No. 18-6834

IN THE
Supreme Court of the United States

DEXTER JOHNSON,
Petitioner,
v.

LORIE DAVIS, Director. Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the federal district court fail to abide by the "separate document" requirement of Fed. R. Civ. P. 58 when it entered a single final judgment disposing of all habeas corpus claims, but explained its rationale for doing so in two separate memorandum opinions?

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BRIEF IN OPPPOSITION

This is a federal habeas corpus appeal brought by Petitioner Dexter Johnson, a death-sentenced Texas inmate, in which the lower court entered final judgment in 2014. Johnson now seeks a writ of certiorari from the Fifth Circuit's denial of a certificate of appealability (COA). The circuit court refused to issue a COA, instead affirming the district court's refusal to relitigate his case under Johnson's theory that the lower court did not properly enter judgment on the majority of his claims and, therefore, retained jurisdiction. But Johnson's arguments to relitigate his federal habeas petition are without merit. Johnson's second bite at the apple should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit previously summarized the facts of the offense in its unpublished opinion denying Johnson a COA:

> During the early morning hours of June 18, 2006, Johnson and four friends were driving around the neighborhood looking for someone to rob. Johnson's companions were: (1) Keithron Fields, whom Johnson considered a brother; (2) Timothy Randle, who was driving that night; (3) Ashley Ervin, the owner of the car; and (4) Louis Ervin, Ashley's fifteen-year-old brother. Louis Ervin testified as to the events that took place that night.
>
> The group eventually came upon Maria Aparece and her boyfriend, Huy Ngo, talking while sitting inside Aparece's blue Toyota Matrix. Johnson ordered Randle to turn the car around and park alongside the curb because he wanted to "jack the people

that was in the car." He asked Fields if he was ready and placed a black bandana over his mouth while Fields pulled the hood on his jacket over his head. Brandishing a shotgun, Johnson ran up the driver's side and threatened to bust through the window if Aparece did not open the car door. Fields was pointing a medium-sized black gun towards the passenger side. Although she refused at first, Aparece eventually complied and opened the door. Johnson pulled Aparece from the car by her hair and forced her into the backseat of the Matrix while Fields shoved Ngo into the backseat as well. Johnson ordered Louis Ervin into the backseat with the victims while he and Fields climbed into the front. Johnson then drove the group around for close to ten minutes demanding money from Aparece and Ngo, but they did not have any. Angered, Johnson drove around for another twenty minutes or so searching for a wooded area while Aparece cried and begged for her freedom. They eventually found a park with a wooded area, and Johnson parked the Matrix in the woods. Randle and Ashley Ervin, who had been following closely in her car, parked nearby. Fields forced Ngo out of the Matrix and onto his knees while Johnson climbed into the backseat and raped Aparece at gunpoint. Fields held a gun to Ngo's head and taunted him as he was crying, saying things like "My brother in there having sex with your girlfriend. What you going to do about it?" Afterward, Johnson told the couple that "it was the end right here" and that he was going to "off them." Although they both continued to cry and Aparece begged for her life, Johnson and Fields marched the couple into the woods and shot them both once in the head.

Immediately after the murders, Johnson and Fields, driving Aparece's blue Matrix, caught up with the rest of their companions at a stoplight. Johnson and Fields were laughing and playing loud music. Before ordering them to follow him to a gas station, Johnson boasted, "Man, I had to go ahead and off them people." At the gas station—where police obtained surveillance video of the Matrix—Louis Ervin asked Johnson why he killed the couple, to which Johnson replied that Johnson had said the name "Louis" to the victims during the robbery and that "they didn't want to give him no money." Johnson also stated that "killing people is what he do." Later, Johnson took the group on a shopping spree at two separate Walmarts where police later obtained surveillance video showing Johnson, Fields, and Randle using Aparece's credit card.

> Johnson was arrested three days later for possession of marijuana and was quickly linked to the disappearance of Aparece and Ngo.

Johnson v. Stephens, 617 Fed. Appx. 293 (5th Cir. 2015).

II. Course of State and Federal Proceedings

Johnson was indicted, convicted, and sentenced to death for the robbery, kidnapping, and murder of Maria Aparece. ROA.8799-802. His conviction and sentence were affirmed on direct appeal. *Johnson v. State*, No. 75,749 (Tex. Crim. App. January 27, 2010) (unpublished), *cert denied*, 130 S. Ct. 3515 (2010); ROA.8803-815. While his direct appeal was still pending, Johnson also filed a state application for writ of habeas corpus, which the Texas Court of Criminal Appeals denied. *Ex parte Johnson*, No. 73,600-01, Per Curiam Order dated June 30, 2010; ROA.8446, 8452-487. A year later, Johnson filed a federal petition for habeas corpus relief under 28 U.S.C. § 2254 raising a total of eleven claims. ROA.8-204. Following the Director's answer, the district court issued its 2013 opinion (2013 Opinion) and denied relief on all but Johnson's claim that his custodial statement was admitted in violation of his Fifth Amendment rights, on which the court ordered the parties to provide additional briefing. ROA.370-419. After taking into consideration the supplemental briefing of both parties, the district court then issued the 2014 opinion (2014 Opinion) and denied relief on Johnson's Fifth Amendment claim as well, but determined that

the claim deserved "encouragement to proceed further" and certified only that claim for appeal. ROA.499-511.

Johnson appealed the district court's decision on his Fifth Amendment claim to the appellate court, and simultaneously requested an additional COA for four other issues raised in his federal petition. On July 2, 2015, the Fifth Circuit issued an unpublished opinion affirming the district court's denial of habeas relief on Johnson's Fifth Amendment claim and denying his request for additional COA. *Johnson v. Stephens*, 617 Fed. App'x. 293 (5th Cir. 2015). Johnson filed a petition for certiorari review which was denied. *Johnson v. Stephens*, 136 S. Ct. 980 (2016).

On June 6, 2017, Johnson filed a motion for new trial in the federal district court. ROA.585. Johnson claimed that because the court had earlier disposed of the bulk of his claims and did not enter a separate final judgment, the lower court retained jurisdiction over those claims. The district court denied Johnson's motion and his motion for reconsideration. ROA.823, 831. Johnson requested and was denied a COA by the Fifth Circuit Court of Appeals. *Johnson v. Davis*, slip Op. No. 17-70032 (5th Cir. Aug. 24, 2018) (per curiam). He now petitions this Court for a writ of certiorari.

REASONS FOR DENYING CERTIORARI REVIEW

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for

"compelling reasons." Sup. Ct. R. 10. In the instant case, Johnson fails to advance a compelling reason for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and straightforward application of established constitutional and statutory principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

In the court of appeals, as a jurisdictional prerequisite to obtaining appellate review of the constitutional claims raised, he was required to first obtain a COA from the court of appeals. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 483. Johnson had to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *see also Miller-El*, 537 U.S. at 336. Furthermore, the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the deferential scheme set forth in 28 U.S.C. § 2254(d). *Miller-El*, 537 U.S. at 336 (noting that, in making a

COA determination, "[w]e look to *the District Court's application of AEDPA* to petitioner's constitutional claims and ask whether *that* resolution was debatable amongst jurists of reason") (emphasis added). But Johnson did not meet the standards for obtaining a COA because the arguments he advances do not amount to a substantial showing of the denial of a constitutional right. In the court below, Johnson sought a COA but the circuit court found his claim unworthy of debate among jurists of reason. Fundamentally, Johnson cannot show the circuit court's decision to deny COA was in error much less worthy of this Court's review.

As explained by the Fifth Circuit, Johnson sought review of the district court's denial of his motion for new trial. The court noted that the case is procedurally "similar to cases where the petitioner seeks a COA for a district court's denial of a Rule 60(b) motion for relief from a prior habeas judgment." *Johnson*, slip Op. No. 17-70032, at 4. Thus, the court blends the COA standard with the underlying standard, "asking whether 'a jurist of reason could conclude that the district court's denial of [the petitioner's] motion was an abuse of discretion.'" *Id*. citing *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011) (brackets in original). Here the lower court correctly found that the district court did not abuse its discretion in refusing Johnson's bid to relitigate the bulk of his finished habeas corpus proceedings.

Under the Rules of Civil Procedure, a motion for new trial "be filed no later than 28 days after the entry of judgment." FED. R. CIV. P. 59(a)(2). Johnson argued to the court below that his motion for a new trial was timely because the district court's 2014 final judgment did not encompass its 2013 order dismissing the bulk of his habeas claims and his request to abate the proceedings or amend his petition. Johnson asserted in the courts below that the absence of a final judgment for that order makes his request for a new trial timely. But as both lower courts held, Johnson's interpretation of the events in his case is wrong.

The 2014 final judgment states: "In accordance with the Court's Memorandum and Order of even date, this Court DENIES Dexter Johnson's petition for a writ of habeas corpus. This case is DISMISSED with prejudice. This is a final judgment." ROA.512; *see also Johnson*, slip Op. No. 17-70032, at 5. In the court below, Johnson asserted that the 2014 final judgment was not a Rule 58(a) final judgment for the 2013 Opinion because the "of even date" language limited the judgment's applicability to the 2014 Opinion. But under Fifth Circuit precedent and as the lower court held, in determining the finality of a judgment, the district judge's intention is "crucial." *Johnson*, slip Op. No. 17-70032, at 5 (citing *Vaughn v. Mobil Oil Expl. & Producing Se., Inc.*, 891 F.2d 1195, 1197 (5th Cir. 1990)). Thus, "even when a judgment does not specifically refer to all pending claims, it will still be deemed final as to the

unreferenced claims 'if it is clear that the district court intended, by the [judgment], to dispose of all claims.'" *Johnson*, slip Op. No. 17-70032, at 6 (citing *McLaughlin v. Miss. Power Co.*, 376 F.3d 344, 351 (5th Cir. 2004)). When the lower court examined the language of the judgment of the present case, it found that "the district court clearly intended the judgment to dispose of all Johnson's claims, including those from the 2013 order." *Johnson*, slip Op. No. 17-70032, at 6.

Looking specifically at the "of even date" language which Johnson relied upon, the lower court noted was preceded by the phrase "'[i]n accordance with the Court's Memorandum and Order.'" *Id.* citing 2014 Opinion. Thus, although the judgment does not refer specifically to the 2013 Opinion, the court concluded "that reference is in the context of the court stating that the judgment was entered consistently with the 2014 [Opinion]." *Johnson*, slip Op. No. 17-70032, at 6. And, in the 2014 Opinion, the district court referred to the 2013 Opinion three times. ROA.499, 509, 511. Later, the district court sua sponte denied Johnson a COA for the claims it considered in the 2013 Opinion. ROA.511. Thus, the circuit court properly concluded that the district court's entering of a final judgment "'[i]n accordance with' the 2014 [Opinion], and its repeated references in the 2014 [Opinion] to the 2013 [Opinion], sufficiently indicates that the court intended the final judgment to dispose of all of Johnson's claims." *Johnson*, slip Op. No. 17-70032, at 6.

Finally, the lower court also notes that Johnson treated the final judgment as covering both orders. *Id*. The court found Johnson's treatment of the 2014 Final Judgment as covering the 2013 Opinion notable because the purpose of Rule 58's separate-document requirement is to clarify when the time for an appeal begins to run. *Id*. at 7 (citing *Ludgood v. Apex Marine Corp. Ship Mgmt*., 311 F.3d 364, 368 (5th Cir. 2002)). Johnson sought a COA on many of the claims denied in the 2013 Opinion to the Fifth Circuit and thus cannot claim he lost his right to appeal.

There is no dispute that final judgment was entered in this case and that all parties acted accordingly. Johnson's claims regarding the necessity of this Court's interpretation of Rule 58 are unfounded. He points to no other case where similar circumstances caused a petitioner to forfeit his appellate rights and he cannot point to such a situation here. Johnson has fully litigated his federal habeas petition and his attempts at a do-over should not command the attention of this Court. For these reasons, certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Johnson's petition for writ of certiorari.

Respectfully submitted,

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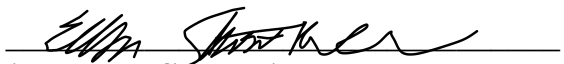

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