CAPITAL CASE

No. 19-6685

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT MCLAUGHLIN,

Petitioner,

v.

ANNE L. PRECYTHE,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KENT E. GIPSON
Law Offices of Kent Gipson, LLC
121 E Gregory Blvd.
Kansas City, Missouri 641134
(816) 363-4400
(816) 363-4300 (Fax)
kent.gipson@kentgipsonlaw.com

LAURENCE E. KOMP*
Supervisor, Capital Habeas Unit
Assistant Federal Public Defender
1000 Walnut, Ste. 600
Kansas City, MO 64106
(816) 471-8282
Laurence_Komp@fd.org
Counsel of Record

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

A disturbing trend is developing in capital cases in federal courts regarding the *pro forma* denial of certificates of appealability ("COA"). In Petitioner's case, both the District Court and the Eighth Circuit summarily denied Petitioner a COA. It has been over an entire calendar year since the Eighth Circuit has granted a COA in a capital case. This *pro forma* practice presents these questions:

1. Does the Eighth Circuit's *pro forma* practice of issuing unexplained blanket denials of COAs in capital habeas cases conflict with 28 U.S.C. § 2253, and this Court's decisions in *Slack v. McDaniel*, 539 U.S. 473 (2000), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Barefoot v. Estelle*, 463 U.S. 880 (1983), by preventing a condemned prisoner from obtaining meaningful appellate review of a first habeas petition?

2. Whether the summary denial of a COA was proper as it pertains to Petitioner's plain violation of the Confrontation Clause as interpreted by this Court in *Giles v. California*, 554 U.S. 353 (2008), when the state court allowed admission of prior testimonial hearsay statements without satisfying *Giles*' intent requirements to establish admissibility under the Sixth Amendment?

REPLY IN SUPPORT

Respondent mischaracterizes petitioner's requested relief as attempting to create "a new requirement that court of appeals must deny certificate of appealability by detailed opinions." Brief in Opposition ("BIO") p. 7. Petitioner makes no such request. Rather, petitioner seeks a requirement that the Eighth Circuit conducts its certificate of appealability ("COA") review in a manner consistent with this Court's precedent.

Respondent also asserts that the unexplained denial of the COA in no manner prevents this Court from exercising review. BIO p. 7. In contradiction with its previous statement, however, respondent then states that the standards for obtaining discretionary review can never be met because petitioner simply seeks "error correction" in seeking certiorari. *Id.*

Petitioner's questions presented are pertinent and important. Petitioner will respond to each of respondent's arguments.

A. **The Eighth Circuit's practice of *pro forma* COA denials.**

Respondent does not contest the *pro forma* denial practice that has developed in the Eighth Circuit as described by petitioner in his Petition for Writ of Certiorari ("Petition") pp. 8-9. The Eighth Circuit has summarily denied COAs in every capital case in the last year with no analysis – often using identical language. Sometimes, contrary to the language of the rule (F.R.A.P. 22(b) (2)) and the statute (28 U.S.C.

2253(c) (1)), the COAs were denied without explainations despite dissents. Respondent does not contest that this practice departs from that of other Circuits. Petition p. 9, n. 2.

Contrary to respondent's view, petitioner seeks a middle ground *already* endorsed by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In *Miller-El*, this Court held that "the COA determination under § 2253(c) *requires* an overview of the claims in the habeas petition and *a general assessment* of their merits." 537 U.S. at 336 (emphasis added). This Court further noted that the COA process "must not be *pro forma* or a matter of course." *Id.* at 337.

Petitioner is not advocating that the law requires a detailed analysis equivalent to a full blown merits review (as Respondent suggests). Rather, petitioner requests the required general assessment of the merits that cannot occur in the summary denial process currently employed by the Eighth Circuit.

Respondent's fall back argument, that petitioner cannot prevail because he is merely seeking error correction, ignores that there is nothing, abolsutely no analysis, for this Court to review from this *pro forma* process. Because the court provides no analysis (as Respondent suggests herein), a litigant can never compare the summary ruling with other decisions as required by this Court's certiorari standards. This Court should not contenance an inferior court cirumventing or insulating itself from the review by this Court. This practice of issuing summary denials is contrary to

Miller-El. Had the Fifth Circuit summarily denied a COA in *Miller-El*, if respondent's position is correct, *Miller-El's* petition for a writ of certiorari would have been denied and he would have been executed.

Respondent also relies upon COA denials from this Court. BIO p. 8. A cursory review of the procedural history of these capital COA denials indicates that they differ. For example, *Mathis v. Thaler*, Case No. 10A1346, involved successor litigation where previous Fifth Circuit opinions addressed the COA standard in reasoned opinions. *See In re Mathis*, 483 F.3d 395 (5th Cir. 2007); *Mathis v. Thaler*, 616 F.3d 461 (5th Cir. 2010).

In *Miller-El*, this Court reversed the Fifth Circuit's COA denial because that court had "sidestep[ped]" the appropriate procedure. *Id.* at 336. The Eighth Circuit's practice is much more egregious. This Court should reaffirm *Miller-El*, grant, review, vacate and remand the case for further proceedings consistent with *Miller-El*.

B. Petitioner presents a colorable claim under *Giles v. California*, 554 U.S. 353 (2008) and *Crawford v. Washington*, 541 U.S. 36 (2004).

Respondent asserts that petitioner cannot argue "the Eighth Circuit entered a decision" on this claim that satisfies this Court's Rule 10, and the Petition should be denied. BIO p. 11. This perniciously attempts to insulate completely review of a colorable claim, when such a claim is summarily rejected.

In a close case where the State failed to convince the jury to impose death, the confrontation clause violation here tainted the penalty phase. Indeed, the jury rejected the aggravating factors that the State submitted that the murder had been committed to prevent Ms. Guenther from testifying in *either* the burglary *or* the adult abuse prosecutions. L.F. 856–57; 865–66; Tr. 1999–2000. Respondent's omission of this critical fact is telling. The Missouri Supreme Court also unreasonably failed to consider this legal fact of signifcance.

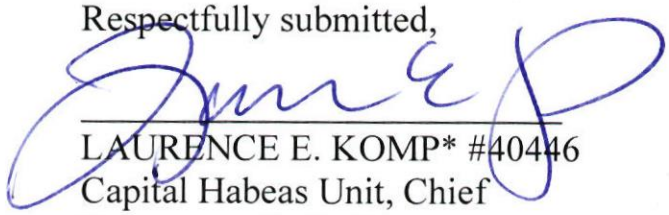
Petitioner also prominently cites this Court's majority opinion in *Giles* authored by Justice Scalia. Petition p. 21-22. In section E of *Giles*, this Court noted that the state courts could not ignore the significant element of intent. *Giles* noted that the state courts "did not consider the intent of the defendant because they found that irrelevant to application of the forfeiture doctrine." *Giles*, 544 U.S. at 377. This language highlights the error committed by the Missouri Supreme Court in its application of *Giles*. As in *Giles*, this Court should "decline to approve an exception to the Confrontation Clause unheard of at the time of the founding fathers or for 200 years thereafter." *Id.*

The Eighth Circuit failed to give meaningful effect to *Giles*, and thus, the Eighth Circuit's *pro forma* COA denial with no reasoning requires this Court's intervention. This Court should review this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court should grant the writ and remand with instructions to the Eighth Circuit, for a proper and full consideration of petitioner's COA request under this Court's precedent.

Respectfully submitted,



LAURENCE E. KOMP* #40446
Capital Habeas Unit, Chief
Federal Public Defender
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, MO 64106
Laurence_Komp@fd.org

KENT E. GIPSON, #34524
121 E. Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400 / fax 816-363-4300
kent.gipson@kentgipsonlaw.com

**Counsel of Record*

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that a true and correct copy of Petitioner's Reply in Support of Petition for Writ of Certiorari were forwarded pursuant to Supreme Court Rule 29.5, postage prepaid, this 31st day of January, 2020, to:

Mr. Michael J. Spillane
Assistant Attorney General
P.O.Box 899
Jefferson City, MO 65102

An original and ten copies of Petitioner's Reply In Support of Petition for Writ of Certiorari were forwarded to:

William Suter, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543

Under Supreme Court Rule 39, this 31st day of January, 2020.

Laurence E. Komp,* #40446
Counsel for Petitioner