No. 21-7956

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY MCCLENDON,
Petitioner,

vs.

CHRIS BREWER,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY MCCLENDON,
Reg. No. 1002548
Western Missouri Corr. Center
609 E. Pence Road
Cameron, MO 64429

Petitioner

QUESTIONS PRESENTED

I

WHETHER JURISTS OF REASON COULD DEBATE THE DISTRICT COURT'S CONCLUSION THAT THE DETECTIVES ACTIONS WERE NOT A CORRDINATED TWO-STEP INTERROGATION TECHNIQUE AND IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS IN **MISSOURI V. SEIBERT,** 542 U.S. 600 (2004) AND **MIRANDA V. ARIZONA,** 384 U.S. 436 (1966), AND DID NOT VIOLATE MCCLENDON'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS (QUESTION OF GENERAL INTEREST AND IMPORTANCE).

II

WHETHER JURIST OF REASON COULD DEBATE THE DISTRICT COURT'S CONCLUSION THAT MCCLENDON DID NOT MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF HIS 5TH, 6TH, AND 14TH AMENDMENT RIGHTS AND WAS NOT ENTITLED TO A CERTIFICATE OF APPEALABILITY. (CONFLICT WITH THIS COURT'S DECISIONS IN **MILLER-EL V. COCKRELL,** 537 U.S. 322 (2003) AND **BUCK V. DAVIS,** 137 S.CT. 759 (2017)(QUESTION OF GENERAL INTEREST AND IMPORTANCE).

LIST OF PARTIES

All parties appear in the caption of the case on the cover.

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CONSTITUTIONAL AMENDMENTS, STATUTES, AND RULES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Petitioner, Timothy McClendon, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit rendered on November 22, 2021.

OPINION BELOW

The Eighth Circuit Court of Appeals affirmed the district court's order denying Petitioner's application for a writ of habeas corpus, and declining to issue a certificate of appealability. The judgment appears at Appendix A to this petition. A petition for rehearing and/or rehearing en banc was denied on January 5, 2022; the order appears at Appendix C to this petition.

JURISDICTION

The Eighth Circuit Court of Appeals' judgment was entered on November 22, 2021. A motion for rehearing was denied on January 5, 2022. On March 15, 2022, this Court granted Petitioner a sixty day extension of time, giving him until June 4, 2022, to file his petition for a writ of certiorari with this Court (Appx. E).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

The following Constitutional and Statutory provisions are involved in this case.

U.S. CONST., AMEND. V

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 offense 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. VI

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.

The following Statutory provision is involved in this case.

28 U.S.C.S. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 U.S.C.S. §2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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 [28 U.S.C.S. §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).

STATEMENT OF THE CASE

A. Statement of Facts

On September 25, 2011, Jose Jenkins told a friend, Reginald Thomas, that he was going to a carwash, located on Prospect Road in Kansas City, Missouri, to kill a man, McClendon. Video footage from the carwash showed that Jenkins surveilled the carwash where McClendon was washing his truck. At around 7:30 p.m., Jenkins was walking back and forth in the rear of the carwash, looking through the carwash stalls, searching for McClendon. Jenkins then left and returned to the carwash in a different car.

At 7:46 p.m., McClendon was sitting on a concrete block next to his Suburban, which was being washed and detailed by Keith Martin. At 7:48 p.m., Jenkins came out from the rear of the carwash, ran up to McClendon, and fired his gun at him, hitting McClendon three times, through the leg and hip, and then ran (Tr. 225-226, 279, 329). McClendon reached into his truck, turned back to the street, and fired his gun at Jenkins. Jenkins ran back through a carwash bay and pointed his gun in Martin's direction just before Martin climbed a fence and ran away (Tr. 269, 272-273, 276, 280). (It was stipulated at trial that Jenkins was the initial aggressor and that the shots fired by McClendon in front of the carwash were fired in self-defense (Tr. 431-432.))

The video then showed Jenkins fall over, landing on the ground in back of the carwash. He tried to get back up but couldn't, so he sat up half way, and continued to point his gun (Tr. 256, 273, 313).

McClendon got into his truck and pulled out onto the street. He drove, with the truck door open, around to where Jenkins was and shot at him. McClendon backed up his truck, fired at Jenkins, and then drove southbound on Prospect (Tr. 313).

The police were called and dispatched to the carwash. When they arrived,

they found Jenkins, dead, with his left hand in a trash can and his right hand extended, still clutching a Walther 9mm Kurtz/.380 automatic handgun--trigger cocked back and still containing a magazine (Tr. 197-200).

Within one-two hours after responding to the shooting death at the carwash, Research Medical Center (RMC) contacted the Kansas City Police Department, Homicide division, and reported that a man named Timothy McClendon was admitted for treatment of gunshot wounds (Suppression Hearing Transcript [hereafter cited as STr. 69, 182).

Prior to Detective Satter's departure to RMC, he ran McClendon's name through KCPD's MULES database which informed him that McClendon was a convicted felon. (It is a well known fact among the law enforcement community that when a suspect with a criminal record is read his Miranda rights he is more likely than not to invoke his right to remain silent. It is also known that a suspect who expresses his desire to deal with the police only through counsel is not subject to further interrogation by the police. **Edwards v. Arizona**, 451 U.S. 477 (1981)) Armed with this knowledge, Det. Satter did not give McClendon Miranda warnings despite knowing that a convicted felon in possession of a firearm is a criminal offense, regardless of whether McClendon acted in self-defense (STr. 69, 83-84, 86).

During Det. Satter's questioning, McClendon attempted to invoke his right to an attorney in which Det. Satter replied that McClendon wasn't under arrest and didn't have a right to an attorney (STr. 69,71, 83-86, 87-88).

Det. Satter then had an officer placed outside McClendon's hospital room (STr. 125, 153). The next day, Dets. Lenoir and Speigel went to RMC to question McClendon, this time armed with an audiotape recorder to record the interrogation, without McClendon's consent or knowledge (STr. 105-106, 131-132). Just as Det. Satter had done the day before, Dets. Lenoir and Speigel did not give McClendon

Miranda warnings, and did not inform him that he was being questioned in regard to a homicide investigation (STr. 104-105).

Later that afternoon, McClendon was transported to police headquarters and interrogated for a third time. This time McClendon was in full custody and under arrest and was given Miranda warnings but was not told he was under arrest for a homicide, and his incriminating statement was videotaped (STr. 125-130, 152). McClendon was charged with first degree murder and armed criminal action, in the Circuit Court of Jackson County, Missouri (Legal File [hereafter cited as L.F.] 2-3, 44-45).

Prior to trial, McClendon filed a motion to suppress all three of his statements to police. The trial court ruled that the first statement (to Det. Satter) was admissible, because it was not a custodial interview but investigatory in nature, and so little time had passed since the shooting (STr. 239-240). Also, McClendon's comment about wanting an attorney was "not pertinent," because no more questioning by Det. Satter happened after that (STr. 240). The court ruled that the second statement (to Dets. Lenoir and Speigel) was suppressed, because there was a guard present outside McClendon's room, and McClendon had earlier said that he wanted to speak to an attorney--factors which tainted the second statement (STr. 240-241). Lastly, the court ruled that the third statement (to Dets. Blank and Lenoir) was not significantly tainted, because of the lapse of time between the second and third statement and change in circumstances (location and primary interviewer); thus the third statement was admissible (STr. 240-242).

McClendon was convicted of first degree murder and armed criminal action. The Jackson County Circuit Court sentenced him to life without the possibility of probation or parole and thirty years; sentences to be served consecutively (L.F. 204-205). McClendon appealed, arguing that the trial court erred in denying his motion to suppress his third statement to police and admitting the statement

at trial, because detectives used an unconstitutional "two step" interrogation technique that bypassed the requirements of Miranda and effectively deprived McClendon of his right to due process, a fair trial, and privilege against self-incrimination. The Missouri Court of Appeals denied relief, concluding:

> McClendon argues that the second and third statements made to police were in response to a coordinated two-step interrogation technique. McClendon claims that despite Detective Lenoir's statement that during the second interview he understood that McClendon had acted in self-defense. The detective knew there was a videotape to be examined and remaining evidence that could still implicate McClendon. Thus, the detective's questioning of McClendon, prior to the viewing of the tape, was an opportunity to talk to McClendon prior to Mirandizing him and, therefore, a violation of his constitutional rights. The State argues that there is no evidence that the police deliberately withheld Miranda warnings trying to obtain an advantage in interrogation.
>
> McClendon's argument that the police deliberately used a two-step interrogation technique to undermine his constitutional rights is not supported by the record. Detective Lenoir, who interviewed McClendon in the hospital during his second un-mirandized suppressed statement, testified that when he spoke with McClendon early in the morning following the shootings, he did not believe McClendon had done anything other than act in self-defense as McClendon had claimed and continued to claim. At that time, the detective had not yet viewed the videotape footage of the incident and had no information regarding the identity of the victim or details regarding how many shots had been fired and by whom. It is also reasonable to infer that he would not have any information from the autopsy, [which] occurred on the same day. As the second interview took place [in the early morning,] it is reasonable to infer the autopsy results were not yet available to police.
>
> It was only after reviewing the videotape seven hours later that police brought McClendon into the police state for questioning, where he subsequently waived his Miranda rights. Detective Lenoir specifically testified that he did not and does not intentionally fail to mirandize someone when he considers them a suspect because he knows the statement would be inadmissible. There is simply no evidence in the record that police deliberately decided to withhold Miranda warnings pursuant to a strategy to elicit information first and mirandize later. There is also no indication that the trial court found the detective's testimony to be anything other than credible.
>
> Finally, in order for a statement to be admissible after finding that there was no improper two-step interviewing technique employed, the statements must have been knowingly and voluntarily made. Apart from his argument that police used improper two-step interrogation technique, McClendon does not contest a knowing and voluntary waiver of his Miranda rights for his third statement and nothing in the record suggests that the waiver was not knowingly and voluntarily made.

State v. McClendon, 477 S.W.3d at 213-15 (Mo.App.WD. 2015)(Appx. D, 9-12).

McClendon timely filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, with the United States District Court, Western District of Missouri, raising fifteen grounds for relief. The district could concluded that "The Missouri Court of Appeals' resolution of Petitioners Miranda claim was not based on "an unreasonable determination of the facts in light of the evidence" or an unreasonable application of "clearly established Federal law" (Appx. B,2-3). The court then declined to issue a certificate of appealability, finding McCelendon failed to make a substantial showing of the denial of a constitutional right on any of his fifteen grounds (Appx. B, 10).

McClendon filed a timely notice of appeal, and requested a certificate of appealability from the Eighth Circuit Court of Appeals but the request was summarily denied (Appx. A). McClendon then filed a motion for rehearing which was also denied (Appx. C).

McClendon requested a sixty-day extension of time to file a petition for a writ of certiorari with this Court which was granted, giving him until June 4, 2022, to file his petition (Appx. E).

REASON FOR GRANTING THE WRIT

A. The Eighth Circuit Court of Appeals' Judgment is in Conflict With Decisions of This Court

A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a certificate of appealability (COA) from a circuit justice or judge. **28 U.S.C. §2253(c)(1).** A COA may issue "only if the petitioner has made a substantial showing of the denial of a constitutional right." **§2253(c)(2).** Until the prisoner secures a COA, the court of appeals may not rule on the merits of his case. **Miller-El v. Cockrell,** 537 U.S. 322, 336, 123 S.Ct. 1029 (2003).

The COA inquiry, this Court has emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the lower courts' resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." **Id.,** at 327, 123 S.Ct. 1029. This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." **Id.,** at 336, 123 S.Ct. 1029. "When a court of appeals 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.,** 336-337, 123 S.Ct. 1029.

In this case, the district court declined to issue a COA after considering the merits of all of McClendon's claims, concluding: "For the reasons explained above, Petitioner's application for a writ of habeas corpus is denied, and the Court declines to issue a certificate of appealability. See 28 U.S.C.

§2253(c)(2)(certificate of appealability may be issued "only if [Petitioner] has made a showing of the denial of a constitutional right"). (Appx. D, 10)."

The district court never considered whether McClendon's claims were debatable. Instead, it declined to issue a COA after deciding the merits of McClendon's claims, in conflict with this Court's decisions in **Miller-El v. Cockrell**, 537 U.S. 322, 123 S.Ct. 1029 (2003) and **Buck v. Davis**, 580 U.S. , 137 S.Ct. 759 (2017)(noting that "full consideration of the factual or legal bases adduced in support of the claims" is not appropriate in evaluating a request for a COA).

The district court, and the court of appeals, failed to inquire and ask whether jurists of reason could disagree with the lower courts' resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. The answer to both is, yes, as to McClendon's Miranda claim. Jurists of reason could find that the detectives' two-step interrogation technique undermined McClendon's 5th, 6th, and 14th Amendment rights.

In **Miranda v. Arizona**, 384 U.S. 436, 444, 487-479 (1966), this Court held that, in order to protect an individual's privilege against self-incrimination, certain warnings must be given before his statement made during custodial interrogation could be admitted in evidence. Any confession made by an accused in connection with an in-custody interrogation will be presumed to be involuntary, unless the accused is first informed that he has a right to remain silent, that anything said can and will be used against him, that he has the right to consult a lawyer, and that if he is indigent a lawyer will be appointed to represent him. **Miranda v. Arizona**, 384 U.S. at 444, 455-456, 478-479; **Dickerson v. U.S.**, 530 U.S. 428, 434-435 (2000).

As a society, we share "the deep-rooted feeling that the police must obey

the law while enforcing the law." **Spano v. New York**, 360 U.S. 315, 32021 (1959); **Miranda v. Arizona**, 384 U.S. 480, quoting Schaefer, Walter V., Federalism and State Criminal Procedure, 70 Harv.L.Rev. 1, 26 (1956)("The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."). Under the U.S. Constitution, police must tell a suspect in custody that he has the right to remain silent and may not deliberately leave the suspect unwarned in the hope that he may be induced to confess.

Here, detectives ignored the law in order to procure incriminating statements from McClendon. First, Detective Satter told McClendon that since he wasn't under arrest he didn't have a right to an attorney. Then, when Detectives Lenoir and Speigel went to the hospital to question McClendon (where an officer was posted to prevent McClendon from leaving hospital room), they secretly hid an audiotape recorder on them to record the interrogation, and did not give McClendon Miranda warnings or inform him that he was being questioned in regard to a homicide investigation (STr. 125, 104-106, 131-132). And after McClendon incriminated himself, detectives had him transported to police headquarters that afternoon and interrogated for a third time, where McClendon was in full custody and under arrest, was given Miranda warnings but wasn't told he was under arrest for a homicide, and his incriminating statement was videotaped (STr. 125-130, 152).

In **Missouri v. Seibert**, 542 U.S. 600 (2004), this Court held that the question-first tactic effectively thwarts Miranda's purpose of reducing the risk that a coerced confession would be admitted. This Court further held that it is unrealistic to treat two spates of intergrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle. This Court described the issue like this:

"This case tests a police protocol for custodial interrogation that calls for giving no warnings of the right to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of **Miranda v. Arizona,** 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), the interrogating officer follows it with Miranda warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible. **Id.**, at 604."

Based upon the facts and circumstances of McClendon's incriminating statements, jurists of reason could conclude the detectives two-step interrogation technique violated McClendon's 5th, 6th, and 14th Amendment rights, rendering his second and third statement inadmissible. Because McClendon's Miranda claim is debatable, he should be granted a COA in order to proceed further.

B. Importance of The Questions Presented

This case presents questions of great importance for pro se petitioners and lower courts because of the issue of whether to issue a COA. Justice Sotomayor summed it up the best in **McGee v. McFadden,** 139 S.Ct. 2608 (2019) when she dissented from the denial of certiorari, writing:

"The federal courts handle thousands of noncapital habeas petitions each year, only a tiny fraction of which ultimately yield relief. See N. King, Non-Capital Habeas Corpus Cases After Appellate Review: An Empirical Analysis, 24 Fed. Sentencing Reporter 308, 309 (2012)(Table 2)(less than 1% of randomly selected cases in an empirical study). While the volume is high, so are the stakes of the pro se litigants. Federal judges grow accustomed to reviewing convictions with sentences measured in lifetimes. Such spans of time are difficult to comprehend, much less to imagine spending behind bars. And any given filing--though it may feel routine to the judge who plucks it from the top of a large stack--could be the petitioner's last, best shot at relief from an unconstitutionally imposed sentence. Sifting

through the haystack of often uncounseled filings is an unglamorous but vitally important task.

"COA inquires play an important role in the winnowing process. The percentage of COA requests granted is not high, see **Id.**, 308 (study finding that "more than 92 percent of all COA rulings were denials"), but once that hurdle is cleared, a nontrivial fraction of COAs lead to relief on the merits, see **Id.**, 309 (Table 2)(approximately 6%). At its best, this triage process focuses judicial resources on processing the claims most likely to be meritorious. Cf. **Miller-El**, 537 U.S., at 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (AEDPA's COA requirement "confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not").

"Unless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down. A court of appeals might inappropriately decide the merits of an appeal, and in doing so overstep the bounds of its jurisdiction. See **Buck**, 580 U.S., at___, 137 S.Ct. 759, 197 L.Ed.2d 1 (slip op., at 13); **Miller-El**, 537 U.S., at 336-337, 123 S.Ct. 1029, 154 L.Ed.2d 931. A district court might fail to recognize that reasonable minds could differ. Or, worse, the large volume or COA requests, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a rubber stamp, especially for pro se litigants. We have periodically had to remind lower courts not to unduly restrict this pathway to appellate review. See, e.g., **Tharpe v. Sellers**, 583 U.S. ___, 138 S.Ct. 545, 199 L.Ed.2d 424 (2018)(per curiam); **Buck**, 580 U.S.__, 137 S.Ct. 759, 197 L.Ed.2d 1; **Tennard v. Dretke**, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)."

McClendon's case provides an illustration of what can be lost when COA review becomes hasty, a man acting in self-defense convicted of first degree murder and sentenced to life without parole and thirty years in prison.

CONCLUSION

For the questions presented and the reason stated, McClendon prays this Court grant a Writ of Certiorari in this case. He further prays for any other and further relief this Court may deem just and proper under the circumstances.

Respectfully Submitted,

Timothy McClendon

Timothy McClendon
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Petitioner

PROOF OF SERVICE

I, Timothy McClendon, do swear or declare that on this date, May 17th, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The name and address of Respondent's attorney being served is:

Andrew Clarke/Whitney Wilson
Assistant Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65102

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on May 17th, 2022.

Timothy McClendon