our decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from all of counsel's deficient performance—as *Strickland* directs it to be." *Ibid.* The court went on to explain that, because of the state court's inadequate procedural rejection of "nearly all of petitioner's allegations of ineffectiveness, an adequate assessment of prejudice arising from the ineffectiveness of petitioner's counsel has never been made in the state courts, so we have no state decision to defer to under § 2254(d) on this issue." *Ibid.*

2. The Fourth Circuit has likewise adopted the view that when a state court does not consider all of the available evidence of prejudice there is no adjudication on the merits to which to defer. In *Winston* v. *Pearson*, 683 F.3d 489 (4th Cir. 2012), the state court refused to provide an evidentiary hearing to a petitioner who alleged a colorable claim of ineffective assistance of counsel. *Id.* at 500-01. The Fourth Circuit held that, when the "state court's unreasonable denial of discovery and an evidentiary hearing" prevented the state court from considering potentially dispositive evidence, through no fault of the petitioner, the decision did not qualify as an

"adjudicat[ion] on the merits" for purposes of Section 2254(d), rendering Section 2254(d) and its requirements of deference categorically inapplicable. *Id.* at 500-01. The federal habeas court was therefore able to review the claim *de novo*, including an evidentiary hearing.

3. In its recent opinion in *Miles* v. *Martel*, 696 F.3d 889 (2012), the Ninth Circuit adopted an approach that allows federal evidentiary hearings, like the Fourth Circuit, but applies a different analytical framework. Under the Ninth Circuit's approach, if a petitioner's state post-conviction petition clearly "demonstrated a 'colorable claim of ineffective assistance' and the state court record does not refute [the petitioner's] factual allegations," then the state court will have acted unreasonably in denying the petitioner's claim on the merits without an evidentiary hearing. Thus, Section 2254(d) applies, but the state court's ruling does not satisfy it. In *Miles*, the petitioner presented the state court with "a 'colorable claim of ineffective assistance,'" but the state court resolved the claim against the petitioner without taking evidence, either at a hearing or by way of affidavits. *Id.* at ___; *id.* at ___ ("The state court unreasonably ruled that even if Miles's allegations were true, he failed to make a *prima facie* showing of ineffective assistance."). On habeas review, the Ninth Circuit held that Section 2254(d)(1) applied but that it was "permitted to remand [to the district court] for an evidentiary hearing for purposes of reviewing [the petitioner's] claim under § 2254(d)." *Ibid.*

4. The Eleventh Circuit's approach is a stark contrast to that of the Tenth and Fourth Circuits. In *Borden* v. *Allen*, 646 F.3d 785 (2011), the Eleventh Circuit held that, where the state court resolved the

legal merits of the petitioner's ineffective assistance claim solely on the basis of the pleadings, Section 2254(d)(1) applies and the federal court must determine whether the state court was unreasonable in deciding that the "facts pled" in the petitioner's state post-conviction petition failed to "establish * * * a reasonable probability" that the outcome of the proceeding would have been different but for trial counsel's deficient performance. *Id.* at 820. The Eleventh Circuit further held that, in making the determination, the federal court must make an apples-to-apples comparison between, on the one hand, allegations that the petitioner made in his state post-conviction petition and, on the other hand, "the types of facts that the Supreme Court has found sufficient to establish prejudice under *Strickland* in analogous situations." *Id.* In other words, contrary to the Fourth Circuit rule, it is not enough for the petitioner to show that he had presented to the state court a colorable, *prima facie* claim of ineffective assistance of counsel that the petitioner might have been able to prove with the benefit of an evidentiary hearing. Rather, the federal court must be convinced that the facts the petitioner alleged in his state court pleading "would warrant a finding of [deficient performance and] prejudice." *Id.* at 821.

And in Petitioner's own case, the Eleventh Circuit applied a mix of *de novo* and deferential review to different parts of Petitioner's ineffective assistance claim. The court began by subdividing Petitioner's ineffective assistance claim into two parts, as the ACCA had: (1) trial counsel's failure to retain a mental health expert, and (2) trial counsel's failure to contact Petitioner's extended family members, friends, and

schoolteachers. The ACCA had resolved the first failure solely on the deficient performance prong of the *Strickland* test and the second failure solely on the prejudice prong. The court of appeals did not disagree with Petitioner that the ACCA's performance-prong resolution of trial counsel's first failure was an unreasonable application of *Strickland* and its progeny. (App. 14a.) Moreover, the court of appeals agreed with Petitioner that, because the ACCA had not addressed the prejudice prong with respect to trial counsel's failure concerning a mental health expert, federal habeas review of the prejudice prong was *de novo*. (App. 15a & n.8.)

Yet, the Eleventh Circuit held, contrary to Petitioner's argument, that AEDPA's deferential standard of review still applied to the ACCA's prejudice analysis of trial counsel's failure to investigate mitigation witnesses among family and acquaintances (see App. 14a-16a & n.9). The court of appeals applied both features of deferential review to this aspect of counsel's deficiency: the "unreasonableness" standard of review and limiting itself to consideration of the pleadings of Petitioner's state court petition, the facts in support of which the state court refused to allow him to develop at a hearing. (*Ibid.*) As a consequence of the court of appeals' willingness to analyze each claim on the same evidentiary basis the state court did, neither the Eleventh Circuit nor the state court has considered *de novo* the cumulative impact of all of trial counsel's penalty phase deficiencies together.

B. A Court of Appeals' Choice of Approach Can Be Outcome Determinative, as It Was in Petitioner's Case

Under the approach adopted by the Tenth Circuit, the outcome in Petitioner's habeas case would have been different. The proper way to analyze the prejudice prong of an ineffectiveness of counsel claim is to consider the cumulative effect of counsel's errors, if they are interrelated. Here, no court has done so. Under the Tenth Circuit's analysis, Petitioner's case would not have been subjected to deferential review under Section 2254(d), and he would almost certainly have been granted relief.

In *Strickland*, the Court held that, in determining whether trial counsel's deficient performance prejudiced the petitioner, a court must assess whether, "but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added); see also *ibid.* (holding that a court must make "the determination whether the specified *errors* resulted in the required prejudice"). The Court's use of the term "errors" was a clear direction that, in a case involving multiple aspects of deficient performance, the prejudice inquiry must be a cumulative one. In *Terry Williams*, the Court made clear once again that, where trial counsel is deficient in multiple respects, a reviewing court must assess the cumulative effect of those multiple deficiencies. See 529 U.S. at 397.

Thus, in a case such as Petitioner's, where each of trial counsel's interrelated deficiencies resulted in mitigation evidence not being presented at the penalty

phase, the court must "evaluate the *totality* of the available mitigation evidence," rather than each unpresented item of evidence piecemeal. *Terry Williams*, 529 U.S. at 397 *(*emphasis added); see also, *e.g.*, *Porter* v. *McCollum*, 558 U.S. 30 (2009) (assessing the cumulative impact that multiple items of unpresented mitigation evidence might have had with respect to the jury's penalty phase decision); *Earls* v. *McCaughtry*, 379 F.3d 489, 495 (7th Cir. 2004) (holding that where "the defense attorney made multiple errors as opposed to a single error, the cumulative effect of those errors should be considered"); *Lindstadt* v. *Keane*, 239 F.3d 191, 199 (2d Cir. 2001) (same). If, for whatever reason, a court does not consider the cumulative effect of multiple interrelated aspects of deficient performance, then the court is not conducting the type of prejudice inquiry that *Strickland* commands.

Neither the state habeas nor federal habeas court has undertaken the cumulative analysis that *Strickland* requires. The state did not do so because it failed to recognize that counsel's failure to investigate a mental health expert was constitutionally deficient. But the Eleventh Circuit did not understand that the state court's failure to consider all of the relevant aspects of deficient performance in its prejudice analysis meant that there had been no "adjudication on the merits" by the state court of the relevant constitutional question. As the Tenth Circuit would have recognized, Petitioner's "ineffectiveness claim has not been adjudicated on the merits [because] the state court failed to consider the evidence on which [Petitioner] based his claim." *Wilson*, 577 F.3d at 1293. It is clear, however, that the Eleventh Circuit did not

undertake the *de novo* cumulative analysis that Tenth Circuit precedent would have called for. Rather, the Eleventh Circuit gave only *deferential* review, subject to both limitations of Section 2254(d), to the part of the prejudice inquiry the state court had considered. The court of appeals very clearly stated that it thought itself "bound to review the merits of [Petitioner's] claim" based on "the allegations in his Rule 32 Petition, because the state court ruled on his claim without the benefit of an evidentiary hearing." (App. 16a n.9.)

It is also evident that the Eleventh Circuit applied a much more demanding standard than the Fourth or Ninth. Rather than ask whether Petitioner's pleadings allegations raised a "colorable claim of ineffective assistance of counsel," as the Fourth or Ninth Circuits would have done, the Eleventh Circuit insisted that Petitioner "allege what specifically a mental health expert would have said about his mental status" or have "alleged facts showing that the undiscovered instances of abuse he suffered were more severe or pervasive than Files's testimony suggested." *Ibid.* As Judge Wilson recognized in his concurring opinion in *Borden*, the Eleventh Circuit's standard puts an impossible burden on habeas petitioners who had been denied an evidentiary hearing in state court: "[w]ithout the aid of legal process and a developed record to rely upon, it would be virtually impossible for any petitioner to carry his or her ultimate burden of proof, let alone to demonstrate that he or she is entitled to habeas relief in federal court under AEDPA's 'double deferential' standard of review." *Id.* at 830 (Wilson, J., concurring in part and dissenting in part).

Petitioner's case is a particularly compelling one in which to consider and resolve these conflicts.

Petitioner, a nineteen year-old high school senior with no significant criminal history, was sentenced to death by the slimmest of margins. If even one more juror had joined the two who were already persuaded against death, Petitioner's life might have been spared. Family could have testified to abuse beyond what his mother self-servingly admitted. And a mental health expert could have testified to the connection between the abuse he suffered and the crime he committed. That two jurors were already convinced to vote against death makes it all the more likely that, with a constitutionally adequate investigation, trial counsel could have put on a mitigation case that would have persuaded at least one more. "[T]he state court has never considered the substance of the claim," *Wilson*, 577 F.3d at 1293, because its inquiry was unreasonably cabined to exclude the mental health expert. Nor did the Eleventh Circuit consider that question *de novo*, because it viewed the evidence regarding family and friends only through the lens of deference.

II. THE COURT OF APPEALS' *SUA SPONTE* RELIANCE ON A CURABLE PLEADING DEFECT TO DISMISS PETITIONER'S HABEAS PETITION VIOLATES *MILYARD*

While accepting Petitioner's claim that the state court unreasonably applied *Strickland* in holding that counsel's failure to retain a mental health expert was not deficient performance, the court of appeals nonetheless affirmed dismissal of the habeas petition for failure to satisfy a pleading requirement with respect to *Strickland*'s prejudice prong that the State had not raised. The court of appeals' *sua sponte* invocation of a pleading deficiency that the State had waived cannot be squared with this Court's recent

decision in *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012). It was fundamentally unfair and an abuse of discretion for the court of appeals to dismiss Petitioner's challenge to his death sentence on a ground that Petitioner never had a chance to address and that he could have cured if the objection had been timely asserted.

A. The Court of Appeals' Dismissal Relied on a Defense the State Had Never Raised

Although the court of appeals did not *explicitly* hold the ACCA's performance ruling unreasonable, the Eleventh Circuit notably declined to rely on that ruling. (See App. 14a (stating it would "not address" the performance prong).) The court implicitly found that ruling unreasonable, because it proceeded to address the prejudice prong of *Strickland* with regard to counsel's failure to pursue the services and testimony of a mental health expert, even though the ACCA "did not consider" prejudice resulting from this aspect of counsel's deficient performance. *Id.* at 15a. This course only makes sense if the court of appeals recognized the unreasonableness of the ACCA's performance holding.[10] Because the court of appeals was not relying on the ACCA's performance holding, and the ACCA had not reached the prejudice prong as an alternative, federal habeas review was *de novo*. See *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005). Likewise,

[10] The State also continued to press in the alternative a procedural default argument with which the district court had agreed but that Supreme Court and Eleventh Circuit precedent foreclosed. Because the Eleventh Circuit rightly rejected the State's procedural default argument, the issue of procedural default is not at issue in this petition for certiorari.

because the court of appeals had no state court opinion to review or to which it must defer on the issue of prejudice, the court of appeals was not limited to the record before the state court at the time of the ACCA's opinion. See *Pinholster*, 131 S. Ct. at 1401 (noting that Section 2254(d) "applies only to 'claims adjudicated on the merits in State court proceedings'").

At that point, the only remaining question was whether the district court erred in denying Petitioner's request for a federal evidentiary hearing. The court of appeals rejected Petitioner's request, not because Petitioner's claim of ineffective assistance of counsel was implausible, but because of a purported a pleading defect in Petitioner's federal habeas petition. Stating that "this would be a different case if [Petitioner] had alleged * * * what specifically a mental health expert would have said about his mental status," the court of appeals affirmed the district court's dismissal without a hearing on the ground that "[Petitioner] has offered no more than a conclusory assertion that a mental-health expert could have testified to a connection between the abuse [Petitioner] suffered as a child [and adolescent] and his subsequent actions." (App. 16a.)

The court of appeals' reliance on the heightened pleading requirements of Rule 2(c)(2) of the Rules Governing Section 2254 Cases to dismiss the petition was entirely *sua sponte*.[11] The State had waived the

[11] Although it may seem unclear whether, in describing the petition's "assertions," the court is referring to the Petitioner's Rule 32 petition or, instead, Petitioner's federal habeas petition, the only reasonable interpretation is that the court was referring to the federal petition. Because there was no state court merits adjudication of the prejudice prong on this issue, there was no need for the court to limit its review to the state court record. See

issue by choosing not to raise it in the trial court or on appeal. It was also entirely without notice. The panel had not raised the issue at oral argument, nor had it asked for post-argument briefing on it. Moreover, had the district court relied on Rule 2(c) to dismiss Petitioner's ineffective assistance claim, the district court would have been required to dismiss the claim *without prejudice* and to allow Petitioner an opportunity to cure the defect through an amended pleading, which Petitioner could easily have done. See *Mayles* v. *Felix*, 545 U.S. 644, 665-66 (2005) (holding that Federal Rule of Civil Procedure 15 applies to habeas corpus petitions); *Espey* v. *Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (holding that district courts are required to provide a habeas petitioner leave to amend a petition unless there are "reasons that might justify denial of permission to amend," such as "undue delay, bad faith or dilatory motive"). Thus, in a cruel irony, the State actually ended up *benefitting* from its waiver of the Rule 2(c) issue in the district court.

B. Because the Court of Appeal's Decision Violates the Court's Recent *Milyard* Decision, a GVR is Appropriate

In *Milyard*, the Court addressed the question whether a federal court of appeals "has the authority to

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Pinholster, 131 S.Ct. at 1401. The court of appeals' reference to the pleading standard was therefore clearly to Rule 2(c)(2) of the Rules Governing Section 2254 Cases, which imposes on a habeas petition a heightened pleading requirement, much like Federal Rule of Civil Procedure 9(b) for civil fraud litigation. See *Mayles* v. *Felix*, 545 U.S. 644, 648 (2005) (holding that "Rule 2(c) * * * requires a more detailed statement" than Federal Rule of Civil Procedure 8 otherwise requires).

address the timeliness of a habeas petition on the court's own initiative." 132 S. Ct. at 1831. The Court held that, although such authority exists, it is tightly circumscribed: a court of appeals must "reserve that authority for use in exceptional cases," and it is an abuse of discretion *per se* to *sua sponte* raise a timeliness issue that the state has waived. *Id.* at 1834.

In Petitioner's case, it is clear that the State had waived any argument it might have had that Petitioner's ineffective assistance of counsel claim, as pled in his federal habeas petition, failed to comply with Rule 2(c)'s heightened pleading requirement. The State's answer to Petitioner's petition and its motion to dismiss raised only two arguments: that Petitioner's claim had been resolved by the state court on an independent and adequate state ground, and that the state court's decision was not an "unreasonable application of" or "contrary to" clearly established federal law. Although the State raised a Rule 2(c) argument with respect to *other* constitutional claims that Petitioner had included in his federal habeas petition, thus indicating that it was aware of the rule's existence and import, the State raised no such challenge with respect to Petitioner's ineffective assistance of counsel claim. (Compare RE.C.22, 24, 26, 29 with RE.C.16-17.) The State thus waived the Rule 2(c) issue with respect to Petitioner's ineffective assistance claim. And, moreover, even if the State had merely forfeited this Rule 2(c) issue, there exist no "extraordinary circumstances" that would warrant an appellate court's *sua sponte* resurrecting of it. *Milyard*, 132 S. Ct. at 1833.

Although *Milyard* involved the affirmative defense of timeliness, it is evident that the legal

principles *Milyard* announced are more broadly applicable. *Milyard* thus applies with equal force in Petitioner's case, where the Eleventh Circuit, on its own initiative, affirmed the district court's decision on the basis of a non-jurisdictional federal pleading defect that Petitioner easily could have cured through an amended pleading—and, under binding precedent, would have been entitled to cure—had the State raised the issue at the procedurally appropriate time. Simply put, the court of appeals' decision cannot be squared with *Milyard*'s holding.

Milyard was decided less than three weeks prior to the court of appeals' decision below, and there is nothing in the court's opinion to suggest that *Milyard* was considered. To be sure, Petitioner did argue in his petition for rehearing *en banc* that the panel's *sua sponte* resolution of his appeal on a ground that the State had chosen not to raise below or on appeal was an abuse of discretion under *Milyard*. But there is no indication that, when it summarily denied Petitioner's rehearing petition, the court of appeals actually considered *Milyard*, which was still just ten-weeks old.

Accordingly, it would be appropriate for the Court to issue a GVR with instructions that the court of appeals reconsider Petitioner's appeal in light of *Milyard*. See *Lawrence* v. *Chater*, 516 U.S. 163, 169-70 (1996) ("[Intervening events triggering the Court's GVR authority] must be extended to include at least Supreme Court decisions rendered so shortly before the lower court's decision that the lower court had no 'opportunity' to apply them * * * . [W]e have never held lower court briefing to bar our review and vacatur

where the lower court's order shows no sign of having applied the [recent] precedents that were briefed.").

C. To the Extent the Eleventh Circuit Is Deemed to Have Found *Milyard* Inapplicable to the Rule 2(c) Issue, the Eleventh Circuit's Decision Is in Conflict With the Seventh and Eighth Circuits

If the Court assumes that that the Eleventh Circuit actually considered and implicitly rejected the *Milyard* argument that Petitioner made in his petition for rehearing *en banc*, then the Eleventh Circuit has created a circuit split with the Seventh Circuit.

In *Ryan* v. *United States*, 688 F.3d 845 (7th Cir. 2012), the Seventh Circuit addressed whether it was free to disregard the government's waiver of the argument that, on collateral review under 28 U.S.C. 2255, a petitioner complaining that the trial court's jury instructions were erroneous must show that the evidence presented at trial was not "sufficient to convict under the correct instructions," as opposed to satisfy the less exacting "harmless error" standard that applies on direct appeal. *Id.* at 847. On remand from this Court's April 30, 2012 GVR for further consideration in light of *Milyard*, see 132 S. Ct. 2099 (2012), the Seventh Circuit held that, under *Milyard*, it was not. *Id.* at 848. The Seventh Circuit explained that

> [*Milyard*] articulates several conclusions: (1) that a court of appeals is entitled to decide an appeal on a ground that the prosecutor has forfeited by overlooking it, but not on a ground that the prosecutor has waived; (2) that the

> power to decide an appeal on a forfeited ground should be used only in exceptional cases; and (3) that a prosecutor's consider decision to refrain from raising a known procedural issue is a waiver.

Id. at 848. *Ryan* thus holds that, under *Milyard*, there is no distinction between an affirmative defense of untimeliness and any other argument that the appellee chooses not to advance. The Eighth Circuit has likewise held that *Milyard* applies outside the context of untimeliness. See *Dansby* v. *Norris*, 682 F.3d 711, 724 (8th Cir. 2012).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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