

In the
Supreme Court of the United States

NICHOLAS CRYSTAL,

Petitioner,

v.

CALVIN JOHNSON, WARDEN; and the
ATTORNEY GENERAL FOR THE STATE OF NEVADA,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit, in a post-conviction appeal by a sentenced Nevada State prisoner, commit reversible error in its pro forma, non-reasoned blanket denial of a Certificate of Appealability to a mentally deficient Appellant pursuant to 28 U.S.C. § 2253(c)?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
No. 22-16294

Nicholas Crystal, *Petitioner-Appellant*, v.
Calvin Johnson; Attorney General for the State of
Nevada, *Respondents-Appellees*.

Date of Final Order: June 15, 2023

United States District Court for the District of Nevada
Case No. 2:21- cv -01729-GMN-NJK

Nicholas Crystal, *Petitioner* v.
Calvin Johnson, et al., *Respondents*.

Date of Final Judgment: July 25, 2022

Court of Appeals of Nevada
No. 81091-COA
Nicholas Crystal, *Appellant* v.
The State of Nevada, *Appellees*.
Date of Final Order: April 12, 2021

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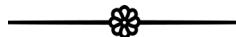
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PETITION FOR A WRIT OF CERTIORARI

NICHOLAS CRYSTAL petitions the Court for a Writ of Certiorari to review the Order denying a Certificate of Appealability by the United States Court of Appeals for the Ninth Circuit.



OPINIONS BELOW

The Ninth Circuit’s unpublished order denying a Certificate of Appealability is attached in the Appendix (“App.”) at 1a. The Federal District Court’s unpublished Order denying Petitioner’s Habeas motion is unreported and is attached at App.2a, 4a. The Nevada Court of Appeals decision is attached at App.18a.



JURISDICTION

The Ninth Circuit entered its order on June 15, 2023. App.1a. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

This case involves the relationship between 28 U.S.C. § 2254, the primary avenue for collateral review of state criminal judgments, and the standard for issuing a Certificate of Appealability in a case involving a mentally deficient prisoner. This case also implicates as a sub-issue, the Court of Appeals' application of 28 U.S.C. § 2253, which bars plenary appellate review in a habeas corpus proceeding unless a court issues a Certificate of Appealability.

28 U.S.C. § 2253(c)(1)-(3)

- (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.
- (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).

28 U.S.C. § 2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

NRS 178.400—**Incompetent Person Cannot Be Tried or
Adjudged to Punishment for Public Offense**

1. A person may not be tried or adjudged to punishment for a public offense while incompetent.
2. For the purposes of this section, “incompetent” means that the person does not have the present ability to:
 - (a) Understand the nature of the criminal charges against the person;
 - (b) Understand the nature and purpose of the court proceedings; or
 - (c) Aid and assist the person’s counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.



STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

A. Clark County Nevada Justice Court Proceedings

On August 5, 2014, criminal charges were filed against Petitioner in the Las Vegas Justice Court (the lower court of limited jurisdiction over preliminary matters in felony cases in Nevada).

The court-assigned Public Defender requested a Competency Evaluation, but never provided the Court nor the appointed psychiatrists/psychologists with any medical or psychiatric evaluations to support a mental assessment. No additional information was provided to the mental health professionals. NOTE: pursuant to Nevada Revised Statute 178.405, et seq., once a Competency Evaluation is requested, all proceedings against the accused are automatically stayed pending competency/incompetency findings of two of more qualified psychiatrists, psychologists, or approved therapists. And, pursuant to Nevada Revised Statute 178.400, an incompetent person cannot be tried for a criminal offense. The Psychiatric Report at App.21a conclusively proves that Petitioner was a Schizophrenic (Paranoid type) before the criminal activity was charged.

Following a Grand Jury indictment, the pending charges in the Justice Court were dismissed. NOTE: Under Nevada law, an indictment on the same charges results in the dismissal of charges in the lower Justice Court.

B. Nevada Trial Court Proceedings

Petitioner was indicted by a Grand Jury in Clark County, Nevada. During the District Court pre-trial and trial proceedings, Petitioner was never evaluated nor treated for his long-standing psychiatric condition: schizophrenia (paranoid) type for which a confirmed diagnosis existed. *See App.21a.*

On January 9, 2015, the Indictment charged the following fourteen counts, all of which are SPECIFIC INTENT crimes, which should have raised a red flag on the issue of Petitioner's mental inability to comprehend whether he knew right from wrong:

Count 1 – Conspiracy to Commit Robbery

Count 2 – Conspiracy to Commit
Kidnaping

Count 3 – First Degree Kidnaping
with Use of a Deadly Weapon

Count 4 – Battery with Use of a Deadly
Weapon Resulting in
Substantial Bodily Harm

Count 5 – Battery with Intent to Commit
Crime

Count 6 – Burglary While in Possession of
a Deadly Weapon

Count 7 – Robbery with Use of a Deadly
Weapon

Count 8 – Grand Larceny Auto

Count 9 – Burglary While in
Possession of a Deadly Weapon

Count 10 – Attempt Murder with
Use of a Deadly Weapon

Count 11 – Robbery with Use of a Deadly
Weapon

Count 12 – Grand Larceny Auto

Count 13 – Battery with Use of a Deadly
Weapon

Count 14 – Battery with Intent to Commit a
Crime.

On March 15, 2016, an Amended Indictment was filed to add an element to Count 3, now First Degree Kidnapping with Use of a Deadly Weapon resulting in Substantial Bodily Harm. Upon conviction, this element would add a substantial sentence to the underlying Kidnapping.

Initial arraignment took place in January 2015. Petitioner pled not guilty to all of the charges in the Indictment. Petitioner invoked the 60-day rule requesting a jury trial within sixty-days after Arraignment in the Nevada District Court, a trial court of general jurisdiction.

During the pre-trial phase, Petitioner was never evaluated nor treated for a long-standing psychiatric condition: schizophrenia (paranoid) type for which a confirmed diagnosis existed.

A six-day jury trial later commenced. Following trial, Petitioner was found guilty of all crimes and was sentenced as follows:

CONSPIRACY TO COMMIT ROBBERY:
24 to 60 months

CONSPIRACY TO COMMIT KIDNAPING:
24 to 60 months

FIRST DEGREE KIDNAPING RESULTING IN
SUBSTANTIAL BODILY HARM:
Life with the possibility of parole after
minimum of 15 years

BATTERY WITH USE OF A DEADLY
WEAPON RESULTING IN SUBSTANTIAL
BODILY HARM: 48 to 120 months

BATTERY WITH INTENT TO COMMIT A
CRIME: 36 to 90 Months

BURGLARY WHILE IN POSSESSION OF A
DEADLY WEAPON: 36 to 90 Months

ROBBERY WITH USE OF A DEADLY
WEAPON: 48 to 120 months

GRAND LARCENY AUTO: 36 to 90 Months

BURGLARY WHILE IN POSSESSION OF A
DEADLY WEAPON: 36 to 90 Months

ATTEMPT MURDER WITH USE OF A
DEADLY WEAPON: 48 to 120 months

ROBBERY WITH USE OF A DEADLY
WEAPON: 48 to 120 months

GRAND LARCENY AUTO: 36 to 90 Months

BATTERY WITH USE OF A DEADLY
WEAPON RESULTING IN SUBSTANTIAL
BODILY HARM: 60 to 120 months

BATTERY WITH INTENT TO COMMIT A
CRIME: 36 to 90 Months

Prior to sentencing, Petitioner was never evaluated nor treated for the long-standing psychiatric condition: schizophrenia (paranoid) type for which a confirmed diagnosis existed. *NOTE: Nevada law permits an attorney to lodge a request for a Competency Evaluation prior to the imposition of a sentence so that the Nevada District Court retains jurisdiction.*

Sentencing occurred in May 2016.

The Judgment of Conviction was filed in June 2016. An Amended Judgment of Conviction was filed in March 2017.

C. Direct Appeal

In June, 2016, a Notice of Appeal was filed. The Nevada Supreme Court docketed this appeal.

Appellant's Opening Brief was filed indicating the following assignment of error:

Appellant's right to due process was violated when the District Court imposed consecutive sentences in the absence of preexistent, cognizable, and reviewable standards and criteria permitting its imposition.

The Nevada Supreme Court filed its Order of Affirmance denying the appeal.

D. Post-Conviction Litigation

In April, 2018, Petitioner filed a state court Petition for Writ of Habeas Corpus Post-Conviction.

In July, 2018, Petitioner filed a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). *The Petition raised several grounds for relief, the most pertinent of which*

was the issue of Petitioner's incompetence to stand trial in the first instance.

In August, 2019, the Nevada State Trial Judge held a hearing on the Nevada Post-Conviction Writ of Habeas Corpus Petition.

Thirteen months after the evidentiary hearing, on June 25, 2020, the Nevada Trial Judge ruled: "The Court finds that error, if any, does not rise to the level of cumulative error necessitating relief."

The Nevada Trial Judge did not factor in his decision the unchallenged Exhibit which documented the long-standing diagnosis of Schizophrenia (Paranoid Type). *See App.21a.*

Petitioner is currently serving his sentence.

E. Federal Habeas Corpus & The Pro Se Appeal to the United States Court of Appeals for the Ninth Circuit

Petitioner timely filed a Motion to Vacate Sentence (Post Conviction: Habeas Corpus) in the United States District Court for the District of Nevada.

Petitioner's counsel at the Federal Habeas level, never argued the impact of Exhibit 68 (App.21a herein) containing the diagnosis of Schizophrenia (Paranoid) type.

The Nevada Attorney General included Exhibit 68 (App.21a herein) but never once argued this diagnosis, merely pointing to a Pre-Sentence Report, which did not contain the 2009 mental instability findings (App. 21a). This Exhibit contained a psychiatric evaluation of the Schizophrenia (Paranoid Type). The Nevada Attorney General disingenuously argued that the sole

basis for a “psychiatric” type defense was an unsupportable conclusion in the Pre-Sentence Report submitted by Nevada State Probation. Therefore, the State of Nevada either neglected or chose not to argue Petitioner’s documented mental instability.

In August 2022, the Federal District Court Judge denied relief and *sua sponte* denied a Certificate of Appealability, without referencing Exhibit 68, which was contained in the Index filed but never mentioned by Respondent Nevada Attorney General. App.16a.

Acting Pro Se, Petitioner filed an appeal but did not lodge a Request/Motion for Certificate of Appealability within the 35-days mandated by the Ninth Circuit Rule 22-1(d). Mentally challenged, Petitioner was unaware of that requirement.

On June 15, 2023, on its own motion as provided for in the Rules of the Ninth Circuit, the United States Court of Appeals for the Ninth Circuit denied a Certificate of Appealability, but in so doing, violated its own clear, controlling precedent that the failure to address the claim of the irrefutable mental/psychiatric evidence submitted to but never considered by the Ninth Circuit nor the Federal District Court. As such, this failure “. . . constitutes error and requires remand.” *See, Rios v. Lynch*, 807 F.3d 1123, 1126. This Certiorari petition has therefore been timely filed.



REASONS FOR GRANTING THE PETITION

This Court's intervention is necessary to resolve the current problem whereby the Ninth Circuit erred by its summary denial of a Certificate of Appealability to a mentally deficient Appellant.

Beyond the Ninth Circuit's substantive misreading of the necessity for the Certificate of Appealability (COA) below, its summary denial of a COA on this issue reflects yet another failure by that court to properly apply 28 U.S.C. § 2254, particularly as it relates to challenges brought by sentenced State prisoners, who seek relief as a last resort in Federal Court. *Compare, Gonzalez v. Crosby*, 545 U.S. 524 (2005).

Petitioner Nicholas Crystal is facing what can only be described as a horrendous sentence, something which should not have been meted out to a mentally deficient person with a history of schizophrenia of the paranoid type. With this confirmed diagnosis, Petitioner should never have been convicted, much less even tried to a jury.

A Writ of Certiorari should be issued to the United States Court of Appeals for the Ninth Circuit with appropriate instructions to allow for further briefing and expansion of the record. This Honorable Court has the authority to Grant the relief to permit Petitioner to plead his case concerning psychiatric deficiencies and mental illness. It is only through granting of the Writ that this court can cure the problem and be true to this Court's long-standing policy to right a wrong in an appropriate case.

I. DUE PROCESS COMPELS GRANTING OF CERTIORARI.

The Ninth Circuit denied the Certificate of Appealability under circumstances where this mentally deficient defendant is facing a potential Life sentence.

While the underlying facts are ugly, this Court can take notice that where the mental diagnosis was available, every single Court in the record below never considered the irrefutable evidence of Schizophrenia (Paranoid type) evidenced in 2009. App.21a.

The State of Nevada listed its Exhibit 68. The State of Nevada never once argued this Exhibit to the Federal District Court. Next, Petitioner's counsel during the federal habeas proceedings never briefed nor argued the impact of that particular Exhibit.

Later, the Federal District Court never mentioned Exhibit 68 in denying habeas relief and denying the Certificate of Appealability. *See* App.4a-17a. This diagnosis was admitted in earlier post conviction proceedings without opposition by the State of Nevada.

In August 2022, Petitioner filed a Notice of Appeal. This filing was in Proper Person. According to the Ninth Circuit rule, a Certificate of Appealability must be filed within 35 days after the notice of appeal is filed. In proper person, Petitioner was unaware of this rule, although charged by law with understanding what the rules and regulations are even if he was initially representing himself on appeal.

Next, the Ninth Circuit never permitted Petitioner the opportunity to present this Exhibit by summarily denying a COA. App.1a.

However, when an appellant fails to lodge a request for a Certificate of Appealability, Ninth Circuit Rule permits the Court, itself, to consider a Certificate of Appealability. The Ninth Circuit never directed Petitioner to file supplemental briefs or evidence to support a Certificate of Appealability, nor briefing on the merits.

This is where the Ninth Circuit went wrong.

The only corrective action is to grant the Writ of Certiorari to cure this constitutional deficiency.

The Ninth Circuit Court of Appeals denied Petitioner due process of law, where process rights apply because federal and state legislatively-created appeals are “an integral part of the system for finally adjudicating the guilt or innocence of a defendant.” *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). So, this Court’s has longstanding precedent which has ruled that defendants who have a constitutional right to an appeal still possesses a Due Process right to a fundamentally fair appeal process once such an appeal has been legislatively provided.

Petitioner’s due process rights were violated by the Ninth Circuit Court of Appeals’ phantom review of his case. Plainly, “[t]he writ of habeas corpus plays a vital role in protecting Constitutional rights.” *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Given the importance and historical role of the Great Writ as stated in *Boumediene v. Bush*, 553 U.S. 723, 745 (2008), habeas review is “an integral part of the system for finally adjudicating the guilt or innocence of a defendant.” *See Evitts*, 469 U.S. at 393 (citing *Griffin*, 351 U.S. at 18). “The importance of the writ is that it protects those detained by providing a tool to call their

jailer into account.” *Boumediene*, 553 U.S. at 745. This Court “[has] made clear that, unless Congress acts to suspend it, the Great Writ of Habeas Corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

The Great Writ is also “. . . a vital instrument for the protection of individual liberty. . . .” *See, Boumediene*, 553 U.S. at 743. This integral part of the criminal justice system was rendered meaningless, in violation of the Due Process Clause, when the Ninth Circuit Court of Appeals perfunctorily denied the COA.

Two Circuits—the Fifth and the Ninth—are still in conflict with five other circuits.

The Eleventh Circuit, for example, would likely have permitted a Rule 60(b)-type motion. In *Williams v. Chatman*, 510 F.3d 1290 (11th Cir. 2007), that court held that a habeas applicant’s Rule 60(b) motion—that the district court should have issued a briefing schedule giving him an adequate opportunity to brief the issues and the respondent a fair chance to respond—did not “fall within this Court’s definition of a successive habeas petition.” 510 F.3d at 1295. The Eleventh Circuit held that the movant’s attack on the court’s denial of a fair process did not attack the merits of its decision denying relief, and thus could be raised as part of a Rule 60(b) motion.

Other Circuits have reached the same conclusion in similar situations. For example, the Sixth Circuit has held that a Rule 60(b) motion challenging the

district court’s failure to hold an evidentiary hearing was a proper Rule 60(b) motion because it identified a defect in the integrity of the habeas procedure. *Mitchell v. Rees*, 261 Fed. App’x 825, 829 (6th Cir. 2008), abrogated on other grounds, *Penney v. United States*, 870 F.3d 459, 462 (6th Cir. 2017).

Likewise, the Tenth Circuit has ruled that a 60(b) motion, asserting that the district court denied a federal § 2255 motion without giving the petitioner an adequate opportunity to access record documents and amend his pleadings to properly present his claims, alleged a defect in the integrity of the proceedings rooted in procedural due process. *United States v. Marizcales-Delgadillo*, 243 Fed. App’x 435, 438 (10th Cir. 2007).

Similarly, the Third Circuit has held that where a petitioner had sought extra time to file his habeas petition, and the district court never ruled on that motion before ultimately dismissing the petition as untimely, a motion seeking relief from that dismissal due to the district court’s earlier failure to rule on the extension request was not an attack on the merits of its decision and thus was properly brought under Rule 60(b). *United States v. Andrews*, 463 Fed. App’x 169, 171-72 (3d Cir. 2012).

The Fourth Circuit has taken the same approach. *See, e.g., Rowe v. Dir., Dep’t of Corr.*, 111 Fed. App’x 150, 151 (4th Cir. 2004) (holding that petitioner’s Rule 60(b) motion alleging that the “district court erred by failing to conduct an evidentiary hearing” before dismissing his § 2254 petition “did not directly attack [the petitioner’s] conviction or sentence” but instead “asserted a defect in the collateral review process itself” and thus “constituted a true Rule 60(b) motion”);

United States v. Gonzalez, 570 Fed. App'x 330, 335-36 (4th Cir. 2014) (where district court granted an evidentiary hearing but failed to appoint counsel to represent petitioner at that hearing, the petitioner's Rule 60(b) motion challenging that decision as a procedural defect did not constitute a successive habeas petition).

In other Circuits, district courts have likewise rejected reading *Gonzalez* so narrowly that Rule 60(b) relief—and by analogy—Habeas Corpus relief would never be available for procedural defects analogous to the one alleged by Petitioner. In *Malpica-Garcia v. United States*, No. CIV. 08-2055 JAF, 2012 WL 1121420 (D.P.R. Apr. 3, 2012), for example, the petitioner's Rule 60(b)(6) motion which alleged that his habeas attorney had committed “gross negligence” by not calling a certain witness during an evidentiary hearing or seeking post-judgment relief. The court allowed the motion to proceed, finding that those allegations challenged “procedural aspects of th[e] habeas proceeding” rather than the movant's underlying issues.

In Petitioner's view, the five Circuits which espouse an expanded view of *Gonzalez* have the more persuasive argument. By contrast, the Fifth and Ninth Circuits take a very narrow view of what constitutes a potential “procedural defect”, and five other Circuits have adopted a more generous, and more well-reasoned interpretation. That conflict is significant and recurring, and deserves this Court's attention.

This Court's intervention is warranted because the Ninth Circuit continues to apply an unfairly steep COA standard in habeas cases, and does so (as here) in cases where the factual record is inadequately developed.

There can be no question that a Certificate of Appealability was warranted for this mentally deficient Petitioner. This Court should grant Certiorari, or remand the case pursuant to the logic in *Figueroa v. Walsh*, No. 00-CV-1160, 2010 WL 772625 (E.D.N.Y. Mar. 4, 2010): Claimant’s Rule 60(b) motion alleged that the district court’s denial of an evidentiary hearing constituted a procedural defect, and the court agreed that such a motion was “the proper vehicle” for that challenge. *Figueroa*, 2010 WL 772625.

The Ninth Circuit Court of Appeal’s one-paragraph ruling conflicts with this Court’s precedent. As such it is appropriate for a habeas court to take into account the severity of a multi-decade sentence when deciding whether to issue a certificate of appealability.

This Court has recognized the appropriateness of taking into account the severity of the sentence when deciding whether to issue a certificate of appealability in a capital case. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (By analogy, “in a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause . . . ”). With the complicated matrix of concurrent and consecutive sentences ordered by the Nevada State Trial Court and without giving the severity of Petitioner’s sentence any consideration at all, the Ninth Circuit Court of Appeals’ one paragraph, unreasoned pro forma ruling again conflicts with this Court’s precedent.

That this is not a capital case makes no difference because the logic is clear: Petitioner was and remains mentally deficient so his decades long sentence is substantively no different than a prisoner awaiting execution in a sentence of death.

The Ninth Circuit's blanket denial of a certificate of appealability still perpetuates the split among the circuits as to whether the blanket denial (or grant) of a COA is permissible under 28 U.S.C. § 2253(c), which provides:

- (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.
- (c)(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.
- (c)(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c)(1)-(c)(3).

Rule 11 of the Rules Governing 2254 cases in the United States District Court also provides that, “[I]f the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(3)(2).” *See*, Hettz and Liebman, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE Sec. 35.4b at 1574, n. 40 (5th Ed. 2005) [Discussing 28 U.S.C. § 2253(c)(3) and citing cases to effect that an issuing court may not simply find that

the overall petition meets (or not) the standard]; *see, also* Ryan Hagglund, *Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions*, 72 U. CHI. L. REV. 989, 1024 (2005).

This Rule requires some reasoned gatekeeping explanation be provided in the granting or denial of a certificate of appealability has been applied in the Fifth, Sixth, Tenth, Eleventh and D.C. Circuits. For example, in *Muniz v. Johnson*, 114 F.3d 43, 46 (5th Cir. 1997), the Court held that “when a district court issues a CPC or COA that does not specify the issue or issues warranting review, as required by 28 U.S.C. § 2253(c)(3), the proper course of action is to remand to allow the district court to issue a proper COA, if one is warranted.”

In *Porterfield v. Bell*, 258 F.3d 484, 486 (6th Cir. 2001) the Sixth Circuit Court of Appeals previously held that:

Both [blanket grants and blanket denials undermine the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability. Moreover, because the district court is already deeply familiar with the claims raised by petitioner, it is in a far better position from an institutional perspective than this court to determine which claims should be certified.

See also, Murphy v. Ohio, 263 F.3d 466 (6th Cir. 2001) (“Such a blanket denial of a COA by the district court in this case is at least as objectionable as the blanket

grant of a COA by the lower court in Porterfield, if not more so.”)

The Tenth Circuit has also construed the statute in the same way. *See, LaFevers v. Gibson*, 182 F.3d 705, 710 (10th Cir. 1999) (“It is equally important, however, that district courts do not proceed to the other end of the jurisdictional spectrum and, make a blanket denial of a certificate of appealability unless the court is convinced there is nothing in the petition that is of debatable constitutional magnitude.”). *Compare, Herrera v. Payne*, 673 F.2d 307, 307 (10th Cir. 1982) [“Clearly the rule imposes a responsibility on the district judge to issue a certificate or a statement detailing his reasons for declining to confer one.”].

In the case before this Honorable Court, can it be successfully argued that a one-paragraph summary denial by a Court of Appeals is sufficient? Answer: NO!

In *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014), the Eleventh Circuit Court of Appeals stated, “[w]e will not be so lenient in future appeals when a certificate fails to conform to the gatekeeping requirements imposed by Congress. Going forward, a certificate of appealability, whether issued by this Court or a district court, must specify what constitutional issue jurists of reason would find debatable. Even when a prisoner seeks to appeal a procedural error, the certificate must specify the underlying constitutional issue.”

Any generalized blanket denial of a COA undermines the gatekeeping function of certificates of appealability. Such perfunctory statements do not comport with the proper review process. That’s what happened here.

Yet not all circuit courts interpret the gatekeeping function in such a uniform manner. The Eighth Circuit, for example, has interpreted 28 U.S.C. § 2253 and this Court's precedent very differently. In *Dansby v. Hobbs*, 691 F.2d 934 (8th Cir. 2022), that court stated:

We do not think Section 2253(c) or the Supreme Court's decisions regarding certificates of appealability dictate that a court of appeals must or must not publish a statement of reasons when it denies an application for a certificate. Whether to issue a summary denial or an explanatory opinion is within the discretion of the court.

691 F.2d at 936.

Thus, it is imperative that this High Court clarify whether there are any minimal requirements for the grant or denial of a certificate of appealability. Petitioner herein, is in the unique position of having been granted no issues to litigate in this habeas appeal, in spite of having asserted numerous viable constitutional claims to the Federal District Court.

Again, the Ninth Circuit's pro-forma, unreasoned, blanket denial of a COA splits from decisions of other circuit courts which give special consideration to the COA procedure in the most serious cases. Barefoot states, ". . . the nature of the penalty is a proper consideration in determining whether to issue a certificate of [appealability]. . . . [,]" *Barefoot*, 463 U.S. at 893. Even though this is not a capital case, Petitioner was sentenced to Life on the top end.

The Ninth Circuit gave this concern absolutely no consideration in its summary, pro-forma denial of any COA. Courts other than the Ninth Circuit, how-

ever, have recognized the appropriateness of taking into account the severity of the sentence when deciding to issue a certificate of appealability. *See generally, Graves v. Cockrell*, 351 F.3d 143, 150 (5th Cir. 2003), *cert. denied*, 541 U.S. 1057 (2004) (“Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination.”).

The pro forma and unreasoned denial of any COA by the Ninth Circuit in this case, is also contrary to its own circuit precedent. *Cf. Rios v. Lynch*, 807 F. 3d 1123, 1126 (9th Cir. 2015) [Failure to address a claim constitutes error and requires remand.] In *Murphy v. Ohio*, 263 F.2d 466 at 467, it was noted that “the lower [district] court denied Murphy a COA before Murphy had even applied for one, and failed to provide any analysis whatsoever as to whether Murphy had made a ‘substantial showing of the denial of a constitutional right.’”

Here, at the Habeas Court level, Petitioner was never given the opportunity to apply for a COA, just as with Murphy, above. Next, again as with Murphy, above, the Habeas Court denied the COA. The District Court Order conclusively proves that the Federal Habeas took upon itself “. . . *sua sponte* . . .” to deny a COA. App.16a.

The Ninth Circuit’s pro forma denial of a COA requests warrants this Court’s attention. The blanket denial should be vacated and this case should be remanded to the for a properly reasoned review.

As it happens, *dicta* in the Ninth Circuit’s decision in Washington would actually support Petitioner’s analogy to Rule 60(b). That interpretation of *Gonzalez*

could reach the allegations in Petitioner’s original Motion to Vacate Sentence under 28 U.S.C. § 2254 and his appeal, if full development of the underlying facts was permitted.

As this Court has long held, *inter alia*, process which is more form is not Due Process. *See, Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950) [Ruling on an issue of notice.] So, a summary denial of a Certificate of Appealability does not conform to basic Due Process.

II. THE NINTH CIRCUIT DID NOT FOLLOW ITS OWN PRECEDENT.

In *Rios v. Lynch*, 807 F.3d 1123, 1126, that Court of Appeals unequivocally stated that the failure to address a claim “. . . constitutes error and requires remand.”

Here, neither the Ninth Circuit nor the Federal Habeas Court addressed the irrefutable evidence of Petitioner’s psychiatric diagnosis.

Certainly reasonable jurists could differ about whether Petitioner was in fact afforded a fair habeas procedure under the circumstances presented in this case, but at the end of the day, the Ninth Circuit’s analysis merely paid “lipservice” to the issue a Certificate of Appealability, but the Circuit Court’s failure to reference the psychiatric evidence or even allow further briefing, should operate to protect habeas applicants against procedural defects which rob a habeas proceeding of integrity.

On this ground alone, Certiorari should be granted.

III. THIS COURT CAN CORRECT THE LOWER COURTS REGARDING A DENIAL OF A CERTIFICATE OF APPEALABILITY.

The decisions from other Circuits authorizing Certificates of Appealability or other motions in the face of much less grave procedural irregularities suggest at least a substantial basis to have issued the Certificate of Appealability in the unusual and highly troubling circumstances of Petitioner’s case. The Ninth Circuit’s unsupportable, one paragraph rejection of any such possibility reflects its continuing failure to appreciate when a habeas case presents a “debatable” question of procedural or substantive law.

In *Mitchell v. United States*, 958 F.3d 775 (9th Cir. 2020), the Ninth Circuit stated that Appellant Mitchell could not appeal from the Federal District Court’s order unless the Court of Appeals, issued a Certificate of Appealability. *See* 28 U.S.C. § 2253 (c)(1)(B). In making this assessment of an incredibly high burden imposed on Habeas petitioners, the Ninth Circuit held to a limited threshold inquiry into the underlying merit of [the] claims,” *Buck v. Davis*, 137 S.Ct. 759, 774 (2017) (quoting *Miller-El*, 537 U.S. at 327), and this inquiry “should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims,’” *Id.* at 773 (quoting *Miller-El*, 537 U.S. at 336). “A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). To satisfy this standard, the applicant must show that “jurists of reason could disagree with the district court’s resolution of his [case] or that jurists could conclude the issues presented are adequate to

deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

May we compare this situation as if Petitioner was seeking an injunction or a stay of proceedings or a stay of execution? YES.

Why? Because Petitioner could have demonstrated:

- (1) That he is likely to succeed on the merits of the irrefutable psychiatric claim.
- (2) That he is likely to suffer irreparable harm in the absence of preliminary relief, to wit: Continued incarceration of a mental deficient.
- (3) That the balance of equities tips in his favor: What possible harm could have come about by letting the man argue his long-standing, documented psychiatric illness?
- (4) That an injunction is in the public interest: We have a Nevada Revised Statute which prohibits mental deficient from being tried.

Compare, *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (citation omitted). Petitioner satisfied those prerequisites.

Further, Petitioner satisfied the standard for a COA. To obtain a COA, Petitioner was to make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). If his counsel and the State of Nevada would have properly addressed Exhibit 68, there is no question that Petitioner showed that “jurists of reason could disagree with the district court’s resolution of his constitutional claims” or “conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*,

137 S.Ct. 759, 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322 at 336). Although he need not prove the merits of his case, he must demonstrate “something more than the absence of frivolity or the existence of mere good faith on his or her part.” *Id.* at 338. There is nothing frivolous about Petitioner’s schizophrenia.

Petitioner’s diagnosis of schizophrenia (paranoid) was and remains unchallenged:

- (1) During the Nevada State Court post-conviction hearing, Exhibit 68 was admitted into evidence without objection, yet the State Court Judge did not reference the prior and still existing diagnosis of schizophrenia (paranoid type)
- (2) During the Federal Habeas proceeding, the Nevada Attorney General submitted Exhibit 68 into its Index, yet the State of Nevada never once mentioned this Exhibit in its Reply/Response to the Federal Habeas petition.
- (3) During the Federal Habeas proceeding, counsel for Petitioner never once mentioned nor argued Exhibit 68.
- (4) In the decision to deny Federal Habeas Relief and to deny the Certificate of Appealability, the Federal District Court never once mentioned Exhibit 68, which was proof positive of an established diagnosis of schizophrenia (paranoid type)

Therefore, Petitioner herein met his threshold burden of proof, to no avail. As an initial matter, he satisfied the threshold statutory requirements for a

COA because he clearly made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2) (emphasis added).

In enacting that threshold requirement, Congress narrowed the prior judge-made standard, which required “a substantial showing of the denial of a federal right,” to apply only to constitutional claims. *Slack*, 529 U.S. at 480, 483 (emphasis added; citations omitted). Petitioner’s claim was raised in every post-conviction court, below.

What does this mean? The Ninth Circuit’s assessment definitely means that darn few Habeas appellants will ever get their day in Court. The Ninth Circuit in *Mitchell, supra*, is totally distinguishable from the constitutional underpinnings of the present case: a diagnosed mentally deficient person was wrongfully convicted because he should never have been tried in the first instance. *See*, NRS 178.400 [“1. A person may not be tried or adjudged to punishment for a public offense while incompetent.”]

By contrast, in *Mitchell*, the Ninth Circuit dicta illustrates the district court did not address the new issue given its conclusion that Mitchell provided no meaningful support for his ill-fated claim of some violation of a treaty. Nor did Mitchell raise any other argument which would make the district court’s conclusions debatable. Under these circumstances, jurists of reason would not debate whether Mitchell’s motion makes “a substantial showing of the denial of a constitutional right.” *Cf.* 28 U.S.C. § 2253(c)(2).

Here, Petitioner basis for habeas relief was inextricably rooted in his incompetence. Unlike Mitchell, this Petitioner presented irrefutable proof

that he had been diagnosed as a schizophrenic (paranoid) type *before* the events leading up to his arrest and conviction. Therefore, reasonable jurists would debate Mitchell's situation. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) [“The district court need not consider arguments raised for the first time in a reply brief.”].

Although the proof of incompetency was in the record in the Federal District Court, neither the State of Nevada nor Petitioner's habeas counsel ever bothered to argue the schizophrenia to the Federal District Court, exercising jurisdiction pursuant to 28 U.S.C. § 2254.

Under Nevada law, had Petitioner's mental illness been pursued through a competency evaluation before trial and sentencing and argued correctly at the Federal Habeas level, there is no question that the original 2254 Motion raised a claim that he had been denied a constitutional right: *a violation of Due Process by being tried while a significant mental defect was supported in the record. See, e.g., Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (per curiam); *Slack*, 529 U.S. at 483-84; *United States v. Mikels*, 236 F.3d 550, 551 (9th Cir. 2001); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997).

Over the past twenty years, the Court has found it necessary to correct the Fifth Circuit's application of the Certificate of Appealability (COA) standard. The first occasion was in *Miller-El v. Cockrell*, 537 U.S. 322 at 327, 341 (finding that in purporting to determine whether a prisoner had made a “substantial showing” that his constitutional rights were violated, the Fifth Circuit in fact required prisoners to demonstrate at the threshold stage that they would prevail if the

merits were reached, an obvious interpretation which was “too demanding . . . on more than one level”).

Second was *Tennard v. Dretke*, 542 U.S. 274 (2004), a solid decision where this Court took a sharply critical tone as it again reversed the Fifth Circuit for having merely “pa[id] lipservice” to the COA standard in concluding that no reasonable jurist would find Tennard’s claim even debatable. 542 U.S. at 283-84.

After *Miller-El* and *Tennard*, the Fifth Circuit seemed to get the message at least temporarily, granting COAs from time to time in habeas appeals by state prisoners without reference to the ultimate merit of the claims presented. By 2015, however, Justices of this Court were questioning whether the Fifth Circuit had in fact corrected its course after *Miller-El* and *Tennard*. See *Jordan v. Fisher*, 135 S.Ct. 2647, 2651-52 (2015) (Sotomayor, Ginsburg, and Kagan, JJ., dissenting from denial of certiorari) (arguing that the Fifth Circuit had “accurately recited” the COA standard but failed to apply it according to this Court’s precedents).

Not long thereafter, this Court found it necessary for a third time to rectify the Fifth Circuit’s failure to ensure meaningful appellate review in habeas cases, *Buck v. Davis*, 137 S.Ct. 759 by rebuking the Fifth Circuit for effectively “invert[ing] the statutory order of operations” required by 28 U.S.C. § 2253 when it yet again ordered that a habeas applicant was not entitled to a COA. *Buck*, 137 S.Ct. at 774.

This Court reminded the Fifth Circuit Court of Appeals below that such an approach placed “too heavy a burden on the prisoner at the COA stage”. See, e.g., *Smith v. Dretke*, 422 F.3d 269, 278 (5th Cir.

2005) (granting COA on penalty-phase IAC claim); *Smith v. Quartermann*, 515 F.3d 392, 404 (5th Cir. 2008) (denying relief on same claim); *Skinner v. Quartermann*, 528 F.3d 336, 344 (5th Cir. 2008) (granting COA on guilt-phase ineffective assistance of counsel claim); *Skinner v. Quartermann*, 576 F.3d 214 (5th Cir. 2009) (denying relief on same claim).

Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner fails to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. *Buck*, 137 S.Ct. at 774 (first emphasis in *Buck*, citing *Miller-El*, 537 U.S. at 336-37.

Here, as in *Miller-El*, *Tennard*, and *Buck*, the Ninth Circuit Court of Appeals foreclosed a colorable appeal with a substantial factual basis because, without stating anything further, subliminally concluding that Petitioner would not have prevailed if the merits were reached. Accordingly, this Court should intervene to preserve the process which Congress prescribed in 28 U.S.C. § 2253.

Significantly, this Court's attention is respectfully invited to review the well-reasoned decisions in *Paul v. United States*, 534 F.3d 832, 834-35 (8th Cir. 2008), granting certificate of appealability on two IAC claims and a claim of mental incompetency) and *United States v. Caro*, F. App'x 651, 653 (4th Cir. 2018) ("This court also granted a Certificate of Appealability to consider whether his trial counsel's decision not to

proffer mental-health testimony” was constitutionally ineffective.)

Notably, by not referencing Exhibit 68 in the case below, the Federal District Court prematurely reached the conclusion to deny a Certificate of appealability without the benefit of a more fully developed record, had habeas counsel been effective in arguing the irrefutable and unchallenged evidence of schizophrenia.

A Ninth Circuit order for a full and fair evidentiary hearing was essential here—with fully informed counsel for the State of Nevada and for the Petitioner—because it would have afforded Petitioner the chance to present evidence to prove the specific facts and would have given him the tools necessary to, *e.g.*, a method to obtain evidence from expert mental health witnesses.



CONCLUSION AND PRAYER FOR RELIEF

The Ninth Circuit's misapplication of the COA standard in this case means that Petitioner—and for that matter most other appellants—will never get an appropriate chance at appellate review of substantial legal and factual disputes in his post-conviction proceedings. This Court should grant Certiorari to review the Ninth Circuit's Order refusing to grant a Certificate of Appealability on the issues raised in Petitioner's federal habeas motion, and grant such other relief as justice requires.

Respectfully submitted,

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