No. 22-5542

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON,

***Petitioner*,**

vs.

PAUL BLAIR, Superintendent,
Potosi Correctional Center

***Respondent*.**

On Petition For A Writ Of Certiorari
To The Eighth Circuit Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit's practice of issuing unexplained summary denials of certificates of appealability (COA) in capital cases conflicts with 28 U.S.C. § 2253 and this Court's decisions in *Barefoot v. Estelle*, 463 U.S. 889 (1983) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

2. Whether 28 U.S.C. § 2253 and this Court's decision in *Barefoot* and its progeny require a certificate of appealability to issue when one circuit judge of a court of appeals' administrative panel tasked with this decision, in dissent, finds that a certificate of appealability should issue.

3. Whether a reviewing court, in assessing trial counsel's overall performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), should consider the cumulative effect of multiple errors of counsel in determining whether a Sixth Amendment violation occurred.

4. Whether a state court decision that truncated a Sixth Amendment claim of ineffectiveness of counsel in the penalty phase under *Wiggins* into separate components in assessing deficient performance and prejudice is contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1).

REPLY ARGUMENT

I.

THERE IS NO PROCEDURAL IMPEDIMENT TO THIS COURT'S DISCRETIONARY REVIEW.

Respondent advances an array of procedural roadblocks in an effort to circumscribe this Court's discretionary review of the merits of the present petition for a writ of certiorari. Each of these procedural defenses, for the reasons set forth below, can be easily dispatched.

A. The Petition was Timely Filed.

First, respondent argues that the petition was filed one day out of time because it was filed one day past its due date which was on Labor Day, a federal legal holiday. (Resp. at 13-14). Respondent cites no authority in support of this argument other than the text of 28 U.S.C. § 2101(c). Since there are no inconsistencies between this Court's Rule 30.1 and the aforementioned statute, the Court's weekend/holiday rule regarding timeliness is well within this Court's rule making authority under 28 U.S.C. § 2071.

Respondent's position, if adopted, would also be impractical and unfair. This Court does not permit petitions to be filed electronically alone. To be timely, a petition must be postmarked by its due date. Requiring a petition to be filed on a legal holiday would be impossible because post offices are closed.

Respondent's argument in this vein is also a backhanded affront to the professionalism of the men and women who staff the clerk's office. These dedicated

individuals would not have accepted and filed the petition if it had been untimely under the applicable rules and statutes.

B. The Questions Presented in this Petition Were Raised in a Timely Manner in the Courts Below.

Respondent's second procedural defense contends that petitioner's questions presented pertaining to cumulative consideration of *Strickland* claims, and his challenges to the Eighth Circuit's COA practices, were not timely raised in the courts below. Specifically, respondent asserted that the *Strickland* questions were not raised in petitioner's habeas petition filed in the district court and that his challenge to the Eight Circuit's COA procedures were not raised until the rehearing motion in the Court of Appeals was filed. Neither of these arguments holds water.

Regarding the questions concerning the application of *Strickland*, respondent is correct in noting that a claim of cumulative error was not raised in the underlying habeas petition. However, respondent's argument ignores the fact that Claim 1 of his habeas petition filed in district court advanced a unitary claim of penalty phase ineffectiveness under *Wiggins* that had three components. (Doc. 11, pp. 6-23). Within the body of this claim, petitioner specifically argued that these three components of claims should be reviewed in tandem and that the Court should consider all of the evidence from the trial and the state post-conviction proceedings in assessing whether a Sixth Amendment violation occurred. *Id.* at 13. This argument was also advanced in petitioner's Rule 59(e) motion. (Doc. 88).

Respondent's contention that his challenges to the Eighth Circuit's decision to deny a COA in his case were not raised at the earliest opportunity is ridiculous.

Petitioner could not have possibly attacked the Eighth Circuit's COA process before the Eighth Circuit actually issued a ruling on the application. It certainly would have been unwise and imprudent for an applicant for a COA to attack the fairness and integrity of a court of appeals' decision making process before the Court ruled on the application.

In a similar situation, the Eighth Circuit rejected the same procedural bar argument raised by the state of Nebraska in *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993). In *Rust*, the court held that there was no procedural bar arising from the fact that *Rust* did not raise a constitutional challenge to the manner in which the Nebraska Supreme Court adjudicated his appeal until the rehearing motion before that court, since that was the earliest opportunity he could have raised it. *Id.* at 1490-1491. As in *Rust*, this procedural defense is meritless.

C. The Length of Time the Case Was Pending in the Courts Below Is Irrelevant.

According to respondent, the "excessive delay" in this case was because petitioner asked for and received several extensions of time in the courts below, should be considered by this Court in assessing the merits of the questions presented in this petition. Respondent cites no authority in support of this argument, apart from inapposite decisions from this Court that involves the distinct situation of stay of execution litigation that occurs after the normal appellate and post-conviction processes in state and federal court have run their course.

Moreover, respondent's arguments that there was an excessive delay does not hold water. The lapse of time between the filing of the habeas petition in this case,

until the district court issued its judgment, was approximately six years in total. Approximately half that time occurred between the time the case was fully briefed and the district court's final judgment. (*See* Docs 69, 85). When compared to the pace of capital habeas litigation in other circuits, this so-called excessive delay pales in comparison. This argument is a "red herring" that is irrelevant to this Court's determination of whether or not this petition should be granted.

II.

THIS COURT'S DISCRETIONARY INTERVENTION IS NECESSARY TO REIGN IN THE ABERRANT CONDUCT OF THE EIGHTH CIRCUIT IN ADJUDICATING COA APPLICATIONS IN CAPITAL CASES.

Respondent's opposition to the two questions presented involving the Eighth Circuit's COA procedures in capital habeas cases is more notable for its omissions than its substance. Most importantly, respondent has nothing to say regarding the statistical evidence that was presented to this Court in *Buck v. Davis*, that indicates that the Eighth Circuit summarily denies COAs in nearly 50% of capital habeas appeals brought by condemned prisoners. In stark contrast, no other circuit has a COA denial rate that exceeds 6.3%. (*See* pet. At 22-23).

In addressing the abnormal behavior of the Eighth Circuit, petitioner believes that he has set out most of the pertinent issues in great detail in the underlying petition. However, a few more words are in order.

Petitioner does not disagree with respondent's primary argument that Courts' of Appeal should be given great leeway in how it elects to evaluate COAs in both capital and non-capital cases. This Court understandably should be reluctant to

second guess the administrative practices of the lower courts. However, the facts of this case, involving a COA denial in a capital case by a split decision, is a bridge too far.

In addressing this split decision issue, respondent's primary argument is that this practice does not violate any relevant statute or rule of appellate procedure and there is no published authority that condemns a similar non-unanimous decision[1]. This argument, however, begs the question. The reason there is no published authority condemning this practice is because it appears this scenario has never occurred outside the Eighth Circuit. Since the Eighth Circuit always denies COAs in one-page unpublished orders, this explains the lack of any published authority addressing this question.

Nevertheless, in the nearly forty years since this Court issued its decision in *Barefoot*[2], this Court's caselaw clearly requires that a COA must issue if reasonable jurists could differ as to the merits of the appeal. Here, a reasonable jurist, Judge Kelly, believed a COA was warranted in order to provide plenary appellate review of petitioner's *Wiggins* claim on the basis of the substance of the third question presented in this petition. (A-1).

This Court has not shown any reluctance to issue per curiam reversals in state-on-top capital habeas cases where a court of appeals fails to strictly adhere to the

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[1] Respondent's citation to the denial of a certificate of probable cause by this Court in *Anderson v. Collins*, 495 U.S. 943 (1990), over the dissents of Justices Brennan and Marshall, is misleading. (Opp. at 21). Those two justices dissented in every capital case based upon their view that the death penalty violated the Eighth Amendment.

[2] *Barefoot v. Estelle*, 463 U.S. 889 (1983).

standard of review provisions of 28 U.S.C. § 2254(d) of the AEDPA. The egregious facts of this case also require a similar result because the denial of the COA over the dissent from an appellate judge, is legally indefensible under *Barefoot* and its progeny.

III.

THE EIGHTH CIRCUIT'S MINORITY VIEW THAT MULTI-FACETED *STRICKLAND* CLAIMS MUST BE CONSIDERED IN ISOLATION WARRANTS DISCRETIONARY REVIEW.

Rather than addressing the clear conflict between the Eighth Circuit's views and the views of virtually every other circuit that reviews counsel's errors in the aggregate in determining whether a Sixth Amendment violation occurred, respondent's primary argument in opposition is that review of this issue would require the Court to issue an advisory opinion because the courts below found that trial counsel's performance was not deficient. (Opp. at 22-27). This argument clearly ignores the substance of the question presented, which alleged that the Eighth Circuit, in conflict with the views of other circuits and prior decisions from this Court, does not consider the cumulative effect of multiple errors in assessing both trial counsel's performance and *Strickland* prejudice.

The Eighth and Fourth Circuit Courts of Appeals are outliers on the question of whether attorney errors should be cumulatively evaluated in assessing performance and prejudice under *Strickland*. Six other Circuit Courts of Appeal have held that *Strickland* errors must be reviewed in the aggregate. (*See* Pet. at pp. 26-27). In addition, state courts are also split on this question. *Cf. People v. Gandiaga*, 70 P.3d 523, 529 (Colo. App. 2002) (recognizing the cumulative impact of multiple

attorney errors); *Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006) (same); *State v. Trujillo*, 42 P.3d 814, 828 (N.M. 2002) (same); *State ex rel. Bess v. Legursky*, 465 S.E.2d 892, 901 n. 10 (W. Va. 1995) (same); *Diaz v. Comm'r of Corr.*, 6 A.3d 213, 222-23 (Conn. App. Ct. 2010) (refusing to cumulate attorney errors); *Weatherford v. State*, 215 S.W.3d 642, 649-50 (Ark. 2002) (same). This circuit split is a long-standing conflict that merits discretionary intervention.

A cumulative assessment of multiple errors of counsel is also consistent with *Strickland* and its progeny. In *Harrington v. Richter*, 562 U.S. 86 (2011), this Court noted that "[W]hile in some instances, 'even an isolated error' can support an ineffective assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Id.* at 111. The converse is also true. When a court conducts piecemeal analysis of multiple errors, it ignores the big picture of whether a defendant, in light of all relevant circumstances, received a fair trial. *Strickland* noted that the purpose behind enforcing the Sixth Amendment is a broad one, so "[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 cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 696.

A cumulative analysis of attorney error is also consistent with *Strickland's* recognition that given the myriad of possible ways an attorney can effectively or ineffectively represent a client, hard and fast formulaic rules for assessing attorney error and prejudice are not sound:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, an act or omission that is unprofessional in one case may be sound or even brilliant in another.

Id. at 693. Given the broad and flexible nature of the *Strickland* framework, courts should avoid unfairly parsing each claim of ineffective assistance into separate components, and instead address the overall effect of an attorney's multiple errors on the client's right to a fair trial. *See Goodman v. Bertrand*, 467 F.3d 1022, 1023-24 (7th Cir. 2006) ("the cumulative effect of trial counsel's errors sufficiently undermines our confidence in the outcome of the proceeding. Rather than evaluating each error in isolation, as did the Wisconsin Court of Appeals, the pattern of counsel's deficiencies must be considered in their totality."). Because the Eighth Circuit's opinion conflicts with *Strickland* and the views of other circuits, certiorari should be granted.

IV.

CERTIORARI REVIEW IS APPROPRIATE TO CORRECT EGREGIOUS ERRORS COMMITTED BY LOWER COURTS IN CAPITAL CASES.

The only argument that respondent could muster in opposing this Court's review of question four in the underlying petition was that this question involves mere error correction, a practice that is not favored. (Opp. at pp. 25-27). Respondent's position is belied by an examination of this Court's practices in reviewing capital cases.

For instance, in *Kyles v. Whitley*, 514 U.S. 419 (1995), the majority in that case was criticized by Justice Scalia's dissenting opinion for improperly engaging in error correction, notwithstanding the flawed reasoning employed by the Fifth Circuit in denying relief on Curtis Kyles' *Brady* claim. *Id.* at 456-459 (Scalia, J., dissenting). As a result of this Court's determination that certiorari review was warranted, Curtis Kyles was ultimately exonerated. If respondent's position here had prevailed in that case, Curtis Kyles would now be dead instead of free.

This Court's per curiam decision in *Hinton v. Alabama*, 571 U.S. 263 (2014), falls into the same category. Respondent's position would have also required this Court to turn a blind eye to a clear injustice arising from the Alabama Courts' failure to correctly apply the *Strickland* test during Mr. Hinton's state habeas appeals. Anthony Ray Hinton was exonerated in 2015.

This Court, as noted earlier, has also not been reluctant to issue per curiam reversals in habeas corpus cases. These decisions are common in state-on-top petitions that allege that a federal court of appeal erroneously applied the standard of review provisions of the AEDPA in granting a prisoner habeas relief. *See e.g. Shinn v. Kayer*, 141 S. Ct. 517 (2020). For the reasons noted in the underlying petition, this case also involves an egregious error by the court of appeals in failing to properly evaluate petitioner's *Strickland* claim under the "contrary to" clause of § 2254(d)(1). This Court must intervene to prevent a clear injustice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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