THIS IS A CAPITAL CASE

No. 21-8153

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

PAUL BLAIR,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

When the Legislative Branch prescribes standards for federal courts to employ, those courts "have no power to redefine" and "lack authority to amend" AEDPA statutory requirements. *Shinn v. Ramirez*, 142 S.Ct. 1718, 1726, 1737 (2022). Here, the lower courts did not follow these standards. This Court should grant certiorari and reinforce the vitality of the legal principles upon which Mr. Tisius relies.

In its zest to secure a denial of relief, the state's brief in opposition ("BIO") relies on material mischaracterizations[1] of fact, law, and procedural history. Mr. Tisius addresses those below. This Court should refuse an invitation to deny certiorari upon the state's mischaracterizations.

STATEMENT OF FACTS

The state wrongly informs this Court that Mr. Tisius's first death sentences were reversed because "the motion court found the State had played the 'wrong song' for the jury during sentencing. . . ." BIO p. 8. This misstatement substantially minimizes the basis for the reversal. Rather than simply indicating the "wrong song" was played, the post-conviction motion court instead found that the state's

[1] The state's lack of candor is also illustrated by the fact that on July 26, 2022, counsel for the state represented to the Court that he had contacted counsel for Mr. Tisius a week earlier, on July 18, to request consent for an extension for the BIO. In fact, that contact occurred on July 26, the day the request was filed. Counsel for the state corrected this misstatement only after counsel for Mr. Tisius brought it to his attention.

prosecutorial misconduct "constituted the presentation of false and misleading evidence." Dist. Ct. Doc. 46-13 p. 63 (PCR1 LF 461). Specifically, the court held:

> The record reflects that in regard to the song that the State **failed to make pertinent discovery disclosures** to the Defendant; that the playing of the song Mo' Murda' constituted **the presentation of false and misleading evidence**; and that trial counsel was ineffective.

Id. (emphasis added).

This finding was not appealed by the state. Thus, the state has previously conceded that the first trial prosecutor presented "false and misleading evidence."[2]

RESPONSE TO STATE'S ARGUMENTS

Contrary to this Court's decades-long precedent, the state combines and conflates the certificate of appealability (COA) standard with the standard for obtaining relief and wrongly suggests that Mr. Tisius must meet both to obtain a COA. In support of this contention, the state relies on *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003), and *Harrington v. Richter,* 562 U.S. 86, 102 (2011), and argues that even in the COA context, 28 U.S.C. § 2254(d) "stops just short of a 'complete bar' on federal review of claims denied in state court." BIO, p. 10.

However, *Harrington* concerned merits review, not the COA standard. And in *Miller-El*, this Court rejected a similar conflation of the COA standard with a merits review and found that the Court of Appeals' ruling that the "petitioner's claim

[2] As a result of the state's false and deceptive conduct, the trial court excluded the tape from the second trial.

lacked sufficient merit to justify appellate proceedings" improperly applied § 2254 deference as a part of the COA inquiry. *Miller-El*, 537 U.S. at 341.

As this Court recognized in *Miller-El*, the state's reading would write the COA standard out of the statute. Every part of a statute must be considered and applied. *See*, *e.g*, *Dahda v. United States*, 138 S.Ct. 1491, 1498 (2018) (citing *United State v. Giordano*, 416 U.S. 505 (1974)). "[A] COA determination is a separate proceeding, one distinct from the underlying merits." *Miller-El*, 537 U.S. at 342. According to Congress and this Court, all Mr. Tisius needs to do to obtain a COA is demonstrate that at least one reasonable jurist would disagree on the district court's holding. This is a "threshold requirement" that specifically does not require—or permit—the court to determine the merits of the claim before issuing a COA. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Miller-El*, 537 U.S. at 337; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[3]

"The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U.S. at 342. Thus, "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 338. The district court did not properly apply this standard, and there is no basis to conclude that the Eighth Circuit did either.

[3] Later in its BIO, the state agrees that the COA analysis is not "'coextensive with the merits analysis'" and "[t]his Court has cautioned that courts of appeals should not engage with the merits of a petitioner's claim in to justify denying a certificate." BIO, p. 27 (citing *Buck*, 137 S. Ct. st 773).

1. This Court should review the denial of a COA on Mr. Tisius's claim of ineffective assistance of counsel for failure to object to the argument concerning victim impact evidence prohibited by *Booth* and *Payne*.

The state's contention that Mr. Tisius did not raise this issue in the court below is false. In addition to citing *Berger v. United States*, 295 U.S. 78, 84 (1935), for the proposition that the jury cannot consider evidence outside the record, Mr. Tisius cited *Booth* and *Payne* in his habeas petition, (Dist. Ct. Doc. 29 p. 149), and amended petition Dist. Ct. Doc. 38 p. 136), as the basis of the objection resentencing counsel unreasonably failed to make. He again discussed *Booth* and *Payne* in his traverse. Dist. Ct. Doc. 55 pp. 138-139. He raised the same issue in his Rule 59 Motion (Dist. Ct. Doc. 86 p. 34) and his COA reconsideration request to the district court. Dist. Ct. Doc. 96 pp. 12-13. Finally, Mr. Tisius reiterated *Booth* and *Payne* in his Eighth Circuit COA request. 8th Cir. COA pp. 64-67.

The state's contention that Mr. Tisius did not properly preserve this claim in state court is misleading and contrary to the position it took below. The state agrees that Mr. Tisius argued in state court "that the arguments were appeals to emotion and based on facts outside the record." BIO, p. 14. But the basis for *Booth*'s prohibition of victim opinion evidence is that "any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'" *Booth*, 482 U.S. at 508 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)). And the state does not contest that the "plea from the families" and request from the Miller children to "get to kill" Mr. Tisius were outside of the record.

Accordingly, in response to the habeas petition, the state recognized that this claim was **"preserved for habeas review"** and **should be considered** by the district court:

> In Claim 10, . . . Tisius's arguments as to the portions of the prosecutor's argument regarding the victims wishes and Tisius's right to ask for mercy are preserved for habeas review because Tisius raised them in state post-conviction proceedings and on post-conviction appeal.

Dist. Ct. Doc. 46 p. 116. The state again contested the *Booth/Payne* issue in its Rule 59 Reply. Dist. Ct. Doc. 89 pp. 10-11. Before the Eighth Circuit, the state yet again contested the merits and offered specific arguments related to *Booth* and *Payne*. 8th Cir. COA Response pp. 21-23.

Contrary to the newly minted, inconsistent, misleading, and wrong argument the state now offers, Mr. Tisius's claim that resentencing counsel were ineffective for failing to object to these arguments as violations of *Booth* and *Payne* was squarely before the district court, which specifically addressed it in the order denying relief and denying a COA, (App. 53a-54a), and the Eighth Circuit. 8th Cir. COA pp. 64-67; 8th Cir. COA Response pp. 21-23. Similarly, Mr. Tisius's question presented to this Court encompasses that same claim:

> Was the denial of a COA proper when a reasonable jurist could conclude that (1) it was improper for the jury to consider, as a reason for death, evidence of the surviving family members pleas for death sentences, when this Court prohibited such evidence in *Booth v. Maryland*, 482 U.S. 496 (1987), *Payne v. Tennessee*, 501 U.S. 808 (1991), and *Bosse v. Oklahoma*, 580 U.S. 1 (2016), and (2) counsel's failure to object to the victim opinion evidence therefore was deficient performance?

Petition p. i.

Mr. Tisius has not raised a new claim before this Court. This Court should reject the state's attempt to misdirect its attention away from the debatability of the underlying claim. Resentencing counsel's failure to protect the jury from improper influences this Court prohibited in *Booth* and *Payne* is central to the claim. The courts below determined that the challenged arguments did not violate *Booth* and *Payne* and therefore there was no deficient performance under *Strickland* for failing to object to them. However, under *Booth*, *Payne*, and *Berger*, a reasonable jurist could conclude that it was improper for the jury to consider, as a reason for death, evidence of the surviving family members pleas for death sentences. A reasonable jurist could likewise conclude that counsel's failure to object to the victim opinion evidence was deficient performance. There is no suggestion in the district court's order that there was any valid reason not to object except for the fact that the objection was not well-founded under *Booth* and *Payne.* This Court should now grant certiorari and require the court of appeals to address this claim.

The state's contention that the state court's factual findings (that the prosecutor's arguments were simply proper responses to the defense arguments and not based on facts outside the record) precludes this Court's review is meritless. Of course, the prosecutor is not permitted to violate the constitutional rights of the defendant in order to respond to proper defense arguments. *See*, *e.g.*, *Griffin v. California*, 380 U.S. 609, 615 (1965) (finding that the prosecution is prohibited from using the defendant's exercise of constitutional right to remain silent against the defendant in case-in-chief). It is a long-standing principle that a defendant can

present a defense and not be penalized for asserting his constitutional rights. *See Simmons v. United States,* 391 U.S. 377 (1968). Moreover, although the merits of the case may depend on whether—for the reasons explained in the petition—the state court's determination is an unreasonable application of the facts pursuant to 18 U.SC. § 2254(d)(2), that is not the inquiry at issue for COA purposes. *Miller-El*, 537 U.S. at 342. Rather, the inquiry is whether a reasonable jurist "would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338. Mr. Tisius has satisfied that standard.

Next, the state again erroneously applies § 2254(d) to the COA inquiry and posits that the provisions of *Booth*, *Gathers*, and *Payne* upon which Mr. Tisius relies is not "clearly established federal law" under § 2254(d). Even assuming for the sake of argument that a "clearly established federal law" determination is relevant to the COA inquiry, this Court has held that *Booth* and *Payne* clearly established the prohibition against victim opinion evidence. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (state court "remain[ed] bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban. The state court erred in concluding otherwise."); *see also id.* at 3 (Thomas, Alito, JJ., concurring).

Moreover, contrary to the state's contention, the arguments at issue here are substantially different from the evidence the *Payne* Court considered. In *Payne*, the prosecutor did not suggest, like the prosecutor here, that the jury imposing a death

sentence "***is an answer to the plea from the families of Leon and Jason***." Doc. 46-19 p. 186 (emphasis added). Nor did the *Payne* prosecutor include a similar statement asserting that if "the Miller children" would say who "they get to kill, because I bet your name [Mr. Tisius] would be on that piece of paper." Dist. Ct. Doc. 46-19 p. 179. These distinctions render this case dramatically different from the victim impact evidence at issue in *Payne*.

Next, the state unpersuasively argues there is no circuit split between the ruling below and other circuits because "there is no clearly established federal law prohibiting the arguments in Tisius's case . . . ." BIO, p. 17. Again, this Court in *Booth* and *Payne* has clearly established the prohibition against victim opinion evidence. *Bosse*, 137 S. Ct. at 2. As noted more fully in his certiorari petition, every federal circuit court of appeals (including authority from the Eighth Circuit) goes Mr. Tisius's way, which further demonstrates that a COA should have been granted.

The state's contention that Mr. Tisius has failed to meet the COA standard with respect to the deficient performance prong of *Strickland* is likewise without merit. Under *Strickland*, "[n]o sound trial strategy could include failing to make a constitutional objection to a prosecutor's improper comment . . . ." *Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001). Resentencing counsel testified that they did not have a strategic reason for failing to object to the arguments. Dist. Ct. Doc. 46-26 pp. 380-82; Dist. Ct. Doc. 46-36 pp. 84-86. Thus, as Mr. Tisius argued in the district court and the Eighth Circuit, a reasonable jurist could conclude that

counsels' failure to object constituted deficient performance, particularly given that courts have found deficient performance in similar circumstances. *See*, *e.g.*, *id.*; *Baer v. Neal*, 879 F.3d 769, 784-85 (7th Cir.), *cert denied*, *Neal v. Baer*, 139 S.Ct. 595 (2018); 8th Cir. COA p. 67; Dist. Ct. Doc. 93 pp. 24-26; Dist. Ct. Doc. 38 p. 136.

Finally, the state unpersuasively argues that this Court should not grant certiorari because Mr. Tisius has not alleged or shown prejudice. The issue here is whether the claim of deficient performance warranted a COA, and no prejudice analysis is required for appellate review of that issue. If this Court remands and the court of appeals finds deficient performance, the appropriate procedure would be for the court of appeals to remand to the court below for a prejudice determination. *Andrus v. Texas*, 140 S.Ct. 1875, 1887 (2020).

2. This Court should direct the court of appeals to review Mr. Tisius's claim of conflict of interest.

The state first argues that *Cuyler v. v. Sullivan,* 446 U.S. 335, 348 (1980), only applies to conflicts of interest resulting from the representation of co-defendants by the same attorney. Of course, Mr. Tisius did not argue below, and does not argue now, that the issue of whether a conflict of interest existed is governed by *Cuyler.* In fact, he cites *Cuyler* only for the proposition that an adverse impact inquiry is required when a conflict is presented. Petition, p. 14. On the issue of whether a conflict exists, he relied on the clearly established federal law in *Wood v. Georgia*, 450 U.S. 261, 271 (1981), as well as *Wheat v. United States*, 486 U.S.

153, 160 (1988). Those cases clearly establish a general right to conflict-free representation.

The state next argues that the court below was bound by the state court's finding that there was no conflict because of the "credible" testimony of prior counsel stating that there was no conflict. Mr. Tisius agrees that resentencing counsel may have believed that the grossly inadequate fee they were paid did not diminish their performance. But the issue presented to the courts below was that under the clearly established standards of *Cuyler*, *Wheat*, and *Wood*, the perceptions of resentencing counsel alone were not enough to sustain the conclusion that there was no conflict. Rather, a reviewing court must examine the actual conduct of counsel to determine whether the suggested conflict influence counsels' behavior.

Finally, the state makes a perplexing argument suggesting that Mr. Tisius is seeking reversal based on "cumulative error." Whatever the status of that principle, it is not at issue here. Mr. Tisius presented to the state court, the district court, and this Court numerous instances of ineffective assistance of counsel which support his single contention that his counsel had a conflict of interest. That was the issue addressed by the district court, and this Court should direct the court of appeals to review it.

3. This Court should direct the court of appeals to review Mr. Tisius's claim that he was denied effective assistance of counsel when trial counsel failed to present evidence from Dr. Peterson.

Again, it is necessary to correct a factual misstatement in the state's Brief in Opposition. The state argues that there was no possible prejudice from trial counsel's failure to interview Dr. Peterson because, "[d]uring the post-conviction evidentiary hearing, Dr. Peterson testified that none of his opinions about the evidence had changed, so there is no basis to find that counsel could have gained additional information after speaking with him. Dist. Dkt. 46-26 at 270-71, 292, 325." BIO, p. 26. The state conveniently ignores Dr. Peterson's testimony at the same hearing that had he spoken with trial counsel, he would have informed them that (1) the testimony trial counsel planned to omit supported his medical conclusions (including the ones counsel planned to present) and (2) he had obtained new medical information since his deposition which supported the mitigating factors counsel chose to omit. Dist. Ct. Doc. 46-26, pp. 280-282. Thus, the record before the district court clearly demonstrated that had trial counsel consulted Dr. Peterson before making decisions about his former testimony, they would have acquired new information that should have affected those decisions.

The state argues that the state court properly relied on trial counsel's opinion that these two mitigators were not appropriately presented to the jury as a matter of trial strategy. But that "strategy" is severely cast into doubt by trial counsel's failure to obtain additional readily available information about the evidence they made an uninformed decided to exclude. Strategy is only as reasonable as the

investigation that supports it. This is clearly established federal law under *Strickland v. Washington*, 466 U.S. 466 U.S. 668, 691 (1984). Based on this error alone, Mr. Tisius is entitled to certiorari and a COA.

4. This Court should direct the court of appeals to explain its pro forma denial of a COA as to any claim.

Mr. Tisius premises his certiorari request on this question upon three arguments: 1) this Court's consistent precedent regarding the minimal COA standards as determined by Congress; 2) this Court's recent reaffirmation in *Shinn* that federal courts "have no power to redefine" (*id.* at 1726) and "lack authority to amend" AEDPA statutory requirements (*id.* at 1737); and 3) the Eighth Circuit's continuing variance from what is legally required when it engages in cut-and-paste and *pro forma* COA denials without explanation of its reasoning. *See Miller-El*, 537 U.S. at 337 (the COA process "must not be *pro forma* or a matter of course.")

The Eighth Circuit practice has two significant consequences. The most important is that this Court cannot evaluate whether the Eighth Circuit is properly applying the COA standard. This does not require a merits determination by the Eighth Circuit. In fact, such a determination would be itself improper. But it does require an explanation of the Eighth Circuit's findings that none of the issues raised by Mr. Tisius warrant a COA. Even one panel of the Eighth Circuit seems to have recognized that, particularly in capital cases, the court should "explain. . . to some degree its decision to deny the application." *See Dansby v. Hobbs*, 691 F.3d 934, 936 (8th Cir. 2012).

The second consequence is that because the panels of the Eighth Circuit do not have the benefit of their colleagues' reasoning about COA denials, inexplicably lawless denials are occurring. It simply makes no sense that the same day rehearing was denied to Mr. Tisius, another panel of the Eighth Circuit heard oral argument on an identical issue in another capital case. *See Dorsey v. Vandergriff*, 30 F.4th 752 (8th Cir. 2022). It simply makes no sense given the plain language employed by Congress that there can be dissents from COA denials or state court decisions that were 4-3, yet a COA is denied. The Eighth Circuit's lack of explanation effectively conceals its failure to properly apply the COA statute.

The state suggests that there is no circuit split because no circuit has specifically held that a statement concerning the denial of a COA is required. This ignores the lack of uniformity—even within circuits—on this issue. It is simply unfair that a certiorari petitioner in the Sixth Circuit, which almost always addresses the COA issue in an opinion, has the ability to make a reasoned argument to this Court as to why a COA should have been issued, while Mr. Tisius and his fellow petitioners in the Eighth Circuit are denied that ability. As explained in more detail in the petition, the Eighth Circuit's failure to explain its COA decisions allows it to skirt such anomalies as granting COA on an issue in one case and denying it in another or denying a COA by a vote of 2-1.[4]

[4] The problem is particularly acute here because, contrary to the state's assertion, the district court did not explain its reasons for denying a COA either. Dist. Ct. Doc. 84, p. 77.

The state then argues that this Court sometimes denies COAs without a reasoned opinion. But that typically happens when a court below has issued a reasoned opinion, and this Court therefore can add nothing. *See In re Mathis*, 483 F.3d 395 (5th Cir.2007); *Mathis v. Thaler*, 616 F.3d 461 (5th Cir. 2010). Moreover, the summary denial by this Court, unlike that of a court of appeals, does not deprive a litigant of the opportunity for further review.

As discussed above, Mr. Tisius presented at least three issues warranting a COA. At a minimum, this Court should grant certiorari and require the Eighth Circuit to explain its denial *in toto* of Mr. Tisius's request for a COA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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