THIS IS A CAPITAL CASE

EXECUTION SET FOR August 1, 2023 6:00 p.m. (central)

No. 23-5244

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the Eighth Circuit Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DANIEL E. KIRSCH*
LAURENCE E. KOMP
MEREDITH H. SCHLACTER
MANDI SCHENLEY
Assistant Federal Public Defenders
Western District of Missouri
1000 Walnut Street, Suite 600
Kansas City, MO 64106
(816) 471-8282
daniel_kirsch@fd.org
laurence_komp@fd.org
meredith_schlacter@fd.org
mandi_schenley@fd.org

KENT E. GIPSON
Law Office of Kent Gipson, LLC
121 E. Gregory Blvd.
Kansas City, MO 64114
816-363-4400/Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

**Counsel of Record*, Member of the Bar of the Supreme Court

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ARGUMENT[1]

I. This Court should review this case to settle the meaning of 28 U.S.C. § 2253(c)(2) and whether an en banc court has authority to vacate a panel's COA grant and deny a petitioner his right to appeal.

A. The meaning of 28 U.S.C. § 2253(c)(2)

The State mischaracterizes Mr. Johnson's argument. Mr. Johnson asserts that under 2253(c)(2) and *Miller-El*, courts should grant a COA when reasonable jurists could debate whether the petition could have been resolved in another manner. The State agrees that when jurists of reason could disagree with the district court's resolution of his constitutional claims, a COA is warranted. BIO at 21. The State does not dispute that in this case, reasonable jurists could debate—and did debate—whether the petition could have been resolved in another manner.

The parties also agree that § 2253 provides the statutory basis for a habeas petitioner's right to appeal and that "Section 2253 provides that either a circuit justice or judge may issue a certificate of appealability." BIO at 17. Here, two judges in the panel proceeding, and then those same two judges plus the Chief Justice of the Eighth Circuit in the en banc proceeding, determined that a COA was warranted. But despite these determinations, Mr. Johnson cannot appeal the denial of his incompetency claim.

Mr. Johnson cannot appeal because the en banc court disagrees his claim was not debatable. However, *all* participating members of the en banc court rejected the

[1] Petitioner has chosen to respond to some of Respondent's arguments. The failure to respond to a specific argument does not equate to an agreement with Respondent's argument.

state court's determination regarding the delusions in Mr. Johnson's medical records. Apx. p. 134a (Gruender, J., concurring) (finding that "Johnson's past medical records show that he had expressed delusions like the ones mentioned in [Agharkar's] report[.]"). The dissent likewise found that Mr. Johnson's "record clearly indicates that Johnson had on more than one occasion expressed delusions similar to the ones that he expressed to his expert psychiatrist—namely, that 'the world will end when he dies.'" *Id.* at 141a (Kelly, J., dissenting). Thus, 10 reasonable jurists clearly disagreed with the district court's ruling to the contrary.

Despite this unanimous finding supporting a debate as to whether the petition should have been resolved in another manner, Mr. Johnson nonetheless lost his right to appeal. The absurdity of this result cannot be what Congress intended, and this Court should review to settle the meaning of § 2253.

Moreover, to the extent that there was disagreement between the en banc judges, such disagreement *itself* dispositively warrants a COA grant. Although the State posits that "disagreement within a panel or within a court en banc does not automatically satisfy the statutory requirement for a certificate of appealability[,]" BIO at 19, the State concedes that a COA grant is appropriate in precisely these circumstances: when reasonable jurists disagree about the resolution of the petition. BIO at 21. The State does not dispute reasonable jurists disagreed. The denial of a COA in these circumstances cannot be what Congress intended.

This Court has made clear that a COA must issue if reasonable jurists could debate the matter at hand. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v.*

McDaniel, 529 U.S. 473, 483-84 (2000). Implicitly, if there is disagreement among judges, then the matter under consideration is, by definition, debatable. *See Jordan v. Fisher*, 135 U.S. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari).

This Court repeatedly has recognized that the "debatability" threshold is low. In *Slack*, this Court explained that because "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights," COAs must not be construed "to bar vindication of substantial constitutional rights on appeal," and must issue when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." 529 U.S. at 483-84 (internal quotations and citation omitted). The determination of whether a COA should issue is independent of, and cannot be coextensive with, a merits determination. In *Miller-El*, this Court underscored that "a COA will issue in some instances where there is no certainty of ultimate relief." 537 U.S. at 337. "Indeed, 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; *see also Buck v. Davis*, 137 S.Ct. 759, 773-74 (2017).

In capital cases, this low bar is even lower. As this Court held in *Barefoot*, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of [appealability] . . . ." *Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). And once the issue of insanity to be executed is

raised, there must be a "satisfactory finding to the contrary" before the execution of the death sentence can occur. *Jones v. Mississippi*, 141 S.Ct. 1307, 1326 (2021) (Thomas, J., concurring). Consistent with Judge Erickson, Justice Thomas noted: "I doubt that a majority of this Court would tolerate the execution of an offender who alleges insanity or intellectual disability absent a satisfactory finding to the contrary." *Id.*

These cases show that, due the disagreement of the judges considering his COA, Mr. Johnson should have a right to appeal. The State's contention that these circumstances do not create a situation for this Court's review has no merit. Under Rule 10(c), this Court may grant certiorari when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Unquestionably, failing to grant a COA when reasonable jurists disagree conflicts with *Slack*, *Barefoot*, *Miller-El*, *Buck*, and their progeny.

Furthermore, because other courts of appeals have determined this important question of federal law differently than the Eighth Circuit, this Court should grant review to settle the question. Rule 10(c). Had these exact same circumstances occurred in the Third, Fourth, Sixth, Ninth, or Eleventh Circuits, Mr. Johnson would have been able to appeal. *See*, *e.g.*, 3rd Cir. R. 22.3 ("if any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c)(1), the certificate will issue"); *Thomas v. United States*, 329 F.3d 305, 309 (7th Cir. 2003) (COA to be denied only if judges unanimously agree that certificate should not issue); 4th Cir. R. 22(a)(3) ("A request to grant or expand a

certificate … shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue."); *Orbe v. True*, 82 Fed. App'x. 802, 805 (4th Cir. 2003) (COA granted where "at least one judge of the panel" found substantial showing of denial of constitutional right); *Smith v. Bell*, 6th Cir. No. 05-6653, DE 75-1 (October 9, 2008) (order granting reconsideration of rehearing motion and granting a COA despite a split decision); 9th Cir. General Orders 6.3(b) ("Pursuant to 28 U.S.C. § 2253(c), a request to grant or expand a certificate of appealability may be granted by any one Judge on the assigned panel."); *Salgado v. Garcia*, 384 F.3d 769 (9th Cir. 2004) (noting that "a single judge is authorized to grant a certificate of appealability"); 11th Cir. R. 22-1(c) ("An application to the court of appeals for a certificate of appealability may be considered by a single circuit judge."). Congress cannot have intended for 2553 to applied differently based on the geographical location of the habeas petitioner seeking the appeal.

Indisputably, reasonable jurists could debate—and did debate—whether the petition could have been resolved in another manner. Yet, absent this Court's intervention, Mr. Johnson cannot appeal, even when a majority of a panel determined he should have an appeal. Because this approach conflicts with decisions of this Court, and because other circuit courts of appeals have decided the issue of how much disagreement satisfies 2253(c)(3)'s COA requirements, this Court should grant review.

B. The authority to vacate a panel COA grant and stay

The State fails to respond to Mr. Johnson's argument: that a ruling granting a COA, as a non-merits ruling, cannot conflict with decisions of this Court or the Eighth Circuit nor be a decision of exceptional importance. Thus, the State's argument is unpersuasive.

The State's argument disingenuously switches from what was argued below. It is entirely inconsistent with the argument it presented to the court below to secure en banc review. The State now argues that "[i]n the Eighth Circuit, the decision to grant or deny rehearing en banc 'is a pure exercise of discretion'" in which no standards identify circumstances appropriate for en banc review. BIO at 21. Contrary to the State's position, there is a rule, FRAP 35, which requires any petition for en banc review must begin with a statement regarding to remedy a conflict with decisions to maintain uniformity or that it presents an issue of exceptional importance. FRAP 35(1)(a) and (b).

Below, the State recognized these prerequisites for obtaining en banc review and complied with FRAP 35. Thus, the State's current contention no standards govern en banc review is wholly disingenuous and entirely unpersuasive.

The State's argument with respect to the en banc court's vacation of a previously entered stay is likewise unpersuasive. The State again fails to respond to Mr. Johnson's argument: that because the en banc court did not apply the requisite standard identified in this Court's for the vacation of a stay, its ruling is contrary to this Court's jurisprudence. The State seems to argue that because the court granted en banc review and vacated the panel decision, the en banc court owed no deference

to the prior entry of a stay. BIO at 21-22. However, this argument presumes that the court properly granted en banc review. As explained above, it did not.

As for the State's reliance on *Williams*, the State is incorrect. *Williams* made clear that no rule of law exists under which "a court of appeals must, in every case, explain the basis for its entry of a stay . . . ." *Bowersox v. Williams*, 517 U.S. 345, 346 (1996). *Williams* does not support the State's position. This Court should grant review.

II. Reasonable jurists can, and do, disagree with the district court's dismissal of Mr. Johnson's competency claim.

Respondent's contention that Mr. Johnson's claim is merely a request for error correction by this Court misses the point. At least three reasonable jurists found his claim may satisfy both § 2254(d)(1) and (d)(2). Therefore, reasonable jurists can, and do, disagree with the district court's decision. As explained above, that meets the standard for granting a certificate of appealability under § 2253(c) and *Miller-El*, and the en banc court's vacatur of the COA based on the disagreement of other reasonable jurists was improper because it *demonstrated* reasonable jurists could disagree. In addition to the procedural reasons Mr. Johnson's appeal should be permitted to go forward, the merits of his claim further warrant relief.

Four reasonable jurists could (and did) find that Mr. Johnson met the threshold showing of incompetence *Panetti* requires, and the state court's decision was contrary to or an unreasonable application of clearly established federal law and an unreasonable determination of the facts. The dissenting Eighth Circuit

judges properly and thoroughly considered Mr. Johnson's claims in light of the standards set forth in § 2254(d) and found his appeal should be permitted.[2] Apx. 135a-143a. Respondent's contentions otherwise are meritless.

A. Contrary to *Panetti*

Respondent's attempt to distinguish Mr. Johnson's case from *Panetti* ignores the substance of this Court's *Panetti* analysis and the evidence presented in each case. BIO at 26-27. Respondent relies on the lack of dispute as to Mr. Panetti's threshold showing of incompetence, but this Court made clear that was not dispositive to its analysis. The Court engaged in its own "independent review of the record" and determined the threshold was met. *Panetti v. Quarterman*, 551 U.S. 930, 950 (2007).

Respondent attempts to inflate the evidence in *Panetti* by stating that the petitioner submitted evidence from "two experts," but the dissent noted that one expert conducted only an "85-minute 'preliminary evaluation'" and submitted a one-page letter that was "unsworn, contains no diagnosis, and does not discuss whether Panetti understood why he was being executed." *Id.* at 969-70 (Thomas, J., dissenting). The other expert submission was "a one-page declaration of a *law professor* who attended Cunningham's 85-minute meeting with Panetti." *Id.* The professor "obviously made no medical diagnosis and simply discussed his lay

[2] In accordance with *Miller-El*, the panel that granted the COA did not decide the merits of Mr. Johnson's claim; it considered whether he stated a valid claim of the denial of a constitutional right and whether reasonable jurists could find the district court's decision debatable. "Whether Johnson is ultimately entitled to federal habeas relief . . . is a merits question that has not yet been presented to this court." Apx. 136a n.7.

perception of Panetti's mental condition in a cursory manner." *Id.* The dissent went on to point out that the petitioner "attached no medical reports or records, no sworn testimony from any medical professional, and no diagnosis of any medical condition." *Id.*

Conversely, the report by Mr. Johnson's neuropsychiatrist, a medical doctor qualified to diagnose, detailed Mr. Johnson's mental health history and the results of the competency evaluation and neuropsychiatric testing conducted over the course of Dr. Agharkar's two-hour-and-forty-minute evaluation. Apx. 1a-55a; *see also* Apx. 137a n.2 (Kelly, J., dissenting). The conclusions in Dr. Agharkar's report, along with the specific delusions Mr. Johnson disclosed to him, were corroborated by the medical records Mr. Johnson also submitted. *See* Apx. 141a ("the record clearly indicates that Johnson has on more than one occasion expressed delusions similar to the ones that he expressed to his expert psychiatrist."); *see also* Apx. 134a (Gruender, J., concurring) ("Dr. Agharkar observed delusions in February 2023 and Johnson's past medical records show that he had expressed delusions like the ones mentioned in the report."). Respondent's reliance on what he claims to be competing evidence in Mr. Johnson's case also fails to distinguish it from *Panetti*, given that the medical records Respondent submitted showed Mr. Johnson's symptoms and delusions had been present for decades and Skaggs's affidavit was "largely irrelevant under the governing legal standards for competency." Apx. 139a (Kelly, J., dissenting).

Respondent's distinction between the timing of Mr. Johnson's evidence compared to that in *Panetti* undercuts his claims of delay and highlights the illogic in Respondent's arguments. BIO at 26. As Respondent points out, Mr. Panetti submitted the evidence he obtained *the day before* his scheduled execution. 551 U.S. at 950. Mr. Johnson's expert evaluated him in anticipation of a potential *Ford* claim, which he filed only weeks after his execution date was set and the claim became ripe, *months* before his scheduled execution. Respondent complains Mr. Johnson's evidence is both too old and too late, but he cannot have it both ways. As reasonable jurists could and have found, in light of the materially indistinguishable facts here and in *Panetti*, the state court's holding that Mr. Johnson failed to make the required threshold showing was contrary to this Court's precedent. Apx. 137a-138a.

B. Unreasonable application of *Ford*, *Panetti*, and *Madison*

Despite knowing in February 2023 that Mr. Johnson was exhibiting such notable symptoms of psychosis that counsel was investigating a potential *Ford* claim, the only evidence Respondent mustered to attempt to rebut Mr. Johnson's incompetence were medical records that corroborated his claim and an irrelevant affidavit from an unqualified counselor who applied an incorrect standard for competency and misstated Mr. Johnson's condition in light of Respondent's own submitted medical records. *See* Apx. 139a-141a.

In ruling on the threshold issue, the state court relied on Respondent's faulty evidence despite it being "largely irrelevant" to the competency question. *See* Apx.

139a. In turn, the court, like the evidence on which it relied, confused an awareness standard with the rational understanding standard *Panetti* requires. *Id.* at 140a. The records the state court cited as contradicting Mr. Johnson's expert report showed only that he "was aware of his impending execution," not "whether he has a rational understanding." *Id.* They "are entirely consistent with a worldview that is nonetheless clouded by irrational delusions." *Id.* As at least three reasonable jurists found, the state court's conclusion, based on an incorrect understanding of the competency standard under this Court's precedent, "involved an unreasonable application of *Ford*, *Panetti*, and *Madison*—all of which set out the proper standard for determining whether an inmate is competent to be executed." Apx. 139a. Given the state court's application of the wrong standard despite its initial recital of the correct one, reasonable jurists could—and did—conclude its decision rested on an unreasonable application of this Court's precedent.

C. Unreasonable determination of the facts

Respondent suggests that the state court's factual findings and credibility determinations are infallible. But that is not the case. While a state court's factfinding and credibility determinations are owed deference, it is not without limits. *See, e.g., Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (state court's rejection of *Atkins* claim based on evidence that was consistent with intellectual disability was an unreasonable determination of the facts). As the reasonable jurists here pointed out in dissent, the state court did not find Mr. Johnson is competent to be executed. Apx. 139a. Even through a deferential lens, when the state court's

"factual findings" and "credibility determinations" on the threshold issue are blatantly and unquestionably contradicted by the record such that they are based on an unreasonable determination of the facts, jurists of reason are not required to ignore those deficiencies.

Just because the state court found that there were no references to the delusions detailed by Dr. Agharkar does not mean Mr. Johnson cannot challenge this finding, particularly when there is no dispute that there were at least five of the *same delusion* in the record. Such a conclusion would render § 2254(d)(2) superfluous. And in fact, *all 10* judges on the en banc court agreed the records *did* contain references to the types of delusions Dr. Agharkar identified, demonstrating the unreasonableness of the state court's finding. Apx. 134a. Likewise, when the state court "finds" medication adequately manages Mr. Johnson's symptoms when the records indicate they do not, under § 2254(d)(2), reviewing courts can determine that the state court finding was unreasonable. Indeed, "the Constitution requires more than a fiat declaration that one piece of paper is more credible than another." Apx. 143a (Erickson, J., dissenting).[3]

The unreasonableness of the state court's factual determinations highlights the necessity of a hearing of some kind or at minimum, review by an appellate court. While *Panetti* and *Ford* do not prescribe the form a competency analysis must

[3] Mis-relying on *Wood v. Allen*, 558 U.S. 290, 301 (2010), Respondents suggests Mr. Johnson must satisfy 2254(e)(1) in order to satisfy (d)(2). This Court has not "defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)," *see Brumfield*, 576 U.S. at 322, and it need not here. Under either view of the relationship between subsections, reasonable jurists could, and do, find (d)(2) satisfied, and Mr. Johnson needed not prove the ultimate merits of his appeal at the threshold COA stage. *Miller-El*, 537 U.S. 336-37.

take, the Constitution "does require something more than what happened here." Apx. 143a. To the extent Respondent's evidence actually countered Mr. Johnson's expert findings and the decades of medical records supporting them, the state court's process in which it "ma[de] credibility determinations by weighing competing pieces of paper" did not comply with due process. *Id.*

Mr. Johnson is not asking this Court to create a new rule, as Respondent suggests. BIO at 16. What Mr. Johnson asks, and what the panel determined he should be permitted, is to present the merits of his appeal. But for the en banc ruling, he would be able to argue that the state court's denial of his claim at the threshold stage was unreasonable, and a court could duly consider whether he is due a "'fair hearing'" in accord with fundamental fairness," as this Court and the Constitution require. *Panetti*, 551 U.S. at 949 (quoting *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring).

D. Respondent's new records demonstrate incompetency.

Respondent's attempt to undercut Mr. Johnson's incompetency by submitting his recent medical records once again misses the mark because the recently disclosed records do not, as Respondent claims, show Mr. Johnson is competent. BIO at 25. Respondent cites a July 17, 2023 record in which Mr. Johnson reported he was doing "better" because the "brain shocks" had gotten better and Mr. Johnson was not currently hearing voices but "admits he had been hearing voices last week." *Id.*; Resp. App. A29. A July 10 record noted Mr. Johnson "denied that any appearance of being distracted during our interactions was response to any

hallucinatory stimuli" and "he denied feeling like . . . demons were driving his behaviors." BIO at 25; Resp. App. A23. In the record from July 26, Respondent notes Mr. Johnson reported the "brain zaps" have stopped, as has "the sense of demons or others messing with him." BIO at 26; Resp. App. A33.

Believing one experiences "brain zaps" or "brain shocks" or feeling that demons are "messing with" you is unquestionably delusional. The fact that Mr. Johnson recently reported improvement only demonstrates that he *continues to possess* the delusion he was experiencing them in the first place. Respondent continues to fail to understand that the temporary alleviation of some symptom of Mr. Johnson's mental illness does not equate to competency. *See* Apx. 141a. A delusion is not the same as a hallucination. Even when hallucinations are improved by medication—and the medical records consistently show that even when they improve, they never go away—his delusions do not simply disappear. Mr. Johnson's end-of-the-world demon delusions have persisted for nearly 20 years. The idea that prison doctors have conveniently cured him of these delusions the week of his scheduled execution after 20 years and more than 35 medications failed to do so is absurd.[4]

Respondent mischaracterizes the July 26 comment about getting a stay of execution to suggest it means Mr. Johnson "understands the nature of the proceedings against him and the rationale for the State's punishment." BIO at 26.

[4] The recent records also show they have *tripled* Mr. Johnson's medication in the last three weeks. Setting aside the fact that Skaggs was wrong to say they were working before, they are clearly trying—and failing—to medicate him into competency.

This is false; the records suggest no such thing. The entire reference to the stay is: "Pt reports CO's told him a few minutes ago on the way to the appointment. Pt is not sure if it's true, but says he feels "alright" about it with a bit of a laugh." Resp. App. A33. Nothing about that exchange sheds any light whatsoever on whether Mr. Johnson understands the "rationale for the State's punishment;" it does not even reveal whether he understands what a "stay" is. Respondent's desperate attempt to prove Mr. Johnson's competence without any testing of their submitted evidence must fail on the face of their evidence. It does not say what Respondent wishes it said.

In sum, the state court's denial of Mr. Johnson's claim was based on its belief, borne from Skaggs's claims in her affidavit, that Mr. Johnson's "current medications are controlling his mental health symptoms" and reports that "he has been free of auditory hallucinations since taking medication." Apx. 108a-111a. Those conclusions were belied by the medical records before the court at that time and the recent records show that continues to be untrue. Mr. Johnson continues to be incompetent.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

DANIEL E. KIRSCH*

LAURENCE E. KOMP
MEREDITH H. SCHLACTER
MANDI SCHENLEY
Assistant Federal Public Defenders
Western District of Missouri
1000 Walnut Street, Suite 600
Kansas City, MO 64106
(816) 471-8282
daniel_kirsch@fd.org
laurence_komp@fd.org
meredith_schlacter@fd.org
mandi_schenley@fd.org

KENT E. GIPSON
Law Office of Kent Gipson, LLC
121 E. Gregory Blvd.
Kansas City, MO 64114
816-363-4400 • Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

*Counsel of Record, Member of the Bar of the Supreme Court