CASE NO. 21-6580

IN THE
Supreme Court of the United States

KEVIN JOHNSON,

Petitioner,

v.

TROY STEELE,
WARDEN, POTOSI CORRECTIONAL CENTER,

Respondent.

Petition's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari

THIS IS A CAPITAL CASE

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REPLY ARGUMENT

I. THE COURT SHOULD REVIEW THE EIGHTH CIRCUIT'S PRACTICE OF UNIVERSALLY WITHHOLDING REASONS FOR DENYING APPELLATE REVIEW IN CAPITAL HABEAS CORPUS CASES.

Respondent misstates the issue as whether courts of appeals are required to "issue written opinions when denying a certificate of appealability." Brief in Opposition ("BIO") at 10. Petitioner seeks no such rule. Rather, Petitioner seeks a requirement that the Eighth Circuit conduct its certificate of appealability ("COA") review in a manner consistent with this Court's precedents. The COA determination "*requires* an overview of the claims in the habeas petition and a *general assessment* of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("*Miller-El I*") (emphases added). Petitioner is not advocating a detailed analysis equivalent to a full blown merits review. He instead contends that the required "general assessment" of the merits cannot occur in the summary denial process currently employed by the Eighth Circuit.

Respondent's remaining arguments are similarly insubstantial. Seeking to minimize the conflict between the Eighth Circuit's practice and that of other circuits, Respondent points to the few instances identified by Petitioner in which other circuits have summarily denied COAs in first-petition capital cases. *See* BIO at 11; Pet'n at 13-14. But the fact remains that such denials are few and isolated outside of the Eighth Circuit, whose uniform practice of unreasoned denials continues to this date. *See* Judgment, *(Johnny) Johnson v. Blair*, No. 20-3529 (8th Cir. Jan. 21, 2022) (summarily denying a COA despite notation that Judge Kelly would grant one).

Neither does it aid Respondent to invoke three cases in which this Court has summarily denied a COA. *See* BIO at 11-12. For one thing, the cited cases materially differ in posture from this case. In *Grayson v. Thomas*, No. 10A917, the Eleventh Circuit had issued a ten-page order denying a COA, including a one-page dissent. *See* Order, *Grayson v. Thomas*, No. 10-13409 (11th Cir. May 13, 2011). Likewise, *Mathis v. Thaler*, No. 10A1246, involved successor litigation in which the Fifth Circuit had already issued a reasoned opinion denying a COA on the prisoner's original petition, as well as a second reasoned opinion affirming the denial of relief on a successive claim under *Atkins v. Virginia*, 536 U.S. 304 (2010). *See Mathis v. Thaler*, 616 F.3d 461 (5th Cir. 2010); *Mathis v. Dretke*, 124 F. Appx. 865 (5th Cir. 2005). The death-sentenced prisoners in both *Grayson* and *Mathis*, then, had already obtained what Petitioner seeks: a reasoned order from the court of appeals on his application for COA. Even less apposite is *Sugden v. United States*, No. 03A1020, which was a non-capital case in which the prisoner proceeded pro se in post-conviction proceedings as well as in his application for COA in this Court. *See* Case Docket, *Patrick John Sugden v. United States*, No. 03-15194 (11th Cir.).

Obvious distinctions aside, summary rulings from this Court do not create the same concern as those from the courts of appeals. Circuit-level COA denials are of course reviewable by certiorari. *See Hohn v. United States*, 524 U.S. 236, 253 (1998). This Court's review is impaired, though, when a court of appeals provides no reasons for the challenged decision – particularly in a capital case in which "the nature of the penalty is a proper consideration" to weigh in favor of authorizing an

appeal. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). Such concern is absent when a COA is denied by this Court, beyond which no further review lies.

Respondent next urges that Petitioner waived the first question presented by not taking issue with unreasoned COA denials in his Eighth Circuit merits brief, as opposed to his petition for rehearing. BIO at 12-13. This argument is disingenuous. Respondent urged below that the merits panel lacked jurisdiction to issue a COA after the administrative panel had denied one. *See* Resp. C.A. Br. at 9, 11-12, 26-30. Indeed, the Eighth Circuit reserved Respondent's jurisdictional objection when it denied a COA within its opinion affirming the district court's refusal to recuse itself. *Johnson v. Steele*, 999 F.3d 584, 589 & n.3 (8th Cir. 2021) (App. 6). Respondent, then, urges that Petitioner was required to advance an argument below at a time that the court lacked authority to consider it.

Even setting aside Respondent's procedural opportunism, a party preserves an issue for this Court's review by timely seeking rehearing when the lower court's decision itself violates the law over and above the correctness or error of its reasoning. *See Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-80 (1930) (court below violated due process). Petitioner was not obligated to forecast the merits panels' unreasoned decision and then to argue the forecasted ruling's illegality. *See Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review."); *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982) (issue under Voting Rights Act was permissibly asserted for first time on

rehearing in the Mississippi Supreme Court).

Nor is the appropriateness of review diminished by the district court's "clearly explained" reasons for rejecting Petitioner's claims, or the likelihood that the court of appeals considered a COA twice – leaving aside Respondent's urging that the court below possessed such authority only once, as well as the Eighth Circuit's reservation of that question. BIO at 13-14; *Johnson*, 999 F.3d at 589 n.3 (App. 6) ("Because we again deny Johnson's application for a COA, we need not address the government's argument that we lack authority to reconsider Johnson's application for a COA."). The clarity of a district court's ruling has nothing to do with the correctness of that ruling, let alone with whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And the Eighth Circuit's two summary denials entail no more of a "general assessment of the[] merits," *Miller-El I*, 537 U.S. at 336, than a single ruling would. Petitioner's ability to seek further review has been materially impaired, regardless of how many times the Eighth Circuit failed to explain itself.

II. THE COURT SHOULD REVIEW THE EIGHTH CIRCUIT'S WRONGFUL DENIAL OF A COA ON PETITIONER'S *BATSON* CLAIM.

Respondent makes two fundamental errors on the merits, one factual and one legal. Its assertion that the state court considered prior instances of discrimination, but still found the evidence lacking, BIO at 17, is wrong; the state court rejected the evidence out-of-hand as irrelevant. *See State v. Johnson*, 284 S.W.3d 561, 571 (Mo. 2009) ("*Johnson I*") (App. 111) ("A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case,

absent allegations relating to this specific case."). This ruling is to contrary to this Court's precedents. *See Miller-El I*, 537 U.S. at 335, 347 ("culture" of discrimination relevant); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (history of discrimination provides an "explanation" for instant disparities). And Respondent is legally wrong (as was the state court) when it argues there must be some nexus between the pattern of prior discrimination and the case at hand. *See* BIO at 18 ("Johnson presented no evidence to indicate a pattern of activity that affected jury selection in this case."). In *Flowers v. Mississippi*, the Court explained, without qualification, that a *Batson* claim may rely on "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction." 139 S. Ct. 2228, 2245 (2019).

Respondent similarly misapprehends the bearing of Judge Teitelman's dissent on the need for federal appellate review. *See Johnson I*, 284 S.W.3d at 589-91 (App. 129-31) (Teitelman, J., dissenting on the *Batson* claim). Disagreeing with the Fifth and Seventh Circuits' rule that issuance of a COA "should ordinarily be routine" when the state court is divided on the constitutional question – *see Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017); *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) – Respondent insists that AEDPA forbids *de novo* review and that a COA requires a showing that reasonable jurists could disagree with the state court's ruling "under AEDPA's highly-deferential standard." BIO at 19-20 (citing *Miller-El I*, 537 U.S. at 336). But the Fifth and Seventh Circuits' rules already incorporate the AEDPA standard. *See Rhoades*, 852 F.3d at 428 (addressing contention that "the state court unreasonably applied the Supreme Court's standard for what mitigating evidence capital defendants have a right to present to the

jury"); *Jones*, 635 F.3d at 1040 (quoting 28 U.S.C. §§ 2254(d)(1)-(2)). Even under AEDPA, a state court dissent will justify a COA unless "the views of the dissenting judge(s) are erroneous beyond any reasonable debate." *Jones*, 635 F.3d at 1040 (citing *Slack*, 529 U.S. at 484). Respondent does not even attempt such a showing here.

III. THE COURT SHOULD REVIEW THE EIGHTH CIRCUIT'S WRONGFUL DENIAL OF A COA ON PETITIONER'S INEFFECTIVE-ASSISTANCE CLAIM.

On the one hand, Respondent denies that the Eighth Circuit's summary ruling "disable[s] further proceedings" in this Court. BIO at 13. On the other, Respondent urges that the ruling below does not justify this Court's review because the claimed error merely involves "erroneous factual findings or the misapplication of a properly stated rule of law" under Rule 10. *Id.* at 20-21. Respondent, then, perniciously attempts to insulate Petitioner's colorable claims from review by exploiting the unreasoned decision that it defends. Respondent's own arguments prove Petitioner's point: the summary ruling below hampers the certiorari review that Petitioner is entitled to seek. *See Hohn*, 524 U.S. at 253.

On the merits of the claim, Petitioner does not quarrel with Respondent's premise that capital trial counsel need not "engage in unlimited investigations on the theoretical possibility that additional mitigation evidence might exist." BIO at 23. But that premise does not describe counsel's failure in this case, for counsel were on ample notice of evidence of Petitioner's violent community. Police reports and social service records from counsel's file, as well as easily accessed newspaper articles, describe pervasive street fights, gang warfare, prostitution, drug sales,

child sex, and murders in the Meacham Park neighborhood. *See* Pet'n at 26-27 and sources cited. Counsel failed to pursue these leads and thus failed to inform the jury about the troubled community in which the crime occurred, even though the case involved the shooting of a police officer in the street. The evidence known to trial counsel "would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). The Court should clarify that capital counsel's duty to investigate is not a generic exercise but must account for the particular facts and circumstances of the case at hand. *See Porter v. McCollum*, 558 U.S. 30, 43 (2009) (state court was "unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have *particular salience* for a jury evaluating Porter's behavior in his relationship with [the victim].") (emphasis added).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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