No. 22-5734

In The
Supreme Court of the United States

TIMOTHY WADE SAUNDERS,

Petitioner,

v.

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Every year, capital and non-capital defendants alike seek to invoke appellate jurisdiction by filing an application for a certificate of appealability in one of the twelve Circuit Courts of Appeals in the United States. The issue presented in Timothy Saunders' petition for writ of certiorari could affect any one of those thousand or more applications and is an important question of federal law. A definitive answer to the question presented by Mr. Saunders is elusive for petitioners as there is an unambiguous split among the Courts of Appeals. The question is neither wildly complex nor unduly complicated. This Court would decide a single issue, responsive to the predominant analysis conducted by the Courts of Appeals, rather than analyze the superfluous arguments Respondent raised. This Court should grant *certiorari* to resolve whether "luck of geography" should determine whether an individual federal habeas petitioner's substantive appeal will ever be considered on its merits based solely on varying interpretations of the application of a federal statute – one such interpretation already rejected by four Courts of Appeals.

When a federal habeas petitioner files an application for a certificate of appealability ("COA") at a Court of Appeals pursuant to 28 U.S.C. § 2253(c)(2) and makes a substantial showing of the denial of a constitutional right, a single circuit judge may grant the application, identify the specific legal issue that will be heard on appeal, and determine the substantial constitutional issue denied – all within the text of the COA granted by that same circuit judge. If that circuit judge grants

the COA, identifies the issue to be heard on appeal but fails to identify any constitutional issue, what should happen? As it stands, the answer to that question depends almost entirely on the location of the circuit where that petitioner resides.

If Mr. Saunders had submitted an identical application for COA to a conviction and death sentence in Ohio and been granted an identical COA as he received from the Eleventh Circuit, his appeal would have continued and been considered on its merits. This is because the Second, Third, Fourth, and Sixth Circuits all hold that when a petitioner files a proper application for a COA, a single circuit judge grants a COA (even a defective one), without objection from the appellee, and the case is fully briefed and set for argument, 28 U.S.C. § 2253's gatekeeping function is satisfied, and the appeal will be heard. This is in direct conflict with the Eleventh, Fifth, Seventh, Eighth, and Ninth Circuits, all of which hold that a panel may later raise, *sua sponte*, a defect in the language of the COA, vacate it, and dismiss the appeal. The single issue before this Court is whether federal law permits, let alone, requires such action.

ANALYSIS

Unable to produce a cogent response to why this Court should not grant *certiorari* and resolve this question, Respondent's Brief in Opposition ("BIO") is nothing more than an attempt to obfuscate the issue for which Mr. Saunders seeks review. None of the legal theories Respondent has put forward to deny this petition are sufficient to do so. Aside from the clear circuit split, if the Eleventh Circuit's opinion goes unchallenged and its practice of waiting until the parties fully brief the

appeal and oral argument has been scheduled remains, it would further allow panels of Courts of Appeals to effectively deny appeals on the merits without jurisdiction.

I. Respondent's argument—that there is no circuit split to be resolved, but only a difference in "discretion"—is of no moment.

Respondent incorrectly argues that there is no circuit split on this question of statutory interpretation.[1] This Court's rules provide compelling reasons that can lead the Court to grant a petition for writ of *certiorari*. The first compelling reason for granting *certiorari* identified is where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."[2] The decisions must be in conflict and the matter upon which they conflict be important. Mr. Saunders' petition satisfies both.

The conflict is not, as Respondent argues, a matter of differing discretion. The Third and Sixth Circuits explicitly hold that, once the gatekeeping function of § 2253(c)(1) is met, there is to be no further inquiry into the matter, regardless of any defects in the COA.[3] The Second Circuit also considers the matter resolved once the COA is granted.[4] In stark contrast, the Fifth and Eleventh Circuits allow panels to revisit these issues, even where, as here, the case has been fully briefed.[5]

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[1] BIO at 18.

[2] Sup. Ct. R. 10(a).

[3] *See, e.g.*, *Sistrunk v. Rozum*, 674 F.3d 181, 186 (3d Cir. 2012); *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001).

[4] *See Rosa v. United States*, 785 F.3d 856, 858 n.3 (2d Cir. 2015).

[5] *United States v. Castro*, 30 F.4th 240, 243 (5th Cir. 2022).

This is not, as Respondent exhorts, a matter of "discretion" or "local rules," but the standard and customary interpretation of a federal statute that federal courts must undertake. Likewise, where there is a disagreement among the circuits as to the statutory interpretation of a federal law, this Court is called on to intervene and resolve the variance. To call this disputation merely differences in exercising discretion misunderstands the cases and their effects. If Mr. Saunders' case was in the Second, Third or Sixth Circuits, his appeal would have been heard on the merits. In the Fifth and Eleventh Circuits, it could be dismissed. This constitutes a circuit split under any reasonable definition of the phrase.

The second requirement, that the circuit split concern an important matter, is also satisfied here. Importance can take many forms, including when it involves: (1) an "important question of statutory construction";[6] (2) "the need for a uniform rule on the point";[7] or a "question of importance not heretofore considered by this Court."[8] This case encompasses all three.

First, as noted above, this concerns a question of statutory construction, a question left open by this Court in *Gonzalez v. Thaler.*[9] Further, there is a need for a uniform rule on the point so federal habeas corpus petitioners (and the States defending their judgments) are treated in the same manner across circuits. Finally, the number of cases affected by the circuit split is large.

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[6] *Shapiro v. United States*, 335 U.S. 1, 4 (1948).

[7] *Comm'r v. Bilder*, 369 U.S. 499, 501 (1962).

[8] *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 507 (1982).

[9] 565 U.S. 134 (2012).

Respondent's argument on this point, that "while laxer standards might make for more carefree briefing, this does not constitute grounds for certiorari,"[10] must also be rejected. Where an area of uncertainty and conflict in interpreting a federal statute spans thousands of cases per year, it is certainly an issue of national importance and not an afterthought.

II. Resolving this case would not create "federal common law."

Concomitantly, Respondent raises a concern about whether deciding the question would create "federal common law."[11] This rests on a fundamental misunderstanding of both federal common law and this Court's responsibility to interpret federal statutes in a manner that ensures uniformity. Despite it being Respondent's lead argument, it requires little consideration.

Mr. Saunders seeks the opposite of the creation of federal common law: he asks this Court to engage in black-letter statutory interpretation to resolve a clear circuit split. This is not a situation involving a sweeping act of Congress necessarily requiring fleshing out by this Court.[12]

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[10] BIO at 28.

[11] *Id.* at 17.

[12] *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642-43 (1981) ("Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law," and identifying two such acts as the Labor Management Relations Act and "the first two sections of the Sherman Act") (citations omitted); *see also id.* at 641 ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.") (footnotes omitted).

Section 2253 contains three requirements: (1) an appeal may not be taken from the final order in a habeas proceeding unless a "circuit justice or judge" issues a COA;[13] (2) the COA may only issue if there is a substantial showing of the denial of a constitutional right;[14] and (3) the COA should identify which issues satisfy the second element.[15] This Court has divided § 2253 into jurisdictional and non-jurisdictional provisions. Section 2253(c)(1) is the jurisdictional portion,[16] while the rest of the statute is non-jurisdictional.[17] In other words, the *grant* of a COA is jurisdictional, but the rest of the statute is not.

Gonzalez was clear that a COA was necessary to vest jurisdiction in an appellate court to hear an appeal from the denial of a habeas petition. However, it did not address what happens if the gatekeeping function of § 2253(c)(1) is satisfied, but the order does not explicitly state what constitutional right was substantially shown to be denied. The decision here presumes that the order granting a COA must contain language indicating the constitutional question at issue. The statute sets out that the order must indicate which issues satisfy the showing.[18] However, the plain language of the statute does not require an order granting a COA

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[13] 28 U.S.C. § 2253(c)(1). This provision does not apply to the State when a district court grants habeas relief to the petitioner. Fed. R. App. P. 22(b)(3).

[14] 28 U.S.C. § 2253(c)(2).

[15] 28 U.S.C. § 2253(c)(3).

[16] *Gonzalez*, 565 U.S. at 142.

[17] *Id.* at 143.

[18] When the issue is a procedural one, the applicant must show a substantial constitutional claim and that reasonable jurists would disagree on the resolution of the procedural issue. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

explicitly indicate both the procedural and valid constitutional issues. The Eleventh Circuit's rule is irreconcilable with this Court's holding in Gonzalez as to the non-jurisdictional aspects of § 2253.

If the prerequisites for an appeal have been satisfied, such as the filing of a timely notice of appeal in a regular civil case, the appellate court has no discretion to dismiss the appeal absent additional violations of the appellate rules. In other words, the gatekeeping function has been satisfied by the appellant filing a timely notice of appeal and either paying, or obtaining leave to pay a partial, filing fee. In a habeas case, the gatekeeping function includes another element to vest jurisdiction—the grant of a COA. This petition asks the question: once the gatekeeping function has been satisfied in a habeas appeal (by issuance of a COA), can the appellate court dismiss the appeal if the order conferring jurisdiction does not include the language prescribed by § 2253(c)(3)? Answering this important question does not require the Court to create "federal common law" but to interpret a statute—something that it has done for over 200 years.[19]

III. Mr. Saunders did (and does) propose a remedy for him and others in his situation to implement when vacating the Eleventh Circuit's decision dismissing his appeal.

Respondent's final basis for denying *certiorari* is that Mr. Saunders did not ask for relief, but merely "clarity."[20] As discussed above, clarity between circuits is a fundamental reason for granting *certiorari*. While Mr. Saunders seeks more than

[19] *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[20] BIO at 2.

simple clarity, clarity and guidance can be factors this Court considers when deciding whether to grant *certiorari*. Recently, in dissenting from the denial of *certiorari*, Justice Thomas recognized that the case at issue was "the opportunity to *provide guidance* on the proper approach for evaluating Second Amendment claims" and "an opportunity to *clarify* that the Second Amendment protects a right to public carry."[21] Here, a lack of clarity has resulted in varying and contradictory results among the Courts of Appeals. Clear and consistent § 2253(c) jurisprudence is required. Without advocating, and regardless of the outcome, the parties deserve clarity as to the right procedure. Any resolution by the Court should eliminate unpredictability and arbitrariness, not in the determination of whether the COA is itself defective, but in what to do when a clearly defective COA has been granted. If, following merits briefing, this Court adopts the approach taken by the Second, Third, and Sixth Circuits, the remedy would be more than "clarity"—it would result in a remand for a decision on the merits. *Certiorari* is appropriate to remedy any lack of standards and obscurity.

The Eleventh Circuit's interpretation of § 2253 is likewise problematic because it lends itself to considering the case on the merits without ever granting a COA, in violation of this Court's precedent. Contrary to Respondent's arguments, a COA determination under § 2253(c) does not involve full consideration of the

[21] *Rogers v. Grewel*, 140 S. Ct. 1865, 1867-68 (2020) (emphases added).

underlying merits of the constitutional claim.[22] "In fact, the statute forbids it."[23] Because, when a Court of Appeals justifies the denial of a COA based on its adjudication of the merits of that claim, "it is in essence deciding an appeal without jurisdiction."[24] The danger of that overreach is even greater here where both parties had briefed the merits and oral argument was imminent. While the parties had briefed the merits of Mr. Saunders' claims because COAs were granted, it is well-known and understood that those merits arguments are displaced in the jurisdictional analysis of his appeal. Indeed, it would be hard to measure how much, if any, of the decision to vacate the COA was based on a perceived lack of underlying merit to Mr. Saunders' claims.[25] This Court has recently made clear that premature consideration of the merits of a case in this posture is impermissible.

In *Buck v. Davis*,[26] this Court found the Fifth Circuit panel improperly reached the merits of the case at the COA stage because it should only have decided

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[22] *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

[23] *Id.*

[24] *Id.* at 336-37.

[25] It is noteworthy that the largest portion of the State's supplemental response analyzed the underlying merits of Mr. Saunders' claims. Moreover, the Eleventh Circuit's procedure raised the distinct likelihood of premature merits analysis. Uniformity on the question presented is needed to avoid not only a discrepancy between the circuits on this issue, but also to ensure that all litigants are afforded consistent treatment pursuant to a federal statute. *See Miller-El*, 537 U.S. 336-37 ("When a court of appeals sidesteps this 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.).

[26] 137 S. Ct. 159 (2017).

the question of whether the District Court's decision was debatable.[27] Here, in vacating the COA and dismissing the appeal, the panel examined the underlying merits of Mr. Saunders' claims in violation of *Buck*.[28] "The COA inquiry, we have emphasized, is not coextensive with a merits analysis."[29] Here, the Eleventh Circuit's order vacating Mr. Saunders' COA and dismissing his appeal blurred the lines between inquiry and analysis and resulted in an impermissible result.

CONCLUSION

For the above reasons, Mr. Saunders respectfully requests that this Court grant *certiorari*, vacate the decision of the Eleventh Circuit, and remand with an order that it reinstate his appeal for a decision on the merits.

Respectfully submitted,

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[27] 137 S. Ct. at 774.

[28] *Id.* ("Those are ultimate merits determinations the panel should not have reached.").

[29] *Id.*