No. 20-7553

IN THE SUPREME COURT OF THE UNITED STATES

LEN DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that his counsel was constitutionally ineffective during the guilt phase of his trial.

2. Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that he was entitled to an evidentiary hearing.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. La.):

United States v. Davis, No. 94-cr-381 (Nov. 6, 1996)

United States v. Davis, No. 94-cr-381 (Dec. 12, 2002)

United States v. Davis, No. 94-cr-381 (Oct. 27, 2005)

United States v. Davis, No. 94-cr-381 (Mar. 22, 2018)

United States Court of Appeals (5th Cir.):

United States v. Causey, Nos. 96-30486 & 96-31173 (Aug. 16, 1999)

United States v. Davis, No. 01-30656 (July 17, 2001)

United States v. Davis, No. 01-30656 (Mar. 12, 2002)

United States v. Davis, No. 03-30077 (Aug. 4, 2004)

United States v. Davis, No. 05-31111 (June 16, 2010)

United States v. Davis, Nos. 14-30516 & 14-30552 (Oct. 28, 2015)

United States v. Davis, No. 15-31120 (Jan. 21, 2016)

United States v. Davis, No. 19-70010 (Aug. 21, 2020)

Supreme Court of the United States:

Davis v. United States, No. 99-8285 (June 29, 2000)

Davis v. United States, No. 02-274 (Dec. 2, 2002)

Davis v. United States, No. 04-7808 (May 16, 2005)

Davis v. United States, No. 10-7564 (Mar. 21, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 971 F.3d 524. The order of the district court (Pet. App. 76-88) is not reported in the Federal Supplement but is available at 2018 WL 1419351.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2020. A petition for rehearing was denied on October 19, 2020 (Pet. App. 11-12). The petition for a writ of certiorari was filed

on March 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of conspiring to violate civil rights resulting in death, in violation of 18 U.S.C. 241; depriving a person of civil rights under color of law resulting in death, in violation of 18 U.S.C. 242 and 2; and tampering with a witness, in violation of 18 U.S.C. 1512(a)(1)(C) and 2. Pet. App. 18-19; see id. at 13-17. After a capital sentencing hearing, the jury unanimously recommended a capital sentence, and the district court imposed that sentence. Id. at 20-26. The court of appeals affirmed petitioner's Section 241 and 242 convictions, reversed his witness-tampering conviction, and remanded for resentencing; this Court denied a petition for a writ of certiorari. 185 F.3d 407, cert. denied, 530 U.S. 1277. On remand, the district court found that petitioner was not eligible for a capital sentence. 2002 WL 35634197. The court of appeals reversed, and this Court denied a petition for a writ of certiorari. 380 F.3d 821, cert. denied, 544 U.S. 1034. After a second capital sentencing hearing, a jury again unanimously recommended a capital sentence for petitioner's Section 241 and 242 convictions, and the district court imposed that sentence. Pet. App. 62-73. The court of appeals affirmed, and this Court

denied a petition for a writ of certiorari. 609 F.3d 663, cert. denied, 562 U.S. 1290.

The district court denied petitioner's subsequent motion for post-conviction relief under 28 U.S.C. 2255, Pet. App. 76-89, and also denied petitioner's request for a certificate of appealability (COA), id. at 91. The court likewise denied petitioner's later motion to alter or amend the judgment. Id. at 92-98. The court of appeals denied petitioner's request for a COA. Id. at 1-10.

1. Petitioner was a New Orleans police officer. Pet. App. 4. On October 10, 1994, Kim Groves witnessed a New Orleans police officer pistol-whip her nephew; she promptly filed a police-brutality complaint against petitioner with the New Orleans Police Department (NOPD). Ibid. Petitioner learned of Groves's complaint on October 12 and was "enraged." Ibid.

The next day, petitioner contacted Paul Hardy, a drug dealer who had done favors for him in exchange for police protection, to discuss a plan to murder Groves. Pet. App. 5, 31. Petitioner offered to help plan the murder and to cover up for Hardy at the crime scene after Hardy committed it. Id. at 4. Petitioner invited Hardy and Damon Causey, one of Hardy's associates, to the police station. Ibid. Petitioner then drove Causey and Hardy around in his police cruiser so that Hardy could see Groves's neighborhood. Ibid. That evening, while on duty and in his police car, petitioner drove through Groves's neighborhood, looking for

Groves; when he found her, he contacted Hardy and provided him with Groves's location and a description of her appearance. Id. at 4, 6; 609 F.3d at 670. Forty-five minutes later, petitioner called Hardy to complain that Groves had not been killed yet, describing Groves's clothing and location in detail. 609 F.3d at 671.

At approximately 11 p.m. Hardy shot Groves "execution-style" in the head, killing her. Pet. App. 30; see 609 F.3d at 671. Petitioner used his police radio to confirm with an officer on the scene that Groves was dead and then "started jumping up and down in joy" and saying "[y]eah, yeah, yeah, rock, rock-a-bye" -- a reference to a film in which an assassin recited a similar phrase every time she killed someone. Pet. App. 4; see id. at 34.

2. Unbeknownst to petitioner, at the time he was planning Groves's murder, he was the target of an FBI undercover investigation into corruption and drug sales in the NOPD. See Pet. App. 4, 31; 609 F.3d at 671. In connection with that investigation, the FBI conducted surveillance and recorded the phone calls of several NOPD officers, including petitioner. 609 F.3d at 671.

A federal grand jury in the Eastern District of Louisiana returned an indictment charging petitioner, Hardy, and Causey on three counts. Count 1 charged the defendants with "willfully * * * conspir[ing]" to violate Groves's civil rights under color of state law, in violation of 18 U.S.C. 241, alleging that it was

"part of the plan and purpose of this conspiracy that * * * Groves * * * would be killed." Pet. App. 13-14; see id. at 15. Count 2 charged the defendants with "willfully depriv[ing]" Groves of her civil rights under color of state law by use of "unreasonable force," in violation of 18 U.S.C. 242 and 2. Pet. App. 16. Count 3 charged the defendants with willfully killing Groves to prevent her communications to a law enforcement officer regarding a possible federal crime, in violation of 18 U.S.C. 1512(a)(1)(C) and 2. Pet. App. 16-17. The government provided notice of its intent to seek a capital sentence. Id. at 31.

After trial, the jury found petitioner guilty on all three counts. Pet. App. 18-19. At the conclusion of the penalty phase, the jury unanimously recommended a capital sentence, finding both that petitioner possessed the requisite intent and the existence of a statutory aggravating factor, see 18 U.S.C. 3591(a)(2)(C), 3592(c)(9). Pet. App. 23-25. The district court imposed such a sentence. Id. at 26.

3. The court of appeals affirmed petitioner's Section 241 and 242 convictions but reversed his witness-tampering conviction and remanded for resentencing. Pet. App. 27-61.

As relevant here, the court of appeals rejected petitioner's argument -- which was premised on an assertion that his "offense did not have its genesis in [his] police duties" and "the murder [was] 'personal' as opposed to 'official'" -- that his Section 241 and 242 convictions "were not supported by sufficient evidence

that [he] acted under 'color of law.'" Pet. App. 33. Relying on this Court's decisions in 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), the court explained that "[i]n determining whether sufficient evidence supported the 'under color of law' element of the convictions," a court 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." Pet. App. 33-34. And the court identified evidence of both at petitioner's trial. Id. at 34-35.

With respect to misuse of official power, the court of appeals observed that the "jury heard evidence that [petitioner] misused or abused his official authority in planning, carrying out and covering up the murder." Pet. App. 34. The jury heard that while he was on-duty, petitioner "paged Hardy and Causey, discussed with them his plan to have Groves killed, met with them in the police station, [and] then took them in his police car to show them the area that Groves frequented." Ibid. The jury also heard how petitioner told Williams that he "would get Hardy to kill Groves, [and] then [petitioner] and Williams would respond to the murder scene and 'handle' any evidence that might link Hardy to the crime." Ibid. And the jury heard that, "while patrolling in the police car, [petitioner] spotted Groves and paged Hardy to give him Groves's location" and that petitioner "used his police radio

to confirm the hit with the police officer at the murder scene." Ibid.

With respect to the nexus requirement, the court of appeals explained that petitioner's "status as a police officer put him in the unique position to * * * offer protection to Hardy from the consequences of the murder." Pet. App. 35. The court further observed that "[t]he motive for the crime arose from a complaint lodged by Groves against [petitioner] in his official capacity," and that the crime "was facilitated by the ability of [petitioner] to case the area in his police car without arousing suspicion and to offer assurance of police protection to his accomplices." Ibid.

Judge DeMoss concurred in part and dissented in part. Pet. App. 41-48. As relevant here, Judge DeMoss dissented from the majority's decision to the extent that it affirmed petitioner's Section 241 and 242 convictions. Id. at 41-45. In his view, the court of appeals should have vacated those convictions because "the government failed to satisfy its burden of establishing a sufficient federal nexus." Id. at 45.

Petitioner filed a petition for a writ of certiorari, which this Court denied. 530 U.S. 1277.

4. On remand, the government again filed a notice of its intent to seek a capital sentence. See 380 F.3d at 825. The district court took the view that deficiencies in the indictment precluded the imposition of such a sentence, see ibid., but the court of appeals reversed, 380 F.3d 821, and this Court denied

certiorari, 544 U.S. 1034. New death-penalty proceedings took place in front of a new jury, which found both that petitioner possessed the requisite intent and the existence of a statutory aggravating factor, and unanimously recommended a capital sentence on both the Section 241 and 242 convictions. Pet. App. 62-71; 609 F.3d at 672. The district court imposed such a sentence. Pet. App. 73.

The court of appeals affirmed. 609 F.3d 663. In that court, petitioner again argued "that the evidence was insufficient to prove the 'color of law' element," for his Section 241 and 242 convictions, but the court explained that "the law of the case doctrine applies to foreclose review in this appeal" because it had "rejected this claim in [petitioner]'s first appeal." Id. at 697.

This Court denied certiorari. 562 U.S. 1290.

5. Petitioner informed the district court that he intended to proceed pro se during post-conviction proceedings. See 629 Fed. Appx. 613, 616 (per curiam). After finding that petitioner understood the consequences of proceeding without counsel and had voluntarily waived his right to counsel, the court ultimately entered an order permitting petitioner to represent himself with respect to the issues he wished to litigate but ordering standby counsel to represent petitioner on additional challenges. See ibid. The court of appeals vacated the district court's order, id. at 613, concluding that the district court "erred in not

allowing [petitioner] to exercise his statutory right to represent himself" and "erred in ordering standby counsel to litigate issues he did not agree to raise," id. at 618. Petitioner subsequently moved to vacate his convictions under 28 U.S.C. 2255 on numerous bases and requested an evidentiary hearing. See Pet. App. 76-78. The district court denied both motions. Id. at 76-88.

The district court rejected petitioner's claim that his counsel rendered constitutionally ineffective assistance by inadequately contesting the "under color of law" element for his Section 241 and 242 convictions. Pet. App. 96. The court observed that petitioner's argument consisted of "mere conclusions not supported by the record or law" and that petitioner could not establish that he was prejudiced by any deficient representation that might have occurred. Ibid.; see id. at 96-97. The court also rejected petitioner's remaining merits arguments, see id. at 82-84; 87-88, emphasizing that "it is worth remembering that in all respects there is overwhelming record evidence of [petitioner's] guilt in a horrendous federal crime," id. at 88.

The district court explained that "where the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the Court may deny a [Section] 2255 motion without an evidentiary hearing." Pet. App. 77. And the court observed that, "[e]ven after [it] allowed for additional exchange of discovery," petitioner "present[ed] no new facts or evidence in support of [his] conclusory claims," and found that petitioner's

"mere recitation of incredible conclusions does not warrant [an] evidentiary hearing." Ibid.; see id. at 82 (referring to petitioner's allegations as "merely * * * conclusions and speculation"); id. at 86 (referring to petitioner's "mere conclusions about [his] lawyer's performance").

The district court declined to issue a COA, finding that petitioner failed to make a substantial showing of the denial of a constitutional right. Pet. App. 91; see 28 U.S.C. 2253(c).

6. A panel of the court of appeals unanimously declined to issue a COA on all of petitioner's claims. Pet. App. 1-10.

The court of appeals explained that "a COA may only issue if the prisoner 'has made a substantial showing of the denial of a constitutional right.'" Pet. App. 5 (quoting 28 U.S.C. 2253(c)(2)). The court further explained that the COA inquiry begins with "a 'threshold question': has the applicant shown 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'?" Id. at 5-6 (quoting Buck v. Davis, 137 S. Ct. 759, 773 (2017)) (internal quotation marks omitted). The court recognized that this inquiry is "not a 'full consideration of the factual or legal bases adduced in support of the claims,'" id. at 6 (quoting Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)), and that a court "'ask[s] only if the District Court's decision was debatable,'" ibid. (quoting Buck, 137 S. Ct.

at 774). And it found that standard unsatisfied here. Id. at 6-9.

The court of appeals first determined that petitioner's "ineffective assistance of counsel claim is * * * not debatable." Pet. App. 7. The court observed that, "[t]o show the deprivation of effective counsel, a prisoner 'must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice,'" and that, "[i]n order to show prejudice, there must be 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 6 (quoting Buck, 137 S. Ct. at 775-776). The court noted that petitioner's trial counsel and an investigator submitted affidavits suggesting that counsel could have better investigated the nature of the relationship between Groves and petitioner, but explained that it "need not decide whether [petitioner] has made the requisite showing of his counsel's deficiency because no reasonable jurist could debate that [petitioner] suffered no prejudice." Ibid.

The court of appeals found that "[t]he evidence for the 'under color of law' requirement was overwhelming." Pet. App. 6 (citation omitted). The court recounted the trial evidence demonstrating that petitioner "put his plan into action the day after learning of Groves's complaint with NOPD"; that, "while on-duty," he met with Hardy and Causey at the police station and "took them in his police car to show them the area that Groves frequented"; that,

while still on-duty, he "cruis[ed] Groves's neighborhood," "spotted her," and "paged Hardy to give him Groves's location"; and that "Hardy went to go kill Groves with an assurance that [petitioner] would take care of any evidence at the crime scene." Id. at 6-7 (citation and internal quotation marks omitted). The court additionally found that petitioner "fail[ed] to show what difference additional information about his relationship with Groves would make," noting that "the jury already heard testimony that [petitioner] and Groves had known each other prior to the filing of the complaint that led to her death." Id. at 7. The court likewise found that petitioner failed to "show why that personal relationship would undermine his conviction given longstanding precedent that [Section] 241 and [Section] 242 convictions can arise out of crimes committed for personal reasons." Ibid.

The court of appeals also denied petitioner's request for a COA on his remaining claims. Pet. App. 7-10. The court declined to issue a COA on petitioner's claim that "his Sixth Amendment right to a jury trial was compromised by 'the adverse impact of external influences and misconduct' during his 1996 guilt-phase trial," observing that "[petitioner] fail[ed] to point to any external influences in his COA briefing" and finding that petitioner did not have "a cognizable constitutional claim, much less * * * a debatable one." Id. at 7-8. And the court also declined to issue a COA on petitioner's claim that the government

withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), finding that -- even assuming that the government did not turn over evidence -- "reasonable jurists could not debate the immateriality of this evidence" and his "Brady claims [were] therefore not debatable." Pet. App. 8-9.

Finally, the court of appeals likewise denied petitioner's request for a COA on the issue of whether he was entitled to an evidentiary hearing. Pet. App. 9-10. The court observed that "Congress specified that we can issue a COA 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" Id. at 9 (quoting 28 U.S.C. 2253(c)(2)). The court explained that because a district court's denial of an evidentiary hearing involves "[t]he denial of a statutory claim" that "obviously does not itself implicate a constitutional right," "a petition challenging an evidentiary ruling may only be entertained as corollary to a constitutional violation." Ibid. (citation omitted). And the court reasoned that "because a COA is a jurisdictional prerequisite to any appeal," it could not address petitioner's request for an evidentiary hearing in the absence of a COA on his constitutional claims. Ibid.

ARGUMENT

Petitioner contends (Pet. 22-35) that the court of appeals erred in declining to issue a COA on his ineffective-assistance claim and that the court likewise erred in declining to issue a COA to review the district court's denial of an evidentiary

hearing. Petitioner also suggests (Pet. 35-37) that this Court should summarily reverse the decision below because it conflicts with the Court's decisions in Buck v. Davis, 137 S. Ct. 759 (2017), and Miller-El v. Cockrell, 537 U.S. 322 (2003). Those contentions lack merit. The decision below is correct and does not conflict with any decision of this Court or implicate a division of authority among the courts of appeals. Neither a grant of certiorari nor summary reversal is warranted.

1. Petitioner contends (Pet. 23-24) that the court of appeals was required to grant a COA on his ineffective-assistance claim regarding his counsel's asserted deficiencies in investigating the "under color of law" element of his crimes because one judge on the panel that considered his merits appeal would have found that the government presented insufficient evidence on that element. Petitioner further contends (Pet. 22-26) that this Court's review is warranted because practices in the courts of appeals differ as to whether the vote of a single judge is sufficient to require the issuance of a COA. Both contentions lack merit. This Court has recently denied a petition for a writ of certiorari in a capital case involving similar arguments, see Nelson v. United States, 140 S. Ct. 1129 (2020) (No. 19-5568), and it should do the same here.

a. Section 2253 of Title 28 provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the

final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1)(B). It further provides that a COA "may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To satisfy that standard, an applicant must show that the district court's "resolution [of the post-conviction claims] was debatable amongst jurists of reason." Miller-El, 537 U.S. at 336.

b. Petitioner's assertion (Pet. 26) that differing practices adopted by the circuits for evaluating requests for COAs present a "split in the circuits" that "requires this Court's intervention" is unsound. The court of appeals here correctly determined that petitioner's "ineffective assistance of counsel claim is * * * not debatable." Pet. App. 7. As the court observed, id. at 6, such a claim requires the defendant to show both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). Here, although petitioner asserted deficiencies in his representation, the court found that "no reasonable jurist could debate that [petitioner] suffered no prejudice." Pet. App. 6. The court observed both that "[t]he evidence for the 'under color of law' requirement was overwhelming" and that petitioner in any event "fail[ed] to show what difference additional information about his relationship with Groves would make." Id. at 6-7.

Petitioner errs in relying (Pet. 23) on Judge DeMoss's dissent in his direct appeal as "compelling evidence that reasonable jurists could debate the correctness of the district court's Section 2255 ruling." Petitioner's direct appeal did not involve an ineffective-assistance-of-counsel claim or indicate that petitioner's counsel rendered ineffective assistance. The basis of Judge DeMoss's dissent was his disagreement with the majority about the type of evidence that can satisfy the "under color of law" element. See Pet. App. 42-44. He did not suggest that under the majority's contrary interpretation of the statute -- which would bind him and any other circuit judge in these collateral proceedings -- the amount of government evidence was anything less than "overwhelming," see id. at 6, let alone that additional investigation by defense counsel of petitioner's relationship with Groves would have made a difference to the trial outcome. Judge DeMoss's dissent on a different issue during the direct appeal thus provides no basis for questioning the unanimous determination of the three-judge panel below that petitioner's collateral attack did not warrant a COA.

c. To the extent that petitioner contends (Pet. 23-24) that Section 2253 should be read to permit an appeal any time a single circuit judge on a multi-judge panel evaluating an application for a COA votes in favor of granting a COA, that contention is foreclosed by this Court's precedents. In Hohn v. United States, 524 U.S. 236 (1998), this Court "construe[d] [Section] 2253(c)(1)

as conferring the jurisdiction to issue certificates of appealability upon the court of appeals rather than by a judge acting under his or her own seal." Id. at 245. And this Court has made clear that the courts of appeals may adopt differing local procedures for issuing COAs.

The predecessor version of Section 2253 stated that "[a]n appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding * * * unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." 28 U.S.C. 2253 (1952). Interpreting that provision in In re Burwell, 350 U.S. 521 (1956) (per curiam), this Court refused to "lay down a procedure for the Court of Appeals to follow for the entertainment of such applications on their merits." Id. at 522. The Court made clear that "[i]t is for the Court of Appeals to determine whether such an application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers." Ibid. The Court emphasized that "[i]t is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under [28 U.S.C. 2253], should be exercised." Ibid.

Burwell's holding remains good law. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1220, amended Section 2253 to its current form by, inter alia, replacing the phrase "certificate of probable cause" with

"certificate of appealability" and expanding the provision's coverage to encompass both state and federal prisoners. But none of those changes modified the provision's basic structure or those aspects of its language relevant to the question presented here. This Court in Hohn cited both Burwell and local circuit practices in construing the amended Section 2253. 524 U.S. at 242-243, 245. And the Federal Rules of Appellate Procedure provide that "[a] request [for a COA] addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." Fed. R. App. P. 22(b)(2) (emphasis added).

The statutory framework, as interpreted by this Court in Burwell and further elaborated in the Federal Rules, thus expressly anticipates that circuits will independently adopt their own procedures for addressing COAs. And even if variations in the approaches taken by the courts of appeals to issuing COAs warranted this Court's intervention, such differences are not implicated here. No jurist in this case has voted to issue a COA. And petitioner errs in asserting that Judge DeMoss's "dissent alone would have entitled [petitioner] to a COA" in the Sixth and Seventh Circuits. Pet. 23. Neither of those courts has held that a COA must issue on a claim because a judge on a prior merits panel would have granted relief on a different claim.

The Sixth Circuit's unpublished order granting a COA on an ineffective-assistance claim in Shields v. United States, 698 Fed. Appx. 807 (2017), relied on a dissenting opinion in the direct

appeal that had expressly described defense counsel's actions as "incomprehensible" and thus the basis for "a glaring ineffective assistance of counsel claim." United States v. Shields, 480 Fed. Appx. 381, 391-392 (6th Cir.), cert. denied, 568 U.S. 923 (2012); see id. at 394 (stating that the district court "failed to take into account the obvious inadequacies of the ineffective assistance defense counsel provided to the defendant"); see also Order at 2, Shields, supra (No. 15-5609) (6th Cir. Nov. 4, 2015). Here, in contrast, Judge DeMoss's dissenting opinion did not mention counsel's performance, let alone conclude that counsel had been constitutionally ineffective -- and thus contained no suggestion that reasonable jurists could debate the district court's later resolution of petitioner's ineffective-assistance claim.

The Seventh Circuit's grant of a COA in Jones v. Basinger, 635 F.3d 1030 (2011), is likewise inapposite. Jones involved a state prisoner's federal habeas petition raising the same claim that a divided state appellate court had rejected. See id. at 1038-1039. After a single circuit judge granted a COA on that issue, Order, Jones, supra (No. 09-3577) (7th Cir. Nov. 4, 2015), the panel noted that "[w]hen a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine," although a COA could be denied if "the views of the dissenting judge(s) are erroneous beyond any reasonable debate." 635 F.3d at

1040. But, unlike in Jones, where the constitutional issue that divided the Indiana Court of Appeals was the same issue on which the Seventh Circuit granted a COA, the issue that divided the court of appeals on petitioner's direct appeal is distinct from the ineffective-assistance-of-counsel claim on which petitioner later sought a COA. See p. 16, supra. Thus, no "divi[sion] on the merits of [a] constitutional question" supports the issuance of a COA. Jones, 635 F.3d at 1040. And petitioner identifies no circuit that would necessarily have granted one.

2. Petitioner contends (Pet. 29-31) that the court of appeals erred in declining to consider petitioner's request for a COA on whether he was entitled to an evidentiary hearing, once it had found that reasonable jurists could not debate the ultimate substance of the constitutional claims to which such an evidentiary hearing would pertain. That contention lacks merit, and the court's resolution of petitioner's request for an evidentiary hearing does not conflict with any decision of this Court or the decision of another court of appeals.

a. The court of appeals correctly determined that the denial of an evidentiary hearing under Section 2255 is not independently reviewable in post-conviction proceedings. To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) (emphasis added). No provision of the Constitution requires a court to grant a prisoner an evidentiary hearing on a claim for collateral relief.

Cf. Schriro v. Landrigan, 550 U.S. 465, 474 (2007). Issuance of a COA accordingly requires a showing that reasonable jurists could debate the merits of the underlying constitutional claim, not simply the district court's procedural decision to resolve that claim without holding a hearing. Cf. Slack v. McDaniel, 529 U.S. 473, 484 (2000) (finding that a court's denial of a post-conviction claim on procedural grounds, rather than on the merits, does not warrant a COA unless the prisoner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling") (emphasis added).

In any event, even assuming the procedural issue alone could be the subject of a COA, reasonable jurists would not debate whether the district court abused its discretion in denying an evidentiary hearing on petitioner's claims. Section 2255 provides that a court may deny a request for post-conviction relief without holding an evidentiary hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. 2255(b). An evidentiary hearing is thus not required if the prisoner's claims do not raise a legitimate factual dispute, the record refutes his claims, or his arguments are clearly without merit. See, e.g., Landrigan, 550 U.S. at 474; Hill v. Lockhart, 474 U.S. 52, 60 (1985); Sanders v. United States, 373 U.S. 1, 15 (1963). A district court's denial of an

evidentiary hearing is reviewed for an abuse of discretion. Landrigan, 550 U.S. at 469, 477. And, under the circumstances here, there was no abuse of discretion in the court's finding that petitioner's claims did not raise a legitimate factual dispute and that his arguments were without merit.

The district court correctly observed that petitioner's ineffective-assistance claim consisted of "mere conclusions not supported by the record or law." Pet. App. 96. And, as the court of appeals explained, petitioner "fail[ed] to show what difference additional information about his relationship with Groves" could have had on the trial outcome. Id. at 7. In the absence of any factual issue that the evidentiary hearing would productively address, no such hearing was warranted, and the district court did not abuse its discretion in denying one.

b. Petitioner urges this Court to grant review to resolve a purported disagreement among the courts of appeals regarding "[w]hether the denial of an evidentiary hearing fits within the COA framework." Pet. 27. No conflict exists warranting this Court's review.

Petitioner identifies (Pet. 27-29) no case in which a court of appeals granted a COA to review the denial of an evidentiary hearing while simultaneously denying a COA on the prisoner's constitutional claim. See Order at 2-5, McQueen v. Napel (No. 11-2206) (6th Cir. Aug. 20, 2012) (denying a COA on constitutional claims and declining to reverse the denial of an evidentiary

hearing); United States v. Moya, 676 F.3d 1211, 1213-1214 (10th Cir. 2012) (same); United States v. Orleans-Lindsay, No. 18-15129, 2009 WL 10430188, at *1 (D.C. Cir. Sept. 18, 2009) (per curiam) (same); United States v. Allen, 290 Fed. Appx. 103, 105-106 (10th Cir. 2008) (same); Collier v. McDaniel, 253 Fed. Appx. 689, 690-692 (9th Cir. 2007) (same), cert. denied, 553 U.S. 1057 (2008); United States v. Ruddock, 82 Fed. Appx. 752, 758-759 (3d Cir. 2003) (finding that the prisoner had not raised any constitutional issues and declining to reverse the denial of an evidentiary hearing); see also Hinson v. Florida Dep't of Corr. Sec'y, No. 08-3089, 2019 WL 2525014, at *2 (11th Cir. Mar. 12, 2019) (declining to grant a COA on the standalone question of whether the district court should have granted an evidentiary hearing); United States v. Chin, 358 Fed. Appx. 440, 441 (4th Cir. 2009) (per curiam) (similar).[1]

Although some of the decisions on which petitioner relies briefly considered whether to grant a COA on the evidentiary-hearing issue, none of the decisions actually confronted the question of whether the court would have the authority to do so absent a viable constitutional claim -- let alone found that the

[1] Petitioner also cites (Pet. 28-29) Forsyth v. Spencer, 595 F.3d 81 (1st Cir. 2010). That decision does not speak to the standard governing the issuance of COAs because it is not a decision regarding a COA. Instead, it is a merits decision in which the First Circuit considered whether the district court properly denied an evidentiary hearing along with its consideration of the merits of a constitutional claim. See id. at 84-85.

denial of an evidentiary hearing on its own could constitute "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) (emphasis added). In the absence of any sound indication that variances in the courts of appeals' approaches to evidentiary-hearing COAs would result in different outcomes in different courts of appeals, this Court's review is unwarranted.

3. Petitioner also contends (Pet. 35-37) that this Court should summarily reverse the decision below because the court of appeals applied a standard for granting a COA that is inconsistent with this Court's decisions in Buck, supra, and Miller-El, supra. That argument lacks merit, and this Court has repeatedly denied review of petitions raising similar arguments. See Vialva v. United States, 577 U.S. 1137 (2016) (No. 14-8112); Bernard v. United States, 577 U.S. 1101 (2016) (No. 14-8071); Bourgeois v. United States, 574 U.S. 827 (2014) (No. 13-8397); Robinson v. United States, 565 U.S. 827 (2011) (No. 10-8146); Hall v. United States, 549 U.S. 1343 (2007) (No. 06-8178).

In Buck, this Court explained that the COA inquiry "is not coextensive with a merits analysis" and that "the only question is whether the applicant has shown 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.'" 137 S. Ct. at 773 (quoting Miller-El, 537 U.S. at 327). And in Miller-El, the Court explained that "a court of appeals

should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief" after a "full consideration of the factual or legal bases adduced in support of the claims." 537 U.S. at 336-337.

The court of appeals here adhered to the Buck/Miller-El standard. It correctly recognized the applicable rule, quoting at length from Buck and Miller-El. See Pet. App. 5-6; pp. 10-11, supra. The court acknowledged that the COA inquiry begins with the "threshold question" discussed by the Court in Buck; that it "ask[s] only if the District Court's decision was debatable"; and that a court answering that question does not engage in a "full consideration of the factual or legal bases adduced in support of the claims." Pet. App. 5-6 (citations and internal quotation marks omitted). The court then faithfully applied that standard in denying each of petitioner's requests for a COA. On petitioner's ineffective-assistance claim, the court found that "no reasonable jurist could debate that [petitioner] suffered no prejudice," and thus that "claim is * * * not debatable." Id. at 6-7. On petitioner's Sixth Amendment juror-misconduct claim, the court found that petitioner failed to set forth a "cognizable constitutional claim, much less * * * a debatable one," emphasizing that petitioner "fail[ed] to point to any external influences" on the jury." Id. at 7-8 (internal citation omitted). And on petitioner's Brady claim, the court found that because "reasonable jurists could not debate the immateriality" of the

evidence identified by petitioner, "[j]urists of reason could not debate" the district court's denial of that claim. Id. at 8.

Petitioner is thus incorrect in asserting that the court of appeals gave only "lip-service to the proper COA standard" and "treated the COA inquiry as coextensive with a merits analysis." Pet. 36. Rather, the court adhered to the proper COA standard under Section 2253(c)(2), Buck, and Miller-El. Neither summary reversal nor plenary review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2021

[2] The Acting Solicitor General is recused in this case.