No. ____

In the
Supreme Court of the United States

JOHN CURTIS DEWBERRY,

PETITIONER,

v.

BOBBY LUMPKIN,

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 FOR REVIEW

Whether the United States District Court For The Eastern District Of Texas erred in denying Petitioner Dewberry a Certificate of Appealability when it found that Petitioner Dewberry's ineffective assistance of counsel claims lacked merit?

Whether the United States District Court For The Eastern District Of Texas erred in denying a Certificate of Appealability when it found that Petitioner Dewberry failed to satisfy the burden of persuasion for his ineffective assistance of counsel under the AEDPA?

Whether the United States District Court For The Eastern District Of Texas erred in sentencing Petitioner Dewberry to death when he was a minor?

Whether the United States District Court For The Eastern District Of Texas erred in denying Petitioner Dewberry an evidentiary hearing for his claims?

Whether the Court of Appeals for the Fifth Circuit erred in denying Petitioner Dewberry a Certificate of Appealability when it affirmed the District Court's recommendation?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

John Curtis Dewberry.

Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS
Trial Court Case No. 1:05CV440
DEWBERRY V. DIRECTOR OF TDCJ-CID
Petition DENIED 2/17/2020 Report And Recommendation Adopted 6/24/2021. District Court's Opinion is Reported at 2020 WL 10456818 and reproduced in the attached Appendix.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
Case No. 21-40511
JOHN CURTIS DEWBERRY v. BOBBY LUMPKIN
Judgment Dated 2/22/2022 Application for Certificate of Appealability DENIED. Court of Appeals Order is not reported and is reproduced in the attached Appendix.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dewberry respectfully requests that a Writ of Certiorari be issued to review the United States District Court For The Eastern District of Texas's denial of a Certificate of Appealability, which was affirmed by the United States Court Of Appeals For The Fifth Circuit.

OPINIONS BELOW

The February 17, 2020, order denying Petitioner Dewberry's Petition for Habeas Corpus from the United States District Court For The Eastern District Of Texas, is reproduced in the Appendix ("Pet. App. 12a") and is reported at 2020 WL 10456818 (slip copy).

The February 22, 2022, order from the United States Court Of Appeals For The Fifth Circuit is reproduced in the Appendix. ("Pet. App. 1a"). This order is not published.

BASIS FOR JURISDICTION IN THIS COURT

The United States Court Of Appeals For The Fifth Circuit entered judgment on February 22, 2022. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

> The Fifth Amendment to the United States Constitution provides:
>
> 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.
>
> U.S. Const. amend. V.
>
> The Sixth Amendment to the United States Constitution provides:
>
> 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.

U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides:

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

U.S. Const. amend. VIII.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C.§ 2253(c)(1)-(3) provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c)(1)-(3).

Title 28 U.S.C.§ 2254(d)(1)-(2) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The Incident In Question

On December 25, 1994, Elmer Rode was found dead at his residence by his sister, Ginger Rode. ("Pet. App. 16a"). Ginger Rode became concerned when Mr. Rode did not arrive at the family's Christmas gathering, and decided to investigate. Upon arriving at Mr. Rode's house, Ginger found the deceased's body bound with a belt and telephone cord and suffering from multiple bullet wounds. ("Pet. App. 16a"). It was later determined that Mr. Rode had been fatally shot numerous times by several weapons of different calibers. ("Pet. App. 17a").

B. Procedural History

Petitioner Dewberry was indicted for capital murder by the Grand Jury of Jefferson County, Texas. ("Pet. App. 5a"). Mr. Dewberry was represented by Trial Counsels James Makin and Jimmy Hamm at trial. Mr. Dewberry entered a plea of not guilty and did not testify at trial. On November 19, 1996, Mr. Dewberry was convicted of capital murder and sentenced to death. ("Pet. App. 13a"). Mr. Dewberry was 17 years old at the time of sentencing.

On October 20, 1999, the Texas Court of Appeals decided to affirm the lower court's decision.

("Pet. App. 13a"). On direct appeal, Mr. Dewberry was represented by Linda C. Cansler.

On December 7, 1998, attorney Kenneth Florence applied for a writ of habeas corpus. On March 19, 1999, the Texas Court of Criminal Appeals denied the petition, adopting the State's proposed findings of fact and conclusions of law almost verbatim. A subsequent petition filed by Mr. Dewberry was denied on December 5, 2000.

Following the third petition for postconviction relief, the Texas Court of Criminal Appeals opted to commute Mr. Dewberry's sentence to life in prison on June 22, 2005. ("Pet. App. 13a").

Two days later, attorney Thomas Scott Smith filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United Stated District Court for the Eastern District of Texas. ("Pet. App.13a"). On November 8, 2011, Gary Allen Udashen replaced Mr. Smith as Dewberry's counsel. Undersigned counsel replaced Mr. Udashen on August 11, 2020.

On February 17, 2020, Mr. Dewberry's writ of habeas corpus petition was dismissed by the United States District Court for the Eastern District of Texas without granting a Certificate of Appealability. On June 24, 2021, the report and recommendation were adopted. ("Pet. App. 4a; 10a"). On July 6, 2021, Petitioner appealed this District Court's decision not to issue a Certificate of Appealability to the Court of Appeals for the Fifth Circuit. The Fifth Circuit denied the appeal on February 22, 2022. ("Pet. App. 1a").

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DISTRICT COURT AND FIFTH CIRCUIT ERRED WHEN BOTH FOUND THAT MR. DEWBERRY WAS NOT ENTITLED TO THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER EITHER *STRICKLAND* OR AEDPA.

A court may issue a Certificate of Appealability ("COA") when an applicant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court denies a petitioner's habeas petition on procedural grounds "without reaching the merits of the petitioner's constitutional claim," the district court *must* issue a COA if the petitioner at least shows that: (1) jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel,* 529 U.S. 473, 483–84 (2000) (citing 28 U.S.C. § 2253(c)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The movant does not need to show that he would prevail on the merits, but rather show that the issues he presents are subject to *debate among jurists of reason*. *See Miller-El*, 537 U.S. at 327. A court could resolve the issues differently, or the issues are worthy of encouragement to proceed further. *See id.*; *see also Buck v. Davis*, 137 S. Ct. 759, 781 (2017) (Thomas, J.,

dissenting) ("A court may grant a COA even if it might ultimately conclude that the underlying claim is meritless, so long as the claim is debatable.").

Recently, this Court addressed the standards for issuing a COA in the Fifth Circuit. *See Buck*, 137 S. Ct. at 773. In *Buck v. Davis*, this Court reversed the Fifth Circuit based on the Fifth Circuit's failure to issue a COA. *See id.* at 780. Regarding the COA standard, this Court explained:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. . . . [The] threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims. When a [court] sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Id. at 773 (citations omitted). This Court noted that 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.* at 744.

Furthermore, a district court should resolve any doubts about whether to grant a COA in favor of the movant. *See Miller v. Johnson*, 200 F.3d, 274, 280-81 (5th Cir. 2000), *cert. denied*, 531 U.S. 849 (2000). In

making this inquiry, the court considers the severity of the prisoner's penalty. *See id.*

In this case, the District Court should have issued a COA because the issues of the dismissal of Mr. Dewberry's § 2254 petition could be debated by reasonable jurists on both substantive and procedural grounds. Specifically, Mr. Dewberry has made a significant showing that he was denied effective assistance of his trial counsel under (1) *Strickland v. Washington*, 466 U.S. 668 (1984) and (2) the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). These claims are discussed in detail below.

A. THE DISTRICT COURT ERRED WHEN IT FOUND THAT MR. DEWBERRY'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS LACKED MERIT UNDER STRICKLAND EVEN THOUGH HE PROCEDURALLY DEFAULTED.

This Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Under *Strickland*, a defendant demonstrates ineffective assistance of counsel by showing that (1) the trial counsel's performance was deficient, meaning that he or she made errors so egregious that they failed to function as the "counsel

guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *See id.* at 686; *Guidry v. Lumpkin*, 2 F.4th 472, 489 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1212 (2022). To establish prejudice, the defendant must show that there "is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

In *Martinez v. Ryan*, this Court established that "[where], under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S. Ct. 1309, 1320 (2012). To that end, this Court established a two-prong test to show cause to overcome a procedural default. *See id*. First, collateral counsel must have been ineffective when presenting or failing to present a ineffective assistance of trial counsel claim. *See id.* at 1318-19.

The second prong requires the petitioner to "demonstrate that the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit," meaning that the defendant had suffered prejudice from the representation. *Id.*

Petitioners in the Fifth Circuit have obtained a COA in cases involving ineffective assistance of counsel for issues varying from a "thorough background investigation" to a counsel's persistent sleeping during trial. *McFarland v. Davis*, 812 F. App'x 249, (Mem)–250 (5th Cir. 2020) (unpublished opinion); *Ibarra v. Davis*, 738 F. App'x 814, 818 (5th Cir. 2018) (unpublished opinion).

In its motion denying Mr. Dewberry's request for a certificate of appealability, the District Court held as follows;

> [The] highest state court found counsel did not provide ineffective assistance. As noted in the Report, the holdings in *Martinez* and *Trevino* do not furnish a federal habeas petitioner a vehicle for obtaining *de novo* federal habeas review of substantive constitutional claims which the petitioner litigated unsuccessfully in a state habeas corpus proceeding but now wishes to relitigate with new evidence and different counsel . . . Petitioner has failed to show either deficient performance or prejudice related to his claims against counsel. Further, petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United

> States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's claims should be denied.

("Pet. App. 6a n. 2") (citing *Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez*, 132 S. Ct. 1309).

Petitioner Dewberry's Strickland claim has merit. The District Court did not address one of the most critical elements of Mr. Dewberry's claim under *Martinez*. The Magistrate Judge failed to engage in *de novo* review, viewing his complaints as already failed. By accepting the Magistrate's report and recommendations in their entirety, the District Court unfairly dismissed Mr. Dewberry's claims without reaching their merits, and the Fifth Circuit further erred in affirming the order.

Mr. Dewberry's trial counsel committed numerous errors that fell below an objective standard of reasonableness under prevailing professional norms. Significantly, Trial counsel failed to file a motion for a new trial as requested by Mr. Dewberry. This failure clearly caused Mr. Dewberry prejudice since it deprived him of an adequate record for his appeal on issues of fact that are outside of the record. This failure prejudiced him further by forcing him to operate with a procedural default throughout these proceedings. The ineffective assistance provided by

trial counsel becomes even more evident when it is considered with counsel's other errors, including a blatant failure to investigate the case adequately. The failure to conduct a "thorough investigation" previously was sufficient for the Fifth Circuit to issue a COA. *See Ibarra*, 738 F. App'x at 818, and should be sufficient again in this case.

These errors alone should raise questions of adequacy under the "reasonable jurists" standard found in *Miller-El*. 537 U.S. at 327. Consequently, this Court should grant Mr. Dewberry's petition for a COA under *Strickland* so that he may continue to seek justice under the law.

B. *THE DISTRICT COURT ERRED WHEN IT FOUND THAT MR. DEWBERRY FAILED TO SATISFY THE BURDEN OF PERSUASION FOR HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM UNDER THE AEDPA.*

In its decision denying Mr. Dewberry's request for a certificate of appealability, the District Court addressed his claim under AEDPA, holding that:

> Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts

> in light of the evidence presented in the state court proceeding. Particularly, when a petitioner brings an ineffective assistance claim under the AEDPA, the relevant question is whether the state court's application of the deferential Strickland standard was unreasonable. *See Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014). "Both the Strickland standard and AEDPA standard are 'highly deferential,' and 'when the two apply in tandem, review is doubly so.'" *Id.* (quoting *Harrington*, 562 U.S. at 105). Petitioner has failed to satisfy his burden.

("Pet. App. 30a"). (citing *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 105 (2011)).

To support its decision, the District Court cited *Beatty v. Stephens*, which in turn relied on *Harrington v. Richter* as controlling precedent. *See Beatty*, 759 F.3d at 463. The *Richter* Court interpreted the AEDPA as follows:

> As amended by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.S. § 2254(d) stops short of imposing a complete bar on federal court re-litigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fair-minded jurists could

> disagree that the state court's decision conflicts with U.S. Supreme Court precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

Richter, 562 U.S. at 102-103.

However, this Court's decision in *Wilson v. Sellers* casts doubt on the continued applicability of the Richter standard of applying AEDPA deference. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). In *Wilson*, this Court stated that when applying AEDPA deference, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again." *Wilson*, 138 S. Ct. at 1192.

The Supreme Court's holding in Wilson has led to other courts questioning whether the Richter

standard has been overruled and, if so, for what type of claims. *Myers v. Superintendent*, 410 F. Supp. 3d 958 (S.D. Ind. 2019). For instance:

> The Supreme Court in *Wilson* further explained that *Richter* does not control in all § 2254 cases, noting that if it "[h]ad . . . intended *Richter*'s 'could have supported' framework to apply even where there is a reasoned decision by a lower state court," its decision issued the same day in *Premo v. Moore* "would have looked very different." *Wilson*, 138 S. Ct. at 1195. Instead, in *Premo*, the Supreme Court "focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA." *Id.* at 1195-96. Indeed, throughout *Wilson* the Supreme Court juxtaposes the "look through" presumption it adopts with the "could have supported" framework, which is difficult to square if the latter approach applied in all cases, even when reasons are provided for a state court's decision. *See id.* at 1193-95. *Wilson* casts serious doubt on the continued application of the *Richter* framework when the last state court decision provides reasons for the decision.

Id. (citing *Premo v. Moore*, 562 U.S. 115 (2011)).

In dismissing Mr. Dewberry's request for an appeal, the District Court relied on *Richter*, a standard this Court has indicated that may no longer be relevant. *See Wilson*, 138 S. Ct. at 1195. Although Petitioner Dewberry has provided substantial evidence and strong legal arguments to support his claims, the District Court's allegiance to an outdated standard seems to be a cause in its decision to deny his request for a certificate of appealability. As a result, this Court should resolve this budding circuit split on the matter of AEDPA deference.

II. THE DISTRICT COURT ERRED IN SENTENCING MR. DEWBERRY BECAUSE HE WAS A MINOR WHEN THE DISTRICT COURT IMPOSED THE DEATH PENALTY ON HIM.

This Court has found that it is inappropriate to sentence minors to death under the Eighth Amendment. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016); *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010); *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Because the death penalty is the most severe punishment, this Court requires it to apply to offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). This Court's justification for not imposing death sentences on juveniles stems from a

juvenile's "lessened culpability"[1] and greater "capacity for change,", and runs afoul of this Court's requirement of individualized sentencing for defendants facing the most serious penalties. *Miller*, 567 U.S. at 465.

As Petitioner Dewberry was a minor when he was sentenced to death, his sentence offended the Eighth Amendment and should be vacated. This Court has consistently held that death sentences imposed on minors contradict the Constitution. *See Montgomery*, 136 S. Ct. at 736; *Miller*, 567 U.S. at 465;

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[1] Scientific evidence shows that juvenile defendants have a diminished capacity due to changing brain structure which leads to impaired decision making and risk understanding skills. Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 U.C. IRVINE L. REV. 905, 923 (2021) ("These standards are problematic when applied to juveniles because young people do not have the same capacity as adults to evaluate the risks and to take these actions."); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 742 (2009) (stating "[b]y now, '[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence,'" and noting that brain structures that are essential to "planning, motivation, judgment, and decision-making . . ." are developed during adolescence); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626–34 (2005) (explaining that a study "found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among young adults.").

Graham, 560 U.S. at 74. This precedent is backed by modern science and comports with the standards of justice. *See Montgomery*, 136 S. Ct. at 736; *Roper*, 543 U.S. at 568.

As the United States Supreme Court has held, life sentences for juveniles must be extremely rare: "a lifetime in prison is a disproportionate sentence for all but the rarest of children." *Montgomery*, 135 S. Ct. at 736 (emphasis added). The Court went on to explain that:

> Miller drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.

Id. at 734.

A court's finding that life is a constitutionally legal sentence, then, is a legal determination that the juvenile offender being sentenced is among that rare subset that are incapable of rehabilitation. Under *Graham*, *Miller*, and their progeny, there must be a presumption of a non-life term of years sentence for a juvenile offender.

"The concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. "The Eighth Amendment, which forbids cruel and unusual punishments, contains a "narrow proportionality principle" that "applies to noncapital sentences." *Ewing v. California*, 538 U.S. 11 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957 (1991)). Thus, *Miller*'s and *Montgomery*'s requirement that life sentences be rare for juvenile offenders is binding on trial courts in imposing a sentence.

Here, is not one of those rare circumstances. Sentencing Mr. Dewberry to life imprisonment for a crime committed when he was 17 represents "an irrevocable judgment about [his] value and place in society which is at odds with a child's capacity for change and rehabilitation." *Graham*, 560 U.S. at 59. Children are constitutionally different from adults for purposes of sentencing. *See id.* at 59-61. Juveniles have a diminished culpability and greater prospects for reform, making them less deserving of the most severe punishments. *See id.* at 59. *Graham* recognized three basic characteristics of juvenile offenders that set them apart from adults.

In *Roper*, the United States Supreme Court deployed similar analysis combined with scientific evidence in expanding on the notion in *Graham* and determined that juveniles are categorically less culpable than adults:

> Three general differences between juveniles under 18 and adults

demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *see also Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult"); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults").

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, 455 U.S. at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological

> damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. *See* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Roper, 543 U.S. at 570.

These differences have also been considered in Texas's latest bill, amending the minimal age of criminal responsibility from 17 to 18, joining forty-seven states that have already done so. *See* 2021 Texas House Bill No. 967, Texas Eighty-Seventh Legislature, 2021 Texas House Bill No. 967, Texas Eighty-Seventh Legislature. Texas has listed several justifications for this amendment, including that:

> (1) 17 year-olds are not entitled to many of the privileges of adulthood, including

> the ability to vote, enlist in the military, or serve on a jury;
>
> (2) young offenders are overwhelmingly arrested for minor offenses and that youth adjudicated in the juvenile justice system experience better outcomes than those placed in the adult system because the juvenile system offers educational and mental health programs that are not available in the adult system; and
>
> (3) that research indicates youth in adult jails and prisons are more likely to experience physical and sexual abuse and are 34 percent more likely to reoffend than those in the juvenile justice system.

Id.

Moreover, as Mr. Dewberry was a minor at the time of the offense, Texas's decision to sentence him to death was disproportionate. The State is currently amending its criminal law due to the issues with juveniles having the capacity to be culpable for their crimes. Thus, given circumstances leading to the conviction, this sentence is grossly disproportionate and should be vacated and set aside. *See Miller*, 567 U.S. at 479 ("But given all we have said in *Roper*, *Graham*, and this *decision about children's diminished culpability and heightened capacity for change*, we think appropriate occasions for sentencing

juveniles to this harshest possible penalty will be uncommon.") (emphasis added).

III. THE DISTRICT COURT ERRED WHEN IT DENIED MR. DEWBERRY'S REQUEST FOR AN EVIDENTIARY HEARING BECAUSE THERE IS A FACTUAL DISPUTE THAT COULD ENTITLE PETITIONER DEWBERRY TO RELIEF.

District courts may not refuse an evidentiary hearing when there is a factual dispute that would entitle him to relief if resolved in the prisoner's favor. *See Coleman v. Vannoy*, 963 F.3d 429, 435 (5th Cir. 2020). As found by this Court in *Martinez*, claims of ineffective assistance "often [turn] on evidence outside the trial record. 132 S. Ct. at 1119-20. Because while an inmate is in prison, he is not positioned to develop an evidentiary basis for his claim of ineffective assistance, evidentiary hearings are necessary to fill in gaps. *See id.*; *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011). An evidentiary hearing is ordinarily unavailable when the petitioner fails to diligently develop the factual bases of the claim in state court. *See Williams v. Taylor*, 529 U.S. 420, 432, (2000). But several circuits have found it necessary to remand a case for an evidentiary hearing where there are facts that impact the severity of the defendant's sentence or the defendant's offense. *See Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) ("Failure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the

defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." (quoting *Trevino v. Thaler*, 569 U.S. 413, 428 (2013))); *Harris v. Sharp*, 941 F.3d 962, 983 (10th Cir. 2019) (finding the defendant "did all that he could to develop the factual foundation for a showing of prejudice. By denying the opportunity for an evidentiary hearing, the OCCA left us with only a cold record and no factual findings for the innately fact-intensive issue of prejudice."); *Buhs v. Sec'y, Fla. Dep't of Corr.*, 809 F. App'x 619, 630 (11th Cir. 2020) (unpublished opinion) (remanding a case back to the District Court for an evidentiary hearing because the defendant "has never been afforded an opportunity to develop [his claimed] factual basis in the crucible of an evidentiary hearing—nor, just as importantly, has the State had the opportunity to challenge them in an adversarial hearing."); *Kon v. Sherman*, 802 F. App'x 240, 243 (9th Cir. 2020) (unpublished opinion) (remanding a case for a limited evidentiary hearing).

Here, Petitioner Dewberry alleges and has presented substantial evidence regarding his claim of ineffective counsel that creates a factual dispute. Specifically, Mr. Dewberry maintains that his trial counsel failed to, among other things, file a motion for a new trial and adequately investigate his case. Mr. Dewberry alleges and has presented substantial evidence that the publicity of his case prejudiced him before trial. Evidentiary hearings on these factual disputes would entitle Mr. Dewberry to relief if resolved in his favor. Thus, the district court erred

when it denied Mr. Dewberry's request for an evidentiary hearing, and this Court should order a remand accordingly.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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