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

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEN DAVIS,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

The Fifth Circuit Court of Appeals denied Petitioner's Application for a Certificate of Appealability (COA) following the district court's denial of his Section 2255 Motion without an evidentiary hearing. It denied a COA for an ineffective-assistance-of-counsel claim on the grounds that prejudice could not be shown, despite the fact that the COA determination is a "threshold" inquiry and is not coextensive with a merits analysis, and even though a circuit court judge had previously found the underlying claim of error to be meritorious. It also held that because it had not granted a COA on any constitutional claims, it was without jurisdiction to review whether the district court improperly denied the request for an evidentiary hearing. The questions presented here are:

1. Whether this Court should grant certiorari and exercise its supervisory authority to bring uniformity to the circuit courts' COA practice so as to avoid arbitrary results in habeas petitioners' access to federal appellate review?
2. Whether this Court should grant certiorari and exercise its supervisory authority to bring uniformity to the circuit courts' review of the denial of an evidentiary hearing?
3. Whether this Court should summarily reverse the Circuit Court's denial of COA where the underlying issues were clearly debatable by jurists of reason?

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JURISDICTION

On August 21, 2020, the United States Court of Appeals for the Fifth Circuit issued its opinion denying Petitioner's application for the issuance of a Certificate of Appealability. App. 1. On October 19, 2020, the United States Court of Appeals for the Fifth Circuit denied Petitioner's Petition for Rehearing En Banc. App. 11. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pursuant to the Court's Order of March 19, 2020, the petition for writ of certiorari is due on March 18, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI to the U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII to the U.S. Constitution

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

28 U.S.C. § 2253(c) provides, in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (B) the final order in a proceeding under section 2255.
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> * * *
>
> (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.

STATEMENT OF THE CASE

A. Introduction

In December of 1994, Petitioner Len Davis, an African American who at the time was a patrol officer with the New Orleans Police Department (NOPD), was indicted in federal court for civil rights offenses, in violation of 18 U.S.C. §§ 241 and

242, as a result of the shooting death of Kim Marie Groves on October 13, 1994. App. 13.[1] The death penalty had just been added as a punishment for violation of these Reconstruction Era statutes with the passage in September of 1994 of the Federal Death Penalty Act ("FDPA"). *See* Pub. L. No. 103-322, 108 Stat. 1796, 1959, reprinted in 1994 U.S.C.C.A.N. 1801.

The indictment alleged with respect to the critical "under color of law" element that Petitioner targeted Ms. Groves because she made a civil rights complaint against him and another NOPD officer as a result of the beating of an individual by the officers. App. 14. The indictment further alleged that on October 13, 1994, Petitioner, while on duty and using his police car, conducted surveillance of Ms. Groves and then ordered codefendant Hardy, known to Davis from the neighborhood, to kill her after reporting to him Ms. Groves' physical description and location. App. 14-15. On that same date, according to the allegations of the indictment, Hardy shot and killed Ms. Groves, and codefendant Causey, recruited by Hardy, concealed the firearm used. App. 15.

At the time of Ms. Groves' murder, Petitioner, unbeknownst to him, was under investigation, along with his patrol partner, Sammie Williams, and other NOPD officers, pursuant to an FBI sting operation codenamed "Operation Shattered Shield," targeting corruption in the NOPD.[2]

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[1] The Original Indictment for Violation of Conspiracy Against Civil Rights was filed on December 13, 1994. ROA.119. The Third Superseding Indictment for Civil Rights Murder and Witness Intimidation was filed on August 18, 1995. App. 13; ROA.815.

[2] Petitioner, Williams and other NOPD officers were separately indicted for a drug conspiracy as a result of this operation. *See United States v. Davis, et al*, No. 2:94-cr-00368 in the United States District Court for the Eastern District of Louisiana.

On July 31, 1995, just over six months after the civil rights indictment, the Government filed Notices of Intent to Seek the Death Penalty against Petitioner and co-defendant Hardy in the civil rights prosecution. ROA.797; ROA.799.

B. The 1996 Civil Rights Death Penalty Prosecution

Petitioner was represented by court-appointed counsel Curklin Atkins and Milton Masinter until December 13, 1995, at which time Dwight Doskey was appointed as co-counsel to replace Atkins. ROA.354, 366, 1296. Thus, more than a year after the institution of the civil rights prosecution, and less than four months prior to the start of trial as a death penalty prosecution, new counsel was appointed who played a leading role at trial in the defense of Petitioner.

Jury trial began on April 8, 1996. ROA.33. The Government's trial theory was that Petitioner ordered the killing of Ms. Groves as a result of her filing a brutality complaint with the NOPD Internal Affairs Division (IAD) against him in connection with the abuse of an arrestee who had, in fact, been abused by Sammie Williams. The Government's case relied heavily on recordings of Petitioner's cellular phone conversations that the FBI had recorded and monitored in real-time pursuant to a wiretap authorized as a part of Operation Shattered Shield. The conversations, however, appeared to use coded language, so the Government relied upon Williams as a key Government witness against Davis. Williams, who was on patrol with Davis throughout the day that ended in Ms. Groves's death, was put on the stand to "interpret" the ambiguous conversations on the wiretap intercepts for the jury and

connect them to that day's events.[3] Williams insisted at trial that he had no plea agreement with the Government.

According to the trial evidence, beginning in early 1994, Petitioner became partners with Williams and the two patrolled the Fifth District, which included the Florida housing project and the Lower Ninth Ward. ROA.9770-9772; ROA.9774. Williams was already caught up in the Operation Shattered Shield investigation of corruption in the NOPD. ROA.14195. As part of that sting operation, the FBI set up a warehouse where supposed cocaine deals took place, and NOPD officers were approached to act as security for the fake drug trafficking enterprise. The aim of the sting operation was to maintain it as long as possible to develop evidence against as many corrupt NOPD officers as possible before having to shut it down. ROA.14198. Petitioner was drawn into the FBI's investigation in April 1994, after Williams introduced him to an undercover FBI agent. ROA.14203. Williams and Petitioner were tasked with recruiting NOPD officers to work "details" guarding the drug shipments. ROA.14203. Over the course of the sting, the FBI paid Petitioner and Williams at least $100,000. ROA.14217-14218. At one point, Petitioner spoke to Juan Jackson, the undercover FBI agent posing as a drug dealer, about quitting the NOPD to work for the sham drug operation full time. ROA.14218.

[3] If Williams's interpretation of the wiretaps is correct, the FBI listened to the planning of a murder and did nothing to stop it, giving rise to the U.S. Attorney Office's conflict in prosecuting Petitioner for the shooting—a claim asserted in Petitioner's § 2255 Motion. ROA.6300-6312. Now former AUSA McMahon oversaw Operation Shattered Shield and inserted himself as a witness in habeas proceedings, essentially "testifying" to what occurred during the investigation while denying his and his office's conflict of interest. ROA.6696-6706. The Fifth Circuit recently overturned a conviction based on similar misconduct by McMahon, which it found "overwhelming" in "magnitude." *See United States v. Beaulieu*, 973 F.3d 354, 361 (5th Cir. 2020).

In addition to other Title III wiretaps, the FBI was authorized to and did wiretap a cellular phone given to Petitioner beginning in September of 1994 and continuing into December of 1994. ROA.14285-14286. Trained monitors listened to the calls contemporaneously and recorded notes on daily phone logs, which were reviewed by an FBI agent the next day. ROA.889-891.

According to Williams, around October 10, 1994, he and Petitioner were patrolling the streets of the Fifth District in the Lower Ninth Ward looking for an individual named Dwayne LeBlanc, a twin, who had shot a police officer. ROA.9788-9789; ROA.9790. They stopped a vehicle with a set of twins in it, but determined that they were Nathan and Nathaniel Norwood. ROA.9789. At this time, Kim Groves came onto the scene and wanted to know why they had stopped her nephews. ROA.9789. According to Williams, Petitioner "told her to go up the street and mind her own business," they "got into a short argument for a while," and she eventually left the scene. ROA.9789.

The next day, October 11, 1994, Petitioner and Williams were again patrolling the Lower Ninth Ward looking for Dwayne LeBlanc, and as they approached an individual standing on a corner, he started running and they began chasing him, with Williams running and Petitioner following in the police car. ROA.9790. When Williams caught up with the suspect, Williams hit him on the back of the head with his gun, which caused the suspect's head to hurl forward and hit a porch railing. It was only after Williams handcuffed the suspect that he realized it was Nathan Norwood, not Dwayne LeBlanc. ROA.9791. Kim Groves arrived at the scene and was

very angry, asking "what have we done to her nephew." ROA.9795-9796. Williams told her to leave the scene, but was not aware that she had exchanged words with Petitioner before leaving. ROA.9795-9796.

According to Williams, on the morning of October 13, 1994, Petitioner informed him that he had heard that Ms. Groves had filed a complaint against him for beating up her nephew and was saying things like "Len Davis beat him up." ROA.9796-9797. Williams responded that if IAD did investigate the complaint, Petitioner would be cleared since he did not, in fact, hit the twin, "so there was nothing for him to worry about." ROA.9795-9798. According to Williams, when he began his shift with Petitioner during the day on October 13, 1994, at 2:25 p.m., Petitioner started talking about how tired he was of IAD and "all the complaints that they investigate on him which are usually unfounded" and how angry he was at Groves for having reported him to IAD and "getting into his business and she ain't got nothing to do with it and people lying on him about various things." ROA.9960-9961. Williams explained, "you know, during the course of the day he would usually mellow out." ROA.9961.

Then, at around 5:00 or so on October 13, 1994, a significant chance event occurred: Williams and Petitioner were in their police vehicle leaving the Lower Ninth Ward when, while stopped at a red light, they noticed Kim Groves in the back seat of a vehicle that had "pulled up right on the side" of them, with the twins and their mother in the car. ROA.9961-9962. As they noticed each other, according to Williams, "Kim started pointing from the back of her car into our car saying – we would read her lips saying, 'That's them. That's them.'" ROA.9962. Petitioner pointed

back at Groves saying "I see you, too. I see you, too," and she then said some things they could not understand because the window was up before the two vehicles turned in different directions. ROA.9962. According to Williams, it was at this point that Petitioner "was real angry then" and said he was going to kill Kim Groves, have her killed, stating "I could get Paul to do that whore and we could handle the 30." ROA.9962.[4] Williams testified that this meant that Petitioner could get "Paul Hardy to come kill her and we will handle the police report, meaning that we will write the report whereby any evidence or any involvement with Paul Hardy would be eliminated." ROA.9963-9963. Petitioner then used his cellular phone to page Hardy on his beeper. ROA.9963.

Williams testified that Hardy, Damon Causey and two other men arrived at the Fifth District Station a little after 7:00 p.m. that date because Petitioner was going to show them some gruesome pictures from an unrelated murder in the Florida housing project. ROA.9967; ROA.9970-9971. At that point, "Len then took them inside to one of the sergeants' offices and started showing them different pictures of different murder scenes, and they looked at them for a while and then came back out and stood outside talking to them and had gave Paul his phone" and left. ROA.9971.

According to Williams, at around 7:28 p.m., he and Petitioner drove in their police car across the canal into the Lower Ninth Ward to see if they could locate Groves, but did not see her at that time. ROA.9974. They then drove to the Florida housing project, where they found Paul Hardy, who had a 9mm gun on him and who

[4] From the time of his arrest, Petitioner has asserted his innocence, stating that his conversations with Williams referred to planting drugs on Ms. Groves and having her arrested.

got into the police vehicle in the back seat. ROA.9975-9977. They proceeded across the canal to the Lower Ninth Ward again to locate Kim Groves and "let Paul know what she looks like so Paul could be familiar with the area that she frequents; *because we didn't know exactly where she lived or anything like that*, but we knew where we saw her at a lot" and "we had saw her on a couple of occasions in this same area" and "figured she at least hangs around that area." ROA.9976 (emphasis added). However, they did not find her and drove back across the canal into the Florida housing project and dropped off Hardy by around 8:00 p.m. on October 13th. ROA.9977-9978. According to Williams, they did not hear from Hardy again up until about 9:45 p.m. ROA.9979. They "went on to do normal police activities" and while they were doing that for about an hour and a half, Petitioner was "getting kind of hyper, angry with Paul Hardy because he hadn't called him." ROA.9979. Petitioner eventually called Hardy to express his anger, but Hardy calmed him down with Petitioner saying then that they were about to "go back over there to see if we can locate her." ROA.9979-ROA.9980.

Williams testified that they then drove back across the canal about 9:50 p.m. and saw Ms. Groves standing in the middle of Alabo Street talking to another individual. ROA.9980. At this point, Petitioner started beeping Hardy, saying "he doesn't want Kim Groves to see us passing in a police vehicle." ROA.9981. According to Williams, when Hardy called to return the beep, Petitioner gave him "a pretty vivid picture of what she was wearing, a real good description of Kim Groves, and let him

know she was standing right there in the middle of the street just talking." ROA.9981.

By the time Williams got off his shift at 10:30 p.m., Hardy had not called back and Williams was thinking "throughout the day it was like Paul was procrastinating with the matter and he hadn't gone over there," so he was thinking "it's not going to actually happen tonight." ROA.9982. Williams testified that, at 11:20 p.m., he was in his personal vehicle and received a call on a cell phone from Petitioner, who was also off-duty, saying "Signal 30, NAT," meaning "necessary action taken." ROA.9983-9984. Williams testified that he was "shocked" and "astonished" because, "even though I knew this murder was being planned throughout the course of the day – but by the time I got off shift, I didn't think it was going to happen." ROA.9984. Williams never made any attempt throughout the day and into the evening of October 13, 1994, to warn officers with IAD, Ms. Groves, or anyone else of the possibility that Paul Hardy was going to kill Ms. Groves.

Williams then met Petitioner at a bar, Flynn's Den. Petitioner had his cellular phone in one hand and his police handheld radio in the other and was talking to Gary Washington, a police officer assigned to the Fifth District, who happened to be the first officer on the scene of the murder and who confirmed that Kim Groves was killed. ROA.9988-9990. Officer Washington later testified that he was contacted by Petitioner and spoke to him on a police radio at around 11:21 p.m., at which time he indicated that Kim Groves was the victim of the shooting. ROA.10082-10085.

Petitioner and Williams were off-duty and did not write any police report on the murder.

On April 24, 1996, Petitioner was found guilty on all counts of the civil rights indictment, App. 18 (jury verdicts), and, on April 26, 1996, the jury returned sentences of death on all counts, App. 23 (jury verdicts), and Petitioner was sentenced to death on all counts. App. 26 (Judgment). In the fall of 1996, Petitioner was tried and convicted of the drug conspiracy Operation Shattered Shield indictment and sentenced to life imprisonment. *See* No. 2:94-cr-00368, Doc. No. 444. *See also United States v. Davis*, 132 F.3d 154 (1997). Petitioner's former NOPD partner Williams pled guilty and was sentenced to five years in prison in the drug conspiracy case. *See* No. 2:94-cr-00368, Doc. No. 482. Williams was never prosecuted for his role in the violation of Kim Groves's civil rights and her death.

C. The Appeal of Civil Rights Convictions and Death Sentences

On appeal of the civil rights prosecution, a panel of the Fifth Circuit affirmed Petitioner's convictions as to Counts 1 and 2, but reversed his conviction as to Count 3 for violation of 18 U.S.C. § 1512 because the Government produced "no evidence that the likelihood or possibility that the murder might impact a future federal investigation played a part in this crime." *United States v. Causey*, 185 F.3d 407, 422-23 (5th Cir. 1999); App. 27. The appellate court vacated Petitioner's death sentences and remanded for a new sentencing hearing. App. 41.

In addressing Petitioner's challenge to the sufficiency of the evidence in support of the "under color of law" essential element of the convictions, a majority of

the panel, citing to *United States v. Classic*, 313 U.S. 299 (1941); *Screws v. United States*, 325 U.S. 91 (1945), and *United States v. Price*, 383 U.S. 787 (1966), recognized that, in addressing the issue, it must determine (1) whether Petitioner misused or abused his official power, and (2) whether there is a nexus between the victim, the improper conduct and Petitioner's performance of official duties. *Id.* at 415. The majority concluded that the evidence was:

> sufficient to support a finding that Davis misused or abused his official power to access the police station, the police car, and the police radio to plan, execute, and cover up the murder. The evidence of a nexus between that abuse and the crime is likewise sufficient. Davis's status as a police officer puts him in the unique position to 'handle the thirty' and thus offer protection to Hardy from the consequences of the murder. The motive for the crime arose from a complaint lodged by Groves against Davis in his official capacity, it was facilitated by the ability of Davis to case the area in his police car without arousing suspicion and to offer assurance of police protection to his accomplices.

App. 34-35 (emphasis added).

In dissenting from this conclusion, Judge DeMoss noted that there was nothing about Petitioner's use of his police pager, radio and patrol car "that rendered the offense possible and nothing about the absence of these items that would have rendered the offense impossible." App. 43. Furthermore, finding the theory that the defendants, a rogue police officer, a drug dealer and the drug dealer's sidekick, were engaged in state action under color of state law "*nothing short of ridiculous*," *id.* (emphasis added), Judge DeMoss concluded:

> There is no but for relationship between Davis' status as a police officer and Groves' murder. Davis' conduct was not committed in the course of any ordinary police duty. Moreover, neither Davis nor any other defendant asserted any actual or apparent authority granted by the state as an initial or final justification for Groves' murder.

App. 43. The United States Supreme Court denied certiorari review on June 29, 2000. *Davis v. United States*, 530 U.S. 1277 (2000).

On August 9, 2005, on remand for a new penalty trial, Petitioner was once again sentenced to death. App. 62 (jury verdicts); App. 72 (judgment). On appeal, the judgment and sentences of death were affirmed by the Fifth Circuit, and the Supreme Court denied certiorari review on March 21, 2011. ROA.2165; *United States v. Davis*, 609 F.3d 663 (5th Cir. 2010), *cert. denied sub nom Davis v. United States,* 562 U.S. 1290 (2011). Petitioner's co-defendants Hardy, the convicted trigger-man, and Causey, are serving life sentences for their roles in the violation of Ms. Groves's civil rights resulting in her death. *See United States v. Causey*, 185 F3d at 412, 420-421; *United States v. Hardy*, 499 Fed.Appx. 388 (5th Cir. 2012).

D. The Federal Section 2255 Proceeding Challenging the 1996 Civil Rights Convictions

On March 20, 2012, Petitioner filed a timely motion under 28 U.S.C. § 2255 for relief from his 1996 convictions for conspiracy against rights under color of law pursuant to 18 U.S.C. § 241, and deprivation of rights under color of law pursuant to 18 U.S.C. § 242, for which he received sentences of death. ROA.5498. *See also* ROA.6267 (corrected Section 2255 motion with citation to the record of the first trial); and ROA.6546 (amended Section 2255 motion). The motion alleged a number of claims challenging his 1996 convictions on federal constitutional grounds, including claims of the violation of his rights to due process and a fair trial under the Fifth, Sixth and Eighth Amendments due to a conflict of interest of the federal prosecutors prosecuting the case (Claim 1), *Brady* violations (Claim 8), race discrimination

(Claims 4, 12 and 20), and juror misconduct (Claim 9); and claims of ineffective assistance of trial counsel at the guilt phase trial in violation of the Fifth, Sixth and Eighth Amendments (Claims 2, 3, 9, 10, 11 and 22-29).

Petitioner specifically alleged that trial counsel did not investigate, develop, or present a consistent theory of defense at trial to the Government's case in support of the essential element of "under color of law" for purposes of Counts 1 and 2 for conspiracy to deprive and deprivation of Kim Groves' civil rights in violation of 18 U.S.C. §§ 241 and 242. In fact, as Petitioner alleged in his Section 2255 motion, the record reflected that trial counsel's defense against the essential element of color of law was deficient in many significant respects. Trial counsel failed to argue and present evidence that the dispute with Ms. Groves was, in fact, highly personal and ripened only when she happened to appear in the car next to Petitioner in the late afternoon of October 13th and gesture to him in such as manner as to support that all subsequent actions allegedly taken by Petitioner that night were motivated more by anger at her actions at that time, rather than the IAD complaint. Additionally, rather than make the insufficiency of the evidence of the "under color of law" element a centerpiece of the defense against the Government's case for guilt, defense counsel relegated it to, at most, an afterthought both in connection with counsel's deficient cross-examination of Government witnesses, including key witness Sammie Williams, and in the defense case and in closing argument to the jury.[5] As a result,

[5] In the closing argument, trial counsel argued that the "under color of law" element is satisfied only when a police chief beats a person up while trying to arrest him, but not if the police chief gets mad at him and, even while in uniform, asks someone else to beat him up, because "[i]t doesn't make any difference what he has on. He's just a person acting against another person." Doc. 710-1, pp. 11-12.

counsel failed to make the case that Petitioner never asserted any actual or apparent authority granted him by the state in connection with the killing of Kim Groves, nor was he acting in the course of some official duty, such as by making or threatening an arrest or responding to the crime scene. Further, trial counsel failed to argue or present evidence that Petitioner had no idea where Kim Groves lived and drove around the Lower Ninth Ward looking for her because that was where he had seen her, just as a private citizen could have done. Trial counsel also failed to argue or present evidence that driving around the Lower Ninth Ward in a highly visible police vehicle would have aroused suspicions and was more of a disadvantage than an advantage. Trial counsel also failed to argue or present evidence that, when Petitioner later came across Ms. Groves at around 10:00 that evening, it was again by happenstance as he drove around the Lower Ninth Ward and saw her in the middle of Alabo Street talking to another individual, not knowing that she had been placed in a "safe house" earlier that evening by IAD, which she had apparently left on her own accord. Nor did trial counsel argue or present evidence that Petitioner did not make or threaten any arrests or "handle" the crime scene investigation that evening, and the only protection possibly offered to Hardy would have been his willingness not to report him to police, nothing more than what a civilian co-conspirator could have done. *See generally* Claim 11, ROA.6401-6407; ROA.2413-6421.

(in the district court record only). Further, counsel stated that Petitioner "didn't act under color of law. He has the trappings of a police officer, but when he is talking about Kim Groves or he is talking to Paul, do you ever hear him talk about anybody going to get anything, it's for anybody, it's for anything? He's just mad at that woman." Doc. 710-1, p. 12.

It was only when trial counsel moved for a post-judgment of acquittal based on insufficiency of the evidence that the element of "under color of law" was finally litigated. ROA.2160. While denying the motion, the district court, even in the face of trial counsel's deficient performance with regard to this issue, stated, "I'm bothered by the color of law issue." ROA.10341.

On December 14, 2015, the district court judge, who was also the trial judge, recused herself from the case, and it was re-assigned. ROA.6868. There was no activity in the case for the next 18 months, until June 13, 2017, when the district court ordered Petitioner to file an updated witness and exhibit list "if they seek an evidentiary hearing on pending claims." ROA.6911. The Government was ordered to file its own witness and exhibit list in response. ROA.6911. Petitioner initially requested that the filing of the witness list and exhibits be suspended briefly in order for certain issues to be resolved, including the completion of discovery. ROA.6920. Nevertheless, Petitioner filed a detailed evidentiary hearing witness and exhibit list on June 27, 2017. ROA.6925. Following the Government's filing of a pleading opposing an evidentiary hearing, rather than a witness and exhibit list, ROA.6932, Petitioner filed a response to the Government's opposition, ROA.6991, and a supplemental response. ROA.7009.

On August 28, 2017, the district court conducted a telephonic status conference. The district court explained that the initial thought was to select dates for a hearing. ROA.14448. The district court inquired as to whether counsel was prepared for a hearing and admonished: "I need you all to get a little bit more active

in getting this case ready for a hearing." ROA.14557. The district court acknowledged that there were "certain claims that don't need an evidentiary hearing," and for those claims "I do intend to at least have oral argument on all claims." ROA.14558.

Following a meeting between counsel for Petitioner and for the Government to resolve discovery issues, ROA.7023, Petitioner filed a memorandum in support of granting an evidentiary hearing on his claims concerning ineffective assistance of counsel in the 1996 trial, as well as *Brady/Giglio* violations, juror bias, and the Government's conflict of interest in connection with the 1996 trial. ROA.7050. Attached to the memorandum were the affidavit of 1996 trial counsel Dwight Doskey, App. 99, declarations of jurors in the 1996 trial, ROA.7091, and Government star witness Sammie Williams's un-redacted FBI-302 witness interview reports, ROA.7072, provided by the Government for the first time in 2017 in connection with the earlier discovery meeting.

As set forth in trial counsel's affidavit, despite the critical nature of the "under color of law" element, trial counsel did not investigate or litigate the weaknesses of the Government's case in support of the element. To the contrary, trial counsel's undisputed affidavit states that there was no discussion or consideration of addressing it in pretrial motions or through investigation, and there was no strategic decision made not to do so. App. 99. As a result, trial counsel was not aware that there was evidence that Petitioner knew Ms. Groves in another very personal context that could have been used to counter the Government's theory, as alleged in the

indictment and asserted at trial, that Petitioner targeted Ms. Groves because of her IAD complaint against him in his official capacity. App. 99-100.

In essence, trial counsel could have established that this was a purely private dispute arising from years of personal history and animosity between Petitioner and Ms. Groves that had nothing to do with his position as a police officer or her filing a baseless brutality complaint against him. This evidence would have then been used to counter that there was any "nexus" between Ms. Groves, her murder and Petitioner's performance of official duties or that any "air of official authority" "pervade[] the entire incident." *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991) (deputy was found to have acted under color of law when, out of personal jealousy, he assaulted his wife's former lover with the help of another officer and the two ran him out of town in their squad car, and an "air of official authority pervaded the entire incident"). Given the strength of the dissent on direct appeal on the insufficiency of the evidence in support of "under color of law," trial counsel's failure to investigate this issue was not only deficient performance but also resulted in prejudice in that it is more likely than not that the result of the proceedings would have been different.

Despite this uncontroverted specific evidence directly relevant to the IAC claim with respect to the "under color of law" element, on March 22, 2018, the district court issued its Order and Reasons denying Petitioner's request for an evidentiary hearing and ordering that Petitioner's claims, and all other pending motions filed in connection with his motion filed pursuant to 28 U.S.C. § 2255, be dismissed. App. 76.

The 13-page opinion was issued without any reference to Petitioner's witness and exhibit list and without any opportunity for Petitioner to respond to the Government's opposition to Section 2255 relief or to argue the merits of any claims to the district court orally, as had been previously referenced. In denying Petitioner's request for an evidentiary hearing, the district court, citing to the abuse of discretion appellate standard of review, erroneously found that Petitioner presented "no new facts or evidence" in support of his "conclusory claims," and erroneously concluded that Petitioner's "mere recitation of incredible conclusions" does not warrant an evidentiary hearing. App. 77.

In denying relief on the claim of ineffective assistance of trial counsel at the 1996 trial, the district court concluded that Petitioner's allegations of ineffectiveness "are based on contentions that are not supported by the law or the evidence" and are "mere conclusions" about his lawyer's performance and not enough to "give rise to a credible assertion of a deficiency" and also fail to demonstrate prejudice. App. 86-87. The district court did not address the undisputed affidavit of 1996 trial counsel Dwight Doskey. Moreover, in denying relief on all of Petitioner's claims, the district court erroneously concluded that Petitioner's Section 2255 motion "raises issues previously considered and decided by both the appellate court and this Court," App. 81, when, as set forth in the memorandum in support of an evidentiary hearing, Petitioner raised an ineffective assistance of trial counsel claim that had not been previously considered and decided by the federal courts.

The district court issued a judgment denying Petitioner's Section 2255 motion with prejudice, App. 89, and issued a denial of a Certificate of Appealability. App. 91.

Petitioner filed a timely motion to alter or amend the judgment denying habeas relief without a hearing. ROA.7151. Petitioner attached the affidavit of investigator Bruce Johnston, concerning the details of his investigation of the "under color of law" element, confirmed by witnesses, including the prior personal relationship between Petitioner and Ms. Groves that, since its dissolution, resulted in long-standing friction and hatred between the two; that Ms. Groves was motivated to file the IAD complaint against Petitioner because of this ongoing personal animosity; and that had trial counsel conducted an adequate investigation they would have uncovered this information. App. 102. In dismissing the motion, the district court concluded again that Petitioner's "argument of ineffective assistance of counsel are mere conclusions not supported by the record or the law." App. 92, 96. Once again, the district court failed to mention the Doskey and Johnston affidavits.

E. Petitioner's Application in the Fifth Circuit for a COA

In his timely application before the Fifth Circuit for the issuance of a COA, Petitioner raised the following issues:

1. Whether he is entitled to a certificate of appealability on the issue of whether the district court erred in denying the Sixth Amendment claim that his counsel in the 1996 guilt-phase trial was prejudicially ineffective?
2. Whether he is entitled to a certificate of appealability on the issue of

whether the district court erred in denying the Sixth Amendment claim of adverse impact of external influences on jury deliberations at the 1996 guilt-phase trial?

3. Whether he is entitled to a certificate of appealability on the issue of whether the district court erred in denying the *Brady/Giglio* claim?
4. Whether he is entitled to a certificate of appealability on the issue of whether the district court abused its discretion in denying a hearing on any of these claims?

A panel of the Fifth Circuit, which was not the same panel that decided the direct appeal, denied the issuance of a COA, concluding with respect to the Sixth Amendment ineffective assistance of trial counsel claim that, in light of the "overwhelming" evidence for the "under color of law" requirement, Petitioner has not shown the requisite prejudice, that is, "a reasonable probability" that the result of his trial would have been different "if his attorney had done more investigating" into the "under color of law" requirement and found Petitioner's personal history with Groves. App. 6-7. In describing the evidence as "overwhelming," the panel failed to acknowledge for purposes of the decision before it – whether to issue a COA – that at least one other Fifth Circuit judge had concluded, to the contrary, that the trial evidence, even despite trial counsel's deficiencies, was "laughable."

With regard to the Sixth Amendment juror claim, the panel concluded that "the evidence reflects no external influence on the jury." App. 7. Regarding the claim that the Government withheld key evidence in violation of *Brady v. Maryland*, 373

U.S. 83 (1963), the panel concluded that Petitioner failed to make any showing of materiality. App. 8-9.

The Fifth Circuit also concluded that because Petitioner had not made the requisite showing for the granting of a COA on his constitutional claims and it could not issue a COA, "we have no power to say anything about his request for an evidentiary hearing." App. 9-10. The appellate court denied Petitioner's timely motion for rehearing en banc. App. 11.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Resolve Conflicts Among The Circuits Regarding Circuit Court Review Of A District Court's Denial Of A COA.

A. The Court Should Grant Certiorari To Resolve A Conflict Among The Circuits About Whether A Certificate May Be Denied Despite A Disagreement, In Fact, Among Judges.

A federal prisoner such as Petitioner seeking a COA must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make such a showing, a petitioner need only demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Courts undertaking a COA

inquiry should "ask only if the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 348) (internal quotation marks omitted). The bar is a low one: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* (alteration in original) (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted). The threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El*, 537 U.S. at 337.

Circuit courts are authorized to adopt local rules and practices to govern the disposition of COA applications. *See Hohn v. United States*, 524 U.S. 236, 242-43 (1998). That authority is not at issue here. Rather, the problem highlighted in this Petition, and in Petitioner's case, is that under the current patchwork of circuit rules, similarly situated habeas petitioners are afforded different opportunities for appellate review, but not for any necessary or rational reason; it is purely a function of geography.

1. There Is A Lack of Uniformity In The Rules And Practices Of The Circuits On When A COA Should Issue.

The fact that Petitioner's underlying "color of law" claim generated a dissent on direct appeal is, on its face, compelling evidence that reasonable jurists could debate the correctness of the district court's Section 2255 ruling on prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In fact, that previous dissent alone would have entitled him to a COA in at least two other Circuits. *See Shields v. United*

States, 698 F. App'x 807, 813 (6th Cir. 2017) (noting that COA was granted on Section 2255 claim based on dissenting panel member's decision on similar issue on direct appeal); *Shields v. United States*, No. 15-5609 (6th Cir. Nov. 4, 2015) (Order, ECF No. 8 at 2) (stating that "[b]ased on the dissenting opinion in the direct appeal, it appears that reasonable jurists could debate" the substantive claim, and granting COA); *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.").

Indeed, some members of this Court have indicated that a disagreement among judges as to the debatability of a habeas claim "alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution" of the claim. *Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari). To find otherwise would necessarily imply that dissenting federal appellate judges—who have been appointed by the President of the United States and confirmed by the United States Senate—are not "jurists of reason."

Yet lower courts are not uniform in their COA practices. Indeed, Petitioner's case is a subset of a broader inconsistency among the circuits' treatment of the existence, in fact, of a disagreement among jurists. In some circuits, a lack of unanimity on whether a certificate should issue automatically results in issuance of a COA. In others, however, it results in automatic denial.

a. The Third, Fourth, Sixth, Seventh, And Ninth Circuits: COA Is Granted If Circuit Judges Disagree.

A majority of the federal courts of appeals to have offered guidance on the issue—either by local rule or in reported decisions—permit a single circuit judge to issue a COA, even where the application is being considered by a panel. In the Third Circuit, COA applications are referred to a panel of three judges, and "if any judge on the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. R. 22.3; *see also Harper v. Vaughn*, 272 F. Supp. 2d 527, 529 n.4 (E.D. Pa. 2003). Likewise, in the Fourth Circuit, an application for a COA "shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue." 4th Cir. R. 22(a)(3); *see also Johnson v. Moore*, 164 F.3d 624, 1998 WL 708691, at *1 (4th Cir. 1998) (unpublished).

In the Ninth Circuit, an application for a COA is "presented to 2 judges rather than the full panel if only 2 are participating. Any judge participating may vote to grant relief and so order." 9th Cir. General Order 6.3(g)(1).

The Sixth and Seventh Circuits have not codified their COA procedures in local rules or general orders, but follow the same practice of granting a COA based on the vote of a single judge. *See Shields*, *supra*; *Thomas v. United States*, 328 F.3d 305, 307-09 (7th Cir. 2003) (explaining circuit practice whereby COA application is assigned to two-judge panel and then, if both vote to deny COA, the applicant may seek reconsideration by a three-judge panel, in which case COA will issue "if one of the judges to whom the application was referred under Operating Procedure 1(a)(1)

concludes, on reconsideration, that the statutory criteria for a certificate have been met"); *cf. Basinger*, *supra*.

b. The Second, Fifth, Eighth, And Eleventh Circuits: COA Can Be Denied Despite Disagreement Among Circuit Judges.

Conversely, the Second, Fifth, Eighth, and Eleventh Circuits permit a COA to be denied over a single judge's dissent, notwithstanding the "debatable among jurists of reason" standard. In the Second Circuit, "[t]he clerk initially refers a request for a certificate of appealability to a single judge of the panel assigned to a death penalty case, who has authority to issue the certificate. If the single judge denies the certificate, the clerk refers the application to the full panel for disposition by majority vote." 2d Cir. Internal Op. Proc. 47.1(c).[6] The Fifth, Eighth, and Eleventh Circuits do not have rules delineating that COA determinations are made by majority vote; instead, their decisional law reflects that these courts regularly deny COA by a vote of two-to-one. *See*, *e.g.*, *Cromartie v. GDCP Warden*, No. 17-12627 (11th Cir. Mar. 26, 2018) (denying COA by vote of two-to-one); *Vang v. Hammer*, 673 F. App'x 596, 598 (8th Cir. 2016) (same); *Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014), *cert. denied sub nom. Jordan v. Fisher*, 135 S. Ct. 2647 (same).

The split in the circuits requires this Court's intervention.

[6] The Second Circuit procedure allowing for non-unanimous COA denials applies at a minimum in capital cases. It is not clear from the Second Circuit's rules whether a similar procedure applies in non-capital cases.

B. The Court Should Grant Certiorari To Resolve A Conflict Among The Circuits About The Standard of Review For Granting A Certificate When An Evidentiary Hearing Is Denied, Particularly In Federal Cases Brought Under Section 2255.

An appeal of a § 2255 proceeding may raise more issues than merely the denial of the merits of a case. In such instances, the role of 28 U.S.C. § 2253(c)(2) (permitting the issuance of a COA for "the denial of a constitutional right") is not well articulated. This Court has held that *scope of habeas representation* under 18 U.S.C. § 3599 is appealable (COA standard notwithstanding) since it does not involve a "final order[] that dispose[s] of the merits of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180, 183 (2009). Yet this Court has assumed without deciding that the COA standard does indeed apply to a denial of a funding request. *Ayestas v. Davis*, 138 S. Ct. 1080, 1088 n.1 (2018). Whether the denial of an evidentiary hearing fits within the COA framework has never been resolved by this Court and the issue has divided the circuit courts below. This case presents an ideal vehicle for the Court to decide this issue and correct the scattershot approaches adopted by the various circuits.

1. Contrary To The Practice Of Other Circuits, The Fifth Circuit Has Found It Does Not Have Jurisdiction To Review The Denial Of A COA Where No COA Is Granted On The Underlying Constitutional Claims.

In Petitioner's case, the Fifth Circuit concluded that because Petitioner was not entitled to a COA on any of his constitutional claims, it lacked jurisdiction to address the improper denial of Petitioner's request for an evidentiary hearing. App. 1 at __; Fifth Circuit Opinion at 15. This extreme position is an outlier among the circuits. Only the Seventh Circuit has also suggested, in dicta, that appellate review

of an evidentiary hearing denial depends upon a substantial showing of the denial of a constitutional right. *Taylor v. United States*, 287 F.3d 658, 660 (7th Cir. 2002).

All other circuits allow review but are split on the proper standard. The District of Columbia, Fourth, Sixth, Ninth, and Eleventh Circuits apply the same COA standard applicable to claims of constitutional error: the debatable-among-reasonable-jurists standard. *United States v. Orleans-Lindsey*, No. 1:00-CR-00440-CCK-1, 2009 WL 10430188, at *1 (D.C. Cir. Sept. 18, 2009) (reasonable jurists would not find debatable whether it was an abuse of discretion to deny an evidentiary hearing); *United States v. Chin*, 358 F. App'x 440, 441 (4th Cir. 2009) (COA will not issue on ruling denying evidentiary hearing because "any procedural ruling by the district court" must be "debatable"); *McQueen v. Napel*, No. 11-2206, at 2-3 (6th Cir. Aug. 20, 2012) (COA on refusal to hold evidentiary hearing denied: COA will only issue if reasonable jurists could debate resolution in a different manner); *Collier v. McDaniel*, 253 F. App'x 689, 692 (9th Cir. 2007) (district court's ruling denying evidentiary hearing "not debatable among jurists of reason"); *Hinson v. Fla. Dep't of Corr. Sec'y*, No. 18-15129-H, 2019 WL 2525014, at *4 (11th Cir. Mar. 12, 2019) ("reasonable jurists would not debate whether the district court abused its discretion in denying . . . motion for an evidentiary hearing").

The First, Third and Tenth Circuits appear to apply the appellate abuse-of-discretion standard to reviewing the district court's denial of an evidentiary hearing in habeas cases, and it is unclear whether that is done in conjunction with the COA standard. *Forsyth v. Spencer*, 595 F.3d 81, 85 (1st Cir. 2010) (district court did not

abuse discretion in failing to hold evidentiary hearing); *United States v. Ruddock*, 82 F. App'x 752, 759 (3d Cir. 2003) ("[i]t was not an abuse of discretion for the District Court to rely on the transcript of the prior hearing instead of holding a new evidentiary hearing"); *United States v. Moya*, 676 F.3d 1211, 1214 (10th Cir. 2021) ("[w]e review the district court's refusal to hold an evidentiary hearing for abuse of discretion"); *United States v. Allen*, 290 F. App'x 103, 106 (10th Cir. 2008) (same).

The Court's guidance is necessary to address the disparate approaches in the lower courts. It is particularly appropriate to grant review here, where the Circuit Court found it had no jurisdiction to review the denial of an evidentiary hearing, essentially depriving Petitioner of the process he required to prove his entitlement to relief in his capital case.

2. The Refusal Of Jurisdiction To Consider Denial Of An Evidentiary Hearing in Section 2255 Cases, Strips Federally-Sentenced Capital Petitioners Of The Opportunity To Present Evidence In Support Of Constitutional Claims.

Although governed by the same Eighth Amendment jurisprudence, capital Section 2255 and Section 2254 proceedings vary in ways critical to federal practice. The most important of these is that in a capital Section 2254 case, the main post-conviction process should occur in state court. By the time the petitioner has entered federal court, the primary opportunity to develop extra-record facts in support of the petition has already taken place. If the Section 2254 petitioner does not succeed in state court, he has a chance to pursue federal claims for relief in the federal system, but the opportunity for new factual development, the ability to obtain a hearing, and the possibilities of relief will all be dependent on the state court process. *See, e.g.*, 28

U.S.C. § 2254(e)(2) (setting forth conditions for evidentiary hearing in Section 2254 cases).

The Section 2255 litigant by contrast has only one forum, and one opportunity, to develop and present extra-record facts in support of the Section 2255 motion, and that is in the federal district court. The Section 2255 district court is both the first and last place where a capital Section 2255 movant can develop facts necessary to support her constitutional claims. The federal prisoner is not constrained by exhaustion requirements or state procedural rulings like his state counterpart. For these reasons, the standard for evidentiary hearings in Section 2255 cases remains as it was pre-AEDPA: to merit an evidentiary hearing on constitutional claims, the movant need merely show that that "the motion and the files and records in the case" do not "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). If "the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible," and, if true, would entitle him to relief, "the function of 28 U.S.C. § 2255 can be served . . . only by affording the hearing which its provisions require." *Machibroda v. United States*, 368 U.S. 487, 495-96 (1962).

The Fifth Circuit's ruling creates a catch-22 and allows for the evisceration of Section 2255 review. Because the Section 2255 proceeding is a federal capital prisoner's only opportunity for development and presentation of extra-record facts, improperly denying a hearing deprives the prisoner of the ability to marshal evidence supporting his allegations, the very evidence necessary to meet the COA standard. In

this case, for example, the district court rejected Petitioner's ineffective-assistance-of-counsel allegations as conclusory and refused to hold an evidentiary hearing despite the existence of supporting declarations whose clear language met the *Strickland* prejudice standard. The Fifth Circuit believed it had no jurisdiction to review that decision. Under the Fifth Circuit's perverse standard, a district court's refusal to allow process—no matter how egregious—insulates the entire Section 2255 proceedings from review if a movant fails to support his claims with sufficient evidence, even where, as here, that process is necessary to prove those claims.

C. This Court Should Exercise Its Supervisory Authority To Bring Uniformity To The Circuits And Ensure That Access To Appellate Review Does Not Hinge On A Factor As Arbitrary As Geography.

This Court has the "general power to supervise the administration of justice in the federal courts," *United States v. National City Lines*, 334 U.S. 573, 589 (1948), which includes the "duty of establishing and maintaining civilized standards of procedure[.]" *See McNabb v. United States,* 318 U.S. 332, 340, (1943). In service of that duty, this Court "may exercise its inherent supervisory power to ensure that . . . local rules are consistent with the principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 649 (1987) (invoking supervisory power to abrogate a district court local rule that disqualified out-of-state attorneys for general bar admission privileges on the basis of office location, holding "the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court.").

This Court has regularly granted certiorari to exercise its supervisory power to bring uniformity to district and circuit court practices. *See*, *e.g.*, *Western Pacific*

Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 260-68 (1953) (invoking supervisory power to issue guidelines regulating the way circuit courts consider petitions for rehearing en banc); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946) (invoking supervisory authority to announce rule governing composition of federal juries); *Castro v. United States*, 540 U.S. 375, 382-83 (2003) (invoking supervisory authority to require that district courts notify pro se litigants about recharacterization and its consequences before actually recasting a prisoner's post-trial motion as one for § 2255 relief); *Rosales-Lopez v. United States*, 451 U.S. 182, 190-92 (1981) (exercising supervisory power to establish rule requiring district courts to inquire into racial prejudice on voir dire when there is possibility that racial prejudice could influence jury); *McCarthy v. United States*, 394 U.S. 459, 463-64 (1969) (exercising supervisory power to establish rule entitling defendant to plead anew if district court accepts a guilty plea without observing Fed. R. Crim. P. Rule 11). Respectfully, this Court should grant certiorari to bring uniformity to the circuit courts' COA practices.

The need for uniformity in this context is dictated by the constitutionally afforded protections of due process and equal protection, which guarantee that all persons similarly situated be treated alike. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). The equal protection clause applies not only to unreasoned distinctions based on race or relative affluence, but also to those based on accidents of geography. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964).

There is no principled reason to make a habeas petitioner's access to appellate review contingent on the specific region of the country where the crime occurred. And yet, this is the unavoidable result of the circuits' disparate COA practices; similarly situated habeas petitioners receive different opportunities for appellate review, purely based on the happenstance of geography. Indeed, had Mr. Davis's case originated in the Western District of Tennessee—just a few hours due north of New Orleans—a COA automatically would have issued based upon Judge Demoss's dissent on the "color of law" issue on direct appeal. *See Shields*, *supra*. Had it originated in any district court, other than those in the Fifth and Seventh Circuits, there would have been circuit-court jurisdiction to review the refusal to hold an evidentiary hearing. Distinctions as arbitrary as these cannot, and should not, be the basis for determining whether a prisoner is entitled to additional process.

D. Uniformity Is Especially Important In Capital Cases Because Of The Need For Heightened Reliability.

This Court has long recognized that the death penalty is fundamentally and qualitatively different from every other punishment because of its severity and finality, and therefore is constitutionally distinct:

> The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. *Moreover, he retains the right of access to the courts.* His punishment is not irrevocable.

Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (citation omitted) (emphasis added).[7] Because of this difference, a heightened level of reliability in capital cases is required that has no parallel in noncapital cases:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The lack of uniformity in circuit COA practice is detrimental to the constitutionally-recognized need for heightened reliability in capital cases because it guarantees that similarly situated capital habeas petitioners will receive different opportunities for appellate review of capital sentencing claims, purely as a matter of geography. There is no principled reason for this result; it only increases the odds that demonstrably unreliable death sentences will go uncorrected. Petitioner's case is an object lesson. Despite the considered opinion of a Fifth Circuit judge bearing directly on the debatability of the underlying "color of law" claim, Petitioner has been denied any additional process—process that he otherwise would have received if his case had been prosecuted in the Sixth or Seventh Circuits. Likewise he has been denied jurisdiction to appeal the denial of an evidentiary hearing—jurisdiction he would have been granted in any other circuit but the Fifth and Seventh Circuits.

[7] *See also id.* at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.").

This arbitrary result is an affront to the constitutional concerns at the core of this Court's Eighth Amendment jurisprudence. This is especially so in the federal context, where all individuals sentenced to death in federal court, including Petitioner, have been prosecuted by and within a single jurisdiction, the United States, represented in all instances by the Department of Justice. There is no rational basis why capital sentencing claims should be less deserving of post-conviction appellate review simply because the federal trial took place in New Orleans (E.D. La.), rather than a few hours further north in Memphis (W.D. Tenn.). Such a system encourages precisely the type of wanton and freakish results in the imposition of death sentences that our Constitution forbids.

II. The Court Should Summarily Reverse The Decision Below Because The Circuit Court Denied A COA Based On The Merits Of The Claims And Not Their Debatability, Contrary To *Miller-El* and *Buck*.

On its face, Petitioner's application demonstrated that the district court's resolution of his claim was "debatable," which is all that is required for issuance of a COA. *See Buck* at 774; *Miller-El* at 348. Yet the Fifth Circuit failed to apply that standard. The Fifth Circuit's failure to apply the proper COA standard is not an isolated error. This Court has repeatedly corrected the Fifth Circuit's unduly restrictive approach to granting COAs. *See Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) ; *Miller-El*, 537 U.S. at 327; *Buck*, 137 S.Ct. at 773-74. *See also Jordan*, 135 S.Ct. at 2652 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari) (noting Fifth Circuit's

"troubling" pattern of failing to apply the threshold COA standard required by this Court's precedent).

Three claims of constitutional error were presented to the Fifth Circuit. In each instance, while giving lip-service to the proper COA standard, the Court denied the claim based on analysis of the merits of the claim. *Buck* reiterated that even where the "court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief," it applied the wrong COA standard by "reach[ing] that conclusion only after essentially deciding the case on the merits." The Fifth Circuit repeated this same error in Petitioner's case.

Throughout its opinion, it is clear that the Fifth Circuit treated the COA inquiry as coextensive with a merits analysis. *See* App. 1 at __; Fifth Circuit Opinion at 7-8 (finding Petitioner failed to show "'a reasonable probability' that the result of his trial would have been different," then concluding *Strickland* claim not debatable); App. 1 at __; Fifth Circuit Opinion at 10 (finding no evidence of external influences, then concluding jury bias claim not debatable or deserving of encouragement); App. 1 at __; Fifth Circuit Opinion at 12-13 (finding materiality not established, then concluding *Brady* claim not debatable). In light of the direct conflict between the decision below and this Court's precedents, Petitioner respectfully requests that the Court grant the petition for certiorari, summarily reverse the decision below, and remand with instructions for the Fifth Circuit to issue a COA.

Although summary reversal is strong medicine, it is appropriate where, as here, "'the law is well settled and stable, the facts are not in dispute, and the decision

below is clearly in error.'" Eugene Gressman et al., Supreme Court Practice 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see id.* at 352 ("the Court has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous"). That remedy is especially appropriate where a circuit court has resisted applying a well-settled legal standard in a capital case. *See Lynch v. Arizona*, 136 S. Ct. 1818 (2016); *Wearry v. Cain*, 136 S. Ct. 1002 (2016); *Christeson v. Roper*, 135 S. Ct. 891 (2015) (*per curiam*); *Hinton v. Alabama*, 134 S. Ct. 1081 (2014) (*per curiam*); *Sears v. Upton*, 561 U.S. 945 (2010) (*per curiam*); *Jefferson v. Upton*, 560 U.S. 284 (2010) (*per curiam*); *Porter v. McCollum*, 558 U.S. 30 (2009) (*per curiam*).

CONCLUSION

For all the foregoing reasons, Petitioner's case presents issues going to the heart of the fundamental fairness of his first degree murder trial and resulting death sentence. Petitioner respectfully prays that this Court grant his writ of certiorari and permit briefing and argument on the issues presented or, alternatively, grant summary reversal because of the Fifth Circuit's failure to apply the proper COA standard in this death penalty case.

Respectfully submitted,

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