No. 17-8188

In the Supreme Court of the United States

SCOTT GROUP,

Petitioner,

v.

TIM SHOOP, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

Did the Sixth Circuit properly deny Group's application for a certificate of appealability?

LIST OF PARTIES

The Petitioner is Scott Group, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution. Shoop is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

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INTRODUCTION

Scott Group killed Robert Lozier and attempted to kill his wife, Sandra, in the bar that the couple operated. After learning that Sandra survived, Group tried to hire a fellow jail inmate to "firebomb" her home to prevent her from testifying as an eyewitness to his crime. Pet. App. A-4. The scheme failed, and Sandra was the key witness at Group's murder trial in Ohio state court. Prosecutors also offered evidence of Robert's DNA that the State obtained from a shoe that Group wore when he voluntarily went to a police station shortly after killing Robert.

Group's defense counsel attempted to undermine Sandra's credibility during cross-examination. Counsel also sought to cast doubt on the State's DNA evidence. After deliberation, the jury convicted him of aggravated murder and recommended the death penalty. The Ohio courts affirmed his conviction and sentence, and denied his claims on post-conviction review.

Group then filed a petition for a writ of habeas corpus in the district court under 28 U.S.C. § 2254. Among his grounds for relief were four claims of ineffective assistance of trial counsel. The district court determined that two of Group's ineffective-assistance claims were procedurally defaulted, because the Ohio courts had found the claims barred by res judicata. And while Group had preserved two ineffective-assistance claims for habeas review, the district court rejected them on the merits after finding that they were owed deference under 28 U.S.C. § 2254(d)(1).

Having reviewed Group's claims in detail, the district court declined to issue a certificate of appealability ("certificate") under 28 U.S.C. § 2253(c). It found that "reasonable jurists could not debate (1) the finding that Group procedurally

defaulted certain claims without good cause to excuse the default or (2) the disposition of those claims Group preserved for habeas review." Pet. App. A-23.

In the Sixth Circuit, Group sought a certificate of appealability on the four ineffective-assistance claims, and on several procedural issues. After considering the applicable legal standards, a panel of Chief Judge Cole, Judge Boggs, and Judge Siler denied a certificate. Pet. App. A-25 to A-26.

Group asserts that the Sixth Circuit violated both § 2253(c) and due process by issuing a "*pro forma*, non-reasoned, and blanket denial of" a certificate of appealability. Pet. at i. He suggests that this Court's precedent precludes opinions like the Sixth Circuit's, *id.* at 13-15, and that the circuits disagree over whether courts must issue reasoned decisions when denying a certificate of appealability, *id.* at 15-20. Finally, Group asserts that a court of appeals' failure to issue a fully reasoned decision violates due process. *Id.* at 23-28.

Group's Questions Presented do not warrant review.

First, Group identifies no statute or case law in conflict with the Sixth Circuit's opinion. Section 2253 requires a habeas petitioner to seek a certificate of appealability from the court of appeals before appealing a district court's denial of the petition. *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000), set forth the general parameters that a court of appeals must follow when entertaining an application for such a certificate. Neither statute nor precedent, however, requires a court of appeals to issue a fully reasoned opinion when denying one. And Group's purported circuit split is built on cases addressing

different questions. The *only* case that Group presents on the actual question—whether, under AEDPA, a court of appeals must explain its reasons for denying a certificate—supports the Sixth Circuit's actions in this case. *See Dansby v. Hobbs*, 691 F.3d 934, 936 (8th Cir. 2012).

Second, Group raises a constitutional due-process claim for the first time in this petition. This Court should not address an issue for the first time in a case, let alone an issue that has not percolated among (or divided) the lower courts.

Third, even if the Sixth Circuit erred, a decision to remand so that the circuit can write a longer opinion to accompany its denial of a certificate of appealability would not change the result in this case. Group has presented no claims worthy of appeal. Two of the ineffective-assistance claims are procedurally defaulted under Ohio's res judicata bar. And Group's two preserved ineffective-assistance claims present no issue that demands further review. Recognizing this, the Sixth Circuit properly performed its gate-keeping function and denied a certificate of appealability. The question presented, then, makes no difference to the ultimate outcome of this case: Whether or not the Sixth Circuit issues an exhaustive opinion, Group's claims simply do not deserve a certificate of appealability.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2017. The court of appeals denied Group's petition for rehearing en banc on December 21, 2017. The petition for a writ of certiorari was filed on March 19, 2018. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2253, provides in relevant part:

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

Rule 11(a) of the Rules Governing § 2254 Proceedings in the United States District Courts provides in relevant part:

> (a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

COUNTERSTATEMENT

A. Scott Group Killed Richard Lozier And Later Tried To Hire Someone To Kill Sandra Lozier

Scott Group worked for Ohio Wine Imports Company and made weekly deliveries of wine and other products to the Downtown Bar in Youngtown, Ohio. *State v. Group*, 781 N.E.2d 980, 985 (Ohio 2002) ("*Group I*"). Sandra Lozier owned

the bar. *Id.* On the morning of January 18, 1997, she and her husband, Richard, were working there. *Id.* at 986. Group knocked on the door and asked if he could see copies of the invoices from his employer, which he had also done the week before. *Id.* After looking at the invoices for some time, he asked to use the bar's restroom. *Id.* He returned to the office with a gun and forced the Loziers into the restroom. *Id.* He then shot both, killing Robert and wounding Sandra. *Id.*

Sandra lost consciousness. *Id.* After regaining consciousness and believing she was dying, Sandra tried to write "Ohio Wine"—Group's employer—on the floor with her blood. *Id.* She then dialed 911 and told the police that "'the delivery man from Ohio Wine'" had shot her and her husband. *Id.* The invoices and $1,200 to $1,300 in cash were also missing from the bar. *Id.* at 986-87.

That afternoon, Group called his mother, who told him that the police were looking for him. *Id.* at 987. He told her that they likely wanted to discuss his unpaid parking tickets, and he voluntarily went to the police station with his mother and his sister. *Id.* While questioning him, the police noticed blood on his shoe and eventually arrested him for the shooting. *Id.* Later DNA testing of the blood indicated that it matched the pattern of Robert's DNA. *Id.*

Several times, Group asked potential witnesses to fabricate stories on his behalf. *See id.* 987-89. For instance, while being held in the county jail before trial, Group asked Adam Perry, another inmate, to "firebomb" Sandra Lozier's house "'to either scare her from testifying or to lead the police into investigating others.'" *Id.* at 988. Group offered Perry $150,000, gave him instructions on making an

explosive device, and told him to leave a "clue" relating to another crime that had occurred at the Downtown Bar. *Id.* Group also told Perry that Sandra no longer lived at the house. *Id.* Once Perry determined that she still lived there, he decided not to continue with Group's plan and eventually told the prosecutor what Group had asked him to do. *Id.* at 989.

B. A Jury Convicted Group, And Ohio Courts Upheld His Conviction And Sentence

Group was charged with one count of aggravated murder, which carried death-penalty specifications for murder during an aggravated robbery and the purposeful attempt to kill two persons. *Id.* He was also charged with aggravated robbery and attempted aggravated murder. *Id.* A superseding indictment later added charges for attempted aggravated murder and intimidating a witness related to Group's plan to firebomb Sandra's house. *Id.*

The evidence against Group included Sandra's eyewitness testimony and her courtroom identification of Group as her husband's killer. *Id.* at 993-94. The State also offered evidence that the blood on the shoe that Group wore to the police station matched Robert's DNA. *Id.* at 994. Group's defense included an alibi that on the morning of the murder, he had taken his stepson to school and then went to his mother's house to do laundry. *Id.* at 987. A jury found Group guilty on all counts and specifications, and he was sentenced to death. *Id.* at 989.

On direct appeal to the Ohio Supreme Court, Group raised sixteen assignments of error. Among them, Group claimed that he received ineffective assistance of counsel based on his trial counsel's alleged failure to arrange for a

defense DNA expert witness. *Id.* at 1002. Group received funds to use Lifecodes Corporation for its DNA testing. *Id.* After an acquisition, Lifecodes became part of the same corporation as Cellmark Diagnostics, which the State had used for its DNA testing. *Id.* Although trial counsel had "no objection" to continuing to use Lifecodes, the expert declined to testify, and no replacement could be found in time for trial. *Id.* The Ohio Supreme Court found that Group's trial counsel was not "at fault" for the expert's decision, and that counsel's actions did not prejudice Group. *Id.*

Group also asserted that his trial counsel rendered ineffective assistance by inadequately cross-examining the State's expert witness. *Id.* The Ohio Supreme Court rejected this claim, finding that "the record indicates that defense counsel researched the subject" of DNA testing and satisfactorily cross-examined the witness. *Id.* The Ohio Supreme Court rejected Group's remaining grounds for relief and affirmed his convictions and sentence. *Id.* at 1006.

While his direct appeal was pending, Group filed a petition for post-conviction relief in state court. *State v. Group*, 2011-Ohio-6422, ¶ 42 (Ohio Ct. App.) ("*Group II*"). His amended petition raised twelve claims of ineffective assistance of counsel and one claim that his sentence was void because the trial court used an anonymous jury system. *Id.* ¶ 53. The State moved for summary judgment on the petition, which the post-conviction court granted. *Id.* ¶ 54. An Ohio appellate court affirmed, holding that "[t]he majority" of Group's ineffective-assistance claims were barred by res judicata, because he had not supported the claims with "cogent

evidence" outside the record, as Ohio law requires. *Id.* ¶ 2. Although some of his claims had the required evidentiary support, the Ohio court found that none "demonstrate[d] substantive grounds for relief." *Id.*

Three of Group's state post-conviction ineffective-assistance claims are relevant here. First, Group asserted that trial counsel did not adequately cross-examine Sandra Lozier at several points in her testimony. *Id.* ¶ 119. He argued that counsel should have pressed Sandra on inconsistencies in her testimony about the shooter and sought to impeach her claims that she had lost consciousness after the shooting. *Id.* He provided copies of a police report in support of the suggested inconsistencies. The Ohio Court of Appeals found that the evidence was not "cogent," however, and applied the State's res judicata bar. *Id.* ¶ 126.

Second, Group asserted that trial counsel did not prepare his alibi witnesses and failed to argue that another person was responsible for the shooting. *Id.* ¶ 132. On the witness-preparation argument, Group offered an affidavit from his mother, but the post-conviction court found it was not credible. *Id.* ¶ 134. On the alternative-shooter argument, the court noted that the Ohio Supreme Court had rejected his alibi defense, precluding any finding that trial counsel's actions prejudiced Group. *Id.* Consequently, res judicata also barred this claim. *Id.*

Third, Group asserted that trial counsel falsely promised the jury that the defense would prove that the State's DNA evidence was contaminated. *Id.* ¶ 92. He argued that failure to fulfill this promise "'caused the defense to lose all credibility.'" *Id.* The post-conviction court found that res judicata also barred this claim, because

Group could have raised it on direct appeal. *Id.* Alternatively, it proceeded to the merits of the claim and found that Group could not "demonstrate prejudice" in light of the other evidence against him. *Id.*

The Ohio Supreme Court declined to review the post-conviction case. *State v. Group*, 986 N.E.2d 1021 (Ohio 2013).

C. The District Court Determined That Group Was Not Entitled To Habeas Relief, And The Sixth Circuit Denied A Certificate Of Appealability

After Group was unsuccessful at obtaining post-conviction relief in the Ohio courts, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Pet. App. A-1. Among his eight grounds for relief were the four ineffective-assistance claims discussed in the preceding section. *Id.* at A-8.

The district court issued a thorough order denying Group's petition on each ground. Pet. App. A-1 to A-23. First, on the cross-examination of Sandra Lozier, the district court held that the Ohio Court of Appeals had properly applied its res judicata rule, and that Group had not demonstrated cause and prejudice to excuse his procedural default. *Id.* at A-12. Second, on the presentation of an alibi defense, the court found that Group had not demonstrated cause to excuse the procedural default. *Id.* Third, on the cross-examination of the State's DNA expert witness and the lack of a defense DNA expert, the court held that the Ohio Supreme Court had not unreasonably applied federal law. *Id.* at A-12 to A-14. Fourth, on trial counsel's unfulfilled promise to the jury about DNA evidence, the court held that the State had waived any procedural-default argument and applied AEDPA deference to the post-conviction court's alternative holding on the merits. *Id.* at A-15.

In the same order, the district court determined whether to grant a certificate of appealability. *Id.* at A-23. Rule 11(a) of the Rules Governing § 2254 Cases in the United States District Courts requires a district court to conduct the certificate analysis "when it enters a final order adverse to the applicant." Rule 11(a). For Group's procedurally defaulted claims, the district court determined that "reasonable jurists could not debate . . . the finding that Group procedurally defaulted certain claims without good cause to excuse the default." Pet. App. A-23. For Group's constitutional claims, it determined that "reasonable jurists could not debate . . . the disposition of those claims Group preserved for habeas review." *Id.* The district court recognized that the state courts had "thoroughly considered" the arguments and "rejected them with considerable record support." *Id.* Thus, it held, a certificate of appealability should not issue. *Id.*

The next month, Group moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). Motion, R.56, PageID#8821-49. Shortly thereafter, he moved to amend his habeas petition to add a ninth ground for relief. Motion, R.57, PageID#8866-80. In support of both, he relied on "new" evidence in the form of a report from Christine Funk, a defense attorney who has consulted in cases involving DNA. Report, R.56-1, PageID#8850. Funk raised various concerns about Group's trial counsel's "understanding" of the principles of DNA testing. *Id.* at PageID#8855. The district court rejected the Rule 59 motion because Funk's report "[was] not new, [was] not newly discovered, and [was] not evidence." Opinion, R.67, PageID#8968. The motion to amend the petition also relied on a report from Dr.

Dan Krane, an expert who critiqued the use of DNA evidence during Group's trial. *Id.* at PageID#8969. The district court rejected this affidavit, too, because Group did not explain why it was unavailable before the court's judgment on Group's petition. *Id.* Finally, the district court explained that the reports "in no way undermine[d] the state court conclusions that any errors were not prejudicial in light of the 'overwhelmingly persuasive' evidence of Group's guilt." *Id.* (quoting *Group II*, 2011-Ohio-6422, ¶ 88). Thus, the district court denied both the Rule 59 motion and the motion to amend the petition. *Id.* at PageID#8969-72.

Having failed to convince the district court that his claims had merit, Group turned to the Sixth Circuit in order to request a certificate. His application raised the four ineffective-assistance claims discussed above. Pet. App. A-28 to A-112. In a brief order, a panel denied the application. *Id.* at A-25 to A-26. The panel recited the applicable standards under 28 U.S.C. § 2253(c)(2), *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). *Id.* at A-26. "Upon consideration," it then found that "Group has failed to make the required showing" and denied a certificate of appealability. *Id.* at A-26.

Group sought en banc rehearing of the panel's order, but no judge requested a vote on the petition. *Id.* at A-27. This timely appeal followed.

REASONS FOR DENYING THE WRIT

Group's petition for a writ of certiorari asks the Court only whether the Sixth Circuit wrongly denied a certificate of appealability via an unreasoned order. The petition neither addresses the underlying merits of his claims nor argues that the Sixth Circuit applied the wrong legal standards for considering a certificate. It

simply asks the Court to establish a non-statutory rule that courts of appeals denying a certificate of appealability must do so with a thorough opinion explaining why. Group thus asks the Court to impose an opinion-writing requirement on lower courts that AEDPA does not require. And he makes this request despite the Court's recent reminder that the certificate-of-appealability "inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Nowhere does § 2253(c) include any indication that a court of appeals *must* issue a written opinion. Sidestepping this obstacle, Group tries to manufacture a conflict for the Court to resolve. But the "circuit split" Group purports to identify has no merit, and the only relevant case he cites supports the Sixth Circuit's opinion below. *See Dansby v. Hobbs*, 691 F.3d 934, 936 (8th Cir. 2012) (reasoning that neither statute nor precedent "dictate that a court of appeals must or must not publish a statement of reasons when it denies an application for a certificate").

Thus, this case does not present an opportunity for the Court to resolve a question that has divided lower courts. Nor does it give the Court an occasion to clarify an important question of federal law. Group also did not present his due-process claim to the Sixth Circuit, so this Court should not consider it. *See Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2781 (2010) (holding that an argument that was "not mentioned below" was brought "too late" and the Court "[would] not consider it").

At best, Group asks the Court to engage in error correction, but there is no error to correct. The district court thoroughly analyzed Group's claims, the record,

and the applicable law. Its conclusions about AEDPA deference and procedural default are unassailable, and its procedural rulings were sound. Overwhelming evidence also supports Group's guilt. Thus, it would make little sense for the Sixth Circuit to repeat the logic carefully spelled out in the district court's opinions. Yet if the Court remands for the Sixth Circuit to apply Group's (atextual) requirement, that is all that would result.

I. NO LAW SUPPORTS GROUP'S CLAIM THAT A COURT OF APPEALS MUST ISSUE A REASONED OPINION WHEN IT DENIES A CERTIFICATE OF APPEALABILITY

The Court should decline Group's first question presented because it is not supported by any law, and Group's attempts to manufacture a conflict worthy of the Court's review fail on all fronts.

A. The Standards That Guide The Certificate-Of-Appealability Analysis Are Well Established

1. In a habeas proceeding under 28 U.S.C. § 2254, a petitioner may not appeal a district court's final order "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c). For a certificate to issue, the petitioner must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). Additionally, a judge *issuing* a certificate must "indicate which specific issue or issues" satisfy this required showing. *Id.* § 2253(c)(3). Yet nothing in the statute requires a court *denying* one to explain why.

Nothing in the Court's precedent requires it, either. The certificate analysis is a procedural rule mandating a "threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S. at 482. It allows courts to "screen[] out issues unworthy of judicial time and attention," protecting appellate panels from

hearing "frivolous claims." *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012). In this sense, it gives courts a "gatekeeping function." *Id.*

The certificate analysis "is not coextensive with a merits analysis." *Buck*, 137 S. Ct. at 773. Indeed, a court of appeals that engages with the merits of a petitioner's claim in order to justify denying a certificate "'is in essence deciding an appeal without jurisdiction.'" *Id.* (quoting *Miller-El*, 537 U.S. at 337). Thus, courts reviewing certificate-of-appealability applications must be careful not to cross the line between engaging in the limited review necessary for the certificate analysis and engaging with the full merits of a petitioner's case.

The Court has explained how lower courts should walk this line. To receive a certificate, a petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), 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. Similarly, if a district court denies a petition on procedural grounds, "a COA should issue" if "jurists of reason" would find it debatable both "whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

The Sixth Circuit recited these standards and concluded that Group's claims did not "deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Group's petition does not contend otherwise. Instead, he urges the Court to read

into *Miller-El* and *Slack* an additional procedural step not found in the text of § 2253. Nothing requires his proposed "written opinion" rule. And even if the Court is inclined to adopt it, this case is a poor vehicle to do so, because the outcome—denial of a certificate—will be the same. *See infra* Part III.

2. In arguing that the lower courts acted contrary to this Court's precedent, Group fails to consider the district court's entire opinion denying his habeas petition. He compares his case to *Miller-El*, where the Court found that the district court had not "'give[n] full consideration to the substantial evidence petitioner put forth.'" Pet. 14 (quoting 537 U.S. at 341). Group proceeds to criticize "the *pro forma* and unreasoned review by *both* the district court and the Sixth Circuit" as failing to comply with § 2253. *Id.* (emphasis added). The comparison to *Miller-El* falls short. The district court's opinion here, spanning thirty-six pages in the Federal Supplement, can hardly be characterized as "*pro forma*" or "unreasoned." Pet. App. A-1 to A-23. The opinion carefully analyzes each of Group's claims for relief and, applying the proper standards under AEDPA, concludes that none warrant granting habeas relief.

After denying habeas relief and entering "a final order adverse to" Group, the district court properly performed the certificate analysis. *See* R. Governing § 2254 Cases in U.S. Dist. Cts. 11(a). Because that analysis flowed directly out of the habeas analysis, the district court had little reason to repeat its findings when assessing whether any of Group's claims warranted a certificate. *See, e.g.*, *Hawkins v. Rivard*, No. 16-1406, 2016 U.S. App. LEXIS 21652, at *4-5 (6th Cir. Nov. 10,

2016) ("[B]ecause the [district] court had already reviewed and analyzed the claims through the adoption of the magistrate judge's report and recommendation, it was not necessary for the court to reassess each claim prior to denying a COA."). Similarly, the court of appeals can rely on the district court's merits analysis when it reviews a certificate application. *Cf. Wilson v. Sellers*, 138 S. Ct. 1188, 1193 (2018) ("[F]ederal habeas law employs a 'look through' presumption.").

B. Group's Attempt To Identify A Conflict Worthy Of The Court's Attention Falls Short, And The Only Relevant Case That He Cites Undermines His Position

Group tries to manufacture a circuit split by arguing that the Sixth Circuit's "blanket denial" of a certificate of appealability creates a conflict over "whether the blanket denial (or grant) of a COA is permissible under 28 U.S.C. § 2253(c)." Pet. 15. Yet blanket grants and blanket denials pose separate questions. As described above, AEDPA requires a court *issuing* a certificate to "indicate which specific issue or issues," 28 U.S.C. § 2253(c), that the petitioner has shown "deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327. Thus, a blanket *grant* of a certificate violates § 2253(c). *See Gonzalez*, 565 U.S. at 154 ("[Section] 2253(c)(3) is a mandatory but nonjurisdictional rule.").

The inverse—that a blanket *denial* of a certificate violates § 2253(c)—does not follow. *Cf. LaFevers v. Gibson*, 182 F.3d 705, 710 (10th Cir. 1999) (cautioning district courts to avoid making "a blanket denial of a certificate of appealability *unless the court is convinced* there is nothing in the petition that is of debatable constitutional magnitude" (emphasis added)). That is the question Group presents

to the Court, but he fails to support it with any authority, much less any conflicting authority.

In fact, Group cites only one case that is directly relevant to the question presented, but that case supports the Sixth Circuit's approach. *See Dansby*, 691 F.3d at 936. In an order denying a petition for rehearing, the Eighth Circuit addressed whether it was appropriate to discuss its reasons for denying an expanded certificate in an earlier opinion. *See id.* The court explained that neither § 2253(c) nor this Court's "decisions regarding certificates of appealability dictate that a court of appeals must or must not publish a statement of reasons when it denies an application for a certificate." *Id.* "Whether to issue a summary denial or an explanatory opinion," it continued, "is within the discretion of the court." *Id.* Although the Eighth Circuit opted to provide reasons for denying the certificate in that case, the Sixth Circuit's decision not to do so here fits comfortably within *Dansby*'s logic. *Dansby* is the only case that Group cites concerning a court of appeals' authority or obligation to issue an opinion when denying a certificate. Pet. 16-19. Thus, there is no conflicting authority for this Court to clarify.

The cases that Group assembles in support of his purported inter-circuit split, *id.* at 15-20, and intra-circuit split, *id.* at 20-23, involve distinct questions. On one hand, a number of cases address a district court's failure to explain why it has *granted* a certificate. *See, e.g.*, *Franklin v. Hightower*, 215 F.3d 1196, 1198-99 (11th Cir. 2000) (reviewing the district court's issuance of a pre-AEDPA certificate of probable cause that did not indicate the reason for granting leave to appeal); *United*

States v. Weaver, 195 F.3d 52, 53 (D.C. Cir. 1999) (remanding for district court to "specify the issue or issues" "worthy of appeal"); *Muniz v. Johnson*, 114 F.3d 43, 45-46 (5th Cir. 1997) (holding that the district court's issuance of a pre-AEDPA certificate of probable cause did not satisfy AEDPA's certificate requirement). The reason that the circuits had to address this is plain from the text of § 2253: the statute requires courts to indicate why they have granted a certificate. *See* 28 U.S.C. § 2253(c). When a district court fails to do so, it fails to comply with the statute. *See Gonzalez*, 565 U.S. at 154. But these cases say nothing about a court's obligation to explain why it denied a certificate and are therefore irrelevant to Group's question presented.

On the other hand, one case addresses a district court's "blanket denial" of a certificate. *See Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (holding that denial of a certificate "before Murphy had even applied for one" and without considering the *Slack* standard was improper). But *Murphy* has no bearing on Group's question presented. Rule 11(a), which requires district courts to conduct the certificate analysis after making a decision adverse to the petitioner, was enacted in 2009, eight years after *Murphy*. Thus, the analysis that the Sixth Circuit critiqued in *Murphy* would be required today. Moreover, the district court and the Sixth Circuit here referred to the proper standards, including *Slack*, when denying the certificate. Pet. App. A-23, A-26.

Finally, the remaining cases that Group cites in support of his purported split address a host of irrelevant issues. *See, e.g.*, *Herrera v. Payne*, 673 F.2d 307, 308

(10th Cir. 1982) (applying only pre-AEDPA rules); *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (en banc) (admonishing a district court for certifying an issue that did not "purport[] to involve an underlying error of constitutional magnitude" but continuing to decide the appeal).

And though Group points out that some courts might consider the nature of the penalty in capital cases to resolve any doubt over whether to issue a certificate, Pet. 19-20, that question is not before the Court. For this question to arise, Group must show that there was any doubt as to whether a certificate should issue. He has not made this showing, so the Court should decline to address the question.

At bottom, Group simply assumes that because a certificate must indicate the issue for appeal, the denial of a certificate must equally indicate why no issue was certified for appeal. That position has no basis in the text of AEDPA, and the courts of appeals have not split over it or addressed it in any detail. Accordingly, the Court should deny Group's petition.

II. GROUP RAISES HIS DUE PROCESS CLAIM FOR THE FIRST TIME IN HIS PETITION

A. This Court Should Not Reach A Claim That Has Not Been Presented To Any Lower Court

This Court should not consider an issue not raised in the lower courts. *See Rent-A-Center, W., Inc.*, 130 S. Ct. at 2781 (holding that an argument that was "not mentioned below" was brought "too late" and the Court "[would] not consider it"). But that is precisely what Group asks the Court to do with his second question presented. Pet. i., 23-28.

Group argues that the Sixth Circuit's opinion violates due process because the court did not "independently assess Group's COA application" under the standard set forth in *Slack*. *Id.* at 23. To be sure, Group did not need to raise this claim in his certificate application, but he failed to raise it in his petition for rehearing and for rehearing en banc. 6th Cir. Doc. 24-2. Group's due-process claim thus appears for the first time in his petition for a writ of certiorari.

B. Group Cannot Show That He Was Denied Any Process

On the merits, Group's due-process argument must fail. While the Court has indicated that an appellate system must comport with due process even when the Constitution does not require the provided right to appeal, *see, e.g.*. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), Group does not explain how the lack of a written opinion denying a certificate application violates due process. He offers only the conclusory statement that the Sixth Circuit violated his due-process rights by conducting a "phantom review of his COA application." Pet. 26. This, he contends, denied him "'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id.* at 28 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

Group's argument misses the procedural forest for the trees. The procedures enacted in § 2253(c) are but a piece of a broader procedural context governed by AEDPA. Congress adopted AEDPA to regulate federal courts' power to grant writs of habeas corpus. *See Miller-El*, 537 U.S. at 337. Under these laws, Group filed a petition for a writ of habeas corpus, *see* 28 U.S.C. § 2254, litigated it before the district court, *see* Pet. App. A-1 to A-23, and filed an application for a certificate, *see* 28 U.S.C. § 2253. He has been heard, and as the district court's thorough opinion

demonstrates, he has been heard meaningfully. *See Mathews*, 424 U.S. at 333. Thus, the claim that the Sixth Circuit's brief opinion violated due process is belied by the record and the process he has received throughout his case.

Group also argues that the requisite assessment of his claims under *Slack* "was not made," thereby violating his due-process rights. Pet. 24. This argument assumes that when a court declines to *explain* a decision it has failed to *make* a decision. That assumption is unwarranted. Courts often summarily affirm a lower court's decision as a means of agreeing with the "'judgment only,'" even if "'the rationale of the affirmance may not be gleaned solely from the opinion below.'" *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1800-01 (2015) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)); *cf. Napa Valley Elec. Co. v. R.R. Comm'n*, 251 U.S. 366, 372 (1920) ("[A]bsence of an opinion by the [California Supreme Court denying a writ of review] did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented."). And it is mistaken to claim that this well-trod appellate procedure violates due process, especially where § 2253 simply requires the appellate court to review whether a claim should proceed further, not to "affirm" the judgment. *See Denko v. INS*, 351 F.3d 717, 729-30 (6th Cir. 2003) (collecting cases that demonstrate a uniform conclusion among the circuits that a streamlined summary affirmance procedure in the Board of Immigration Appeals did not violate due process).

Further, Group's characterization of the Sixth Circuit's opinion is wrong. That court may not have elaborated upon its decision to deny a certificate, but its

opinion demonstrates that it adequately performed its "gatekeeping function." *Gonzalez*, 565 U.S. at 145; *cf. Wilson*, 138 S. Ct. at 1199-1200 (Gorsuch, J., dissenting) ("[A] busy appellate court sometimes may not see the profit in devoting its limited resources to explaining the error and the alternative basis for affirming when the outcome is sure to remain the same, so it issues a summary affirmance instead."). It reviewed Group's application and the decision below, applied the applicable legal standards, and, "[u]pon consideration," concluded that Group failed to satisfy the standards. Pet. App. A-25 to A-26. The Sixth Circuit denied Group a certificate because he lacked a meritorious issue to appeal, not because it failed to consider his case, and certainly not in a way that violated his right to due process.

III. THIS CASE IS A POOR VEHICLE FOR THE QUESTIONS PRESENTED BECAUSE A REVERSAL WOULD NOT AFFECT THE JUDGMENT BELOW

Group's questions presented go no further than the proper procedure for granting or denying a certificate of appealability under 28 U.S.C. § 2253(c)(2). The merits of the claims he raised in his application are not before the Court. *See Miller-El*, 537 U.S. at 331 ("A COA ruling is not the occasion for a ruling on the merit[s] of a petitioner's claim[s]."). Because he did not ask the Court to reverse on the *merits* of his application—just the *procedure*—no action taken by the Court will give Group the relief he seeks. The maximum relief for Group in this case, then, is the reversal of the Sixth Circuit's denial of a certificate and a remand to that court to issue a written decision in support of denying the certificate.

A. Requiring The Sixth Circuit To Provide A Written Reason For Denying A Certificate Would Not Change The Result

The limited relief Group seeks will not affect the judgment in this case. *Miller-El* and *Slack* require only a threshold examination of the claims in support of a certificate of appealability. *Id.* at 348; *Slack*, 529 U.S. at 484. The Sixth Circuit applied this standard when it denied the certificate. And it complied with the standard, because Group's application did not "demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims." *Miller-El*, 537 U.S. at 327.

Group repeatedly refers to the Sixth Circuit's opinion as "*pro forma*," "unreasoned," or "perfunctory." *See, e.g.*, Pet. 1, 6, 11, 13, 15, 20, 29. These characterizations are wrong. Brief though it may be, it summarized the proceedings, and it set forth the applicable legal standards. Pet. App. A-25 to A-26. Finally, it concluded that "[u]pon consideration," a certificate was not warranted, because "Group has failed to make the required showing." *Id.* at A-26. In short, the Sixth Circuit issued a reasoned decision, not a perfunctory or pro forma one.

Remanding the case to the Sixth Circuit for additional written analysis would serve no purpose. The panel has held that Group "failed to make the required showing" to warrant a certificate. *Id.* Thus, it has concluded that Group's claims are not debatable. Asking the court to write an opinion elaborating upon that conclusion will result only in the expenditure of that court's resources to reiterate the written conclusions in the district court's order. It will not result in a certificate of appealability, because Group has offered no basis for the Sixth Circuit to change

its conclusion. The district court's thorough explanation and rejection of Group's claims underscores why his case does not "deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

Group's petition all but ignores the district court's opinion, which fully grappled with Group's arguments and explained why each was procedurally defaulted or failed to clear AEDPA's threshold. Pet. App. A-1 to A-23. In short, that court demonstrated precisely why Group's claims did not merit a certificate. Against this backdrop, Group's plea that he has "been given no issues to appeal" or "any articulated understanding as to why not" rings hollow. Pet. 12.

B. The Outcome Below Was Correct, So This Case Is A Poor Vehicle For This Court To Review The Questions Presented

1. Group sought a certificate of appealability on four ineffective-assistance claims: (1) that trial counsel did not adequately cross-examine Sandra Lozier, (2) that trial counsel did not effectively prepare alibi witnesses or introduce evidence of another potential suspect, (3) that trial counsel unsuccessfully cross-examined the State's DNA witness and failed to rebut that expert with a defense expert, and (4) that trial counsel falsely promised jurors that an expert—who later became unavailable through no fault of trial counsel—would undermine the State's DNA evidence. Pet. App. A-48, A-61, A-87.

a. The district court found that the first two claims were procedurally defaulted. *Id.* at A-12. Ohio's res judicata rule bars a post-conviction petitioner from raising a claim that was or could have been raised on direct appeal. *See State v. Cole*, 443 N.E.2d 169, 170-71 (Ohio 1982); *State v. Perry*, 226 N.E.2d 104, 108

(Ohio 1967). When a defendant fails to raise a record-based claim of ineffective assistance on direct review, res judicata bars him from raising that claim in post-conviction review unless he provides cogent, outside-the-record evidence of the claim. *See Cole*, 443 N.E.2d at 171.

Ohio's res judicata bar "is an adequate and independent state ground that bars federal habeas relief." *Hand v. Houk*, 871 F.3d 390, 409 (6th Cir. 2017), *cert. denied sub nom. Hand v. Shoop*, No. 17-7463, 2018 U.S. LEXIS 2603 (Apr. 23, 2018). Yet a procedurally defaulted claim can be excused if a "prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The Ohio Court of Appeals applied the res judicata bar to Group's claims concerning the cross-examination of Sandra Lozier, and the evidence he adduced to excuse the default was not competent or cogent. *Group II*, 2011-Ohio-6422, ¶ 119; Pet. App. A-11 (incorporating analysis from Order, R.49, PageID#8757-63). For example, Group's state post-conviction counsel failed to submit Sandra's medical records that he nevertheless cited in support of an attempt to undercut her claim that she had lost consciousness. *Id.* Group's habeas petition argued that his post-conviction counsel's failure to attach the records was ineffective assistance and excused the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). But whether those cases applied here was irrelevant, because the district court held that Group was not prejudiced by either the failure to attach the medical records or the failure to impeach Sandra's loss of

consciousness. Order, R.49, PageID#8758-61. *Martinez* and *Trevino* allow petitioners to lift a procedural bar in certain defined circumstances; they do not create a substantive right to the effective assistance of post-conviction counsel. No certificate was necessary on the *Martinez*/*Trevino* issue, because no reasonable jurist could debate that Group had failed to demonstrate a viable claim under *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Ohio Court of Appeals also applied the res judicata bar to Group's claims concerning his trial counsel's attempts to establish an alibi defense. *Group*, 2011-Ohio-6422, ¶¶ 134-35. Reasonable jurists would not debate that the self-serving affidavits he offered were insufficient outside-the-record evidence to lift the res judicata bar, as both the state post-conviction and the habeas courts found. *See State v. Calhoun*, 714 N.E.2d 905, 911 (Ohio 1999). Nor could reasonable jurists debate the district court's conclusion that Group's theory about another suspect was "unsupported and not credible." Order, R.49, PageID#8765. His theory rested "'on information and belief,'" *id.*, so denial of a certificate was proper.

b. The district court found that Group's remaining two ineffective-assistance claims were preserved for habeas review, because the Ohio courts "adjudicated [them] on the merits." 28 U.S.C. § 2254(d). Neither claim, it held, involved an "unreasonable application" of the Court's precedent or an "unreasonable determination of the facts." *Id.*; Pet. App. A-12 to A-16.

First, the district court reviewed Group's claims that his counsel was ineffective for not arranging a separate DNA expert witness after the initial expert

from Lifecodes refused to appear, and for not being prepared to cross-examine the State's expert. Pet. App. A-14. Reasonable jurists could not debate that a habeas court should defer to the Ohio Supreme Court's conclusions that Group's counsel was not "at fault" for the expert's decisions and that trial counsel was not deficient in cross-examining the witness when counsel had researched the law and been prepared with questions. *Group I*, 781 N.E.2d at 1002; *see also* Pet. App. A-14. Group's attempts to use *Trevino* to support his claims with evidence outside the record are meritless. Pet. App. A-94. It is beyond dispute that *Trevino* excuses only procedural default in certain state post-conviction systems. *See* 569 U.S. at 429. Reasonable jurists would not dispute that it would be a vast expansion of *Trevino* to apply it to a state court's ruling on the merits that a defendant would not be able to establish the prejudice prong of the *Strickland* analysis. *See Group I*, 781 N.E.2d at 1002; *see also Strickland*, 466 U.S. at 687.

Second, the district court reviewed Group's claim that his counsel was ineffective for telling the jury that a defense expert would show that the State's DNA evidence was contaminated, but then failing to produce that expert. Pet. App. A-15. Reasonable jurists would not debate that § 2254(d) requires deference to the post-conviction court's holding that the "'overwhelmingly persuasive'" evidence against Group—including DNA evidence, Sandra's eyewitness testimony, and the efforts to intimidate Sandra by firebombing her house—meant that Group could not demonstrate prejudice. *Group II*, 2011-Ohio-6422, ¶¶ 88, 92.

2. Group also sought a certificate of appealability on the district court's denial of a motion for discovery, a Rule 59 motion, and a motion to amend his habeas petition. None warrant a right to appeal.

The district court denied Group's motion for discovery in part on the basis of *Cullen v. Pinholster*, 563 U.S. 170 (2011), and in part because Group had procedurally defaulted some claims. Order, R.49, PgID#8754-56. As discussed above, the district court's analysis of Group's procedural default is not subject to reasonable debate.

The district court denied Group's Rule 59(e) motion because the "new evidence," in the form of an affidavit from an attorney and a declaration from an expert versed in DNA evidence, was not new. Order, R.67, PageID#8968-70. Both witnesses were available before the district court's final decision, and neither could overcome the state courts' conclusion that the overwhelming evidence against Group outweighed any prejudice. *Id.* Reasonable jurists could not dispute this conclusion, particularly in light of the abuse-of-discretion standard of review that applies to Rule 59(e) motions. *See Keith v. Bobby*, 618 F.3d 594, 597 (6th Cir. 2010).

The district court denied Group's motion to amend his petition to add a ninth claim of ineffective assistance, because it found that the claim was untimely, procedurally barred, and meritless. Order, R.67, PageID#8970-72. Again, Group must demonstrate that reasonable jurists could debate whether the district court abused its discretion in denying him leave to amend his petition. Because the

proposed claim could have been raised before the district court's final judgment, there was no abuse of discretion.

CONCLUSION

The Court should deny Group's petition for writ of certiorari.

Respectfully submitted,

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