No. 23-6008

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW JOHNSON,
Petitioner,

v.

BOBBY LUMPKIN,
Respondent.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

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Introduction

Petitioner Matthew Johnson filed his Petition for a Writ of Certiorari ("Pet.") on November 9, 2023. Respondent filed his Brief in Opposition ("BIO") on January 12, 2024. Petitioner now files this Reply to Respondent's Brief in Opposition.[1]

[1] In this Reply, Petitioner addresses only those arguments made by Respondent he deems merit a reply.

I. The second question presented in Johnson's Petition—regarding whether requiring an indigent habeas petitioner to file his Petition in less time than a non-indigent petitioner—is properly before this Court.

The issue presented in Johnson's initial brief in the court of appeals regarding the district court's scheduling order was whether the district court's initial refusal to afford Johnson the full one-year period provided by Congress to file his federal habeas petition suggested the district court harbored animus against Johnson. Because Johnson was appealing the district court's denial of his recusal motion, this is precisely the question Johnson needed to present in his opening brief in the court of appeals. In response to this question, the Fifth Circuit found that "no reasonable person who knows all the circumstances would harbor doubts about the district court's impartiality." Appendix A at a014 (internal quotation marks and citations omitted). The Fifth Circuit reached this conclusion, in part, because it faulted Johnson for failing to cite any "governing legal authority recognizing the right to delay his briefing until the final day of AEDPA's statute of limitations." Appendix A at a013. Accordingly, Petitioner filed a petition for rehearing, the sole purpose of which was to argue that a great deal of legal authority, including, but not limited to, this Court's Equal Protection and Due Process jurisprudence, necessitated that Johnson be afforded the entire period of limitations to file his habeas petition in the district court. Counsel for Respondent appears to believe this argument made in the court below is not sufficient for the question to properly be before the Court. BIO 26-27. However, Counsel for Respondent has not presented any authority—and Counsel for Petitioner is unaware of any precedent—that holds

questions presented to a *federal*[2] court of appeals in a Petition for Rehearing are not properly before this Court. Indeed, Petitions for Rehearing are quite often filed in the federal courts of appeals to ensure the court of appeals is given a full and fair opportunity to address an important question of federal law which an attorney intends to present in a Petition to this Court, as Counsel have done in this case.

II. Respondent's Brief in Opposition mischaracterizes the nature of the scheduling order at issue in this case.

Respondent seems to characterize the scheduling order entered by the Magistrate as inviting requests for extensions. BIO at 13, 27. In actuality, the scheduling order makes clear that requests for extensions would be entertained if and only if Counsel were able to satisfy the court that they had diligently attempted to file Johnson's Petition in just over half the time Congress intended. ROA.28-29 ("Any party seeking an extension of any of the foregoing deadlines shall file a written motion *prior* to the expiration of the deadline in question and shall set forth in such motion a detailed description of the reasons why that party, despite the exercise of due diligence, will be unable to comply with the applicable deadline."). There is no reasonable reading of this order other than that it aimed to coerce counsel representing an indigent petitioner to file the petition in less time than the petitioner is entitled to under federal law.

In addition, Respondent seems to suggest that the scheduling order could not

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[2] As this Court is aware, its jurisprudence does make clear that, absent extraordinary circumstances, a question presented to a *state* court in a rehearing petition is not properly before the Court if the state court does not address the question. *E.g.*, *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

reflect animus on the part of the Article III judge because it was entered by a magistrate. BIO at 19. Rule 10 of the Rules Governing Section 2254 and 2255 Cases makes clear a magistrate may perform the duties of a district judge in a habeas proceeding, as authorized by 28 U.S.C. § 636. As section 636 makes clear, a magistrate is only authorized to act in habeas proceedings upon designation by an Article III judge. 28 U.S.C. § 636(b)(1)(B). Given that the magistrate was acting as the district judge's designee when she entered the scheduling order, any animus reflected in that document constitutes animus held by the district court judge. Moreover, if the district court judge did not approve of the order, the district court judge could have entered a superseding order. For example, in this proceeding, because the eighteen dollars Johnson had in his inmate trust fund at the time he sought leave to proceed in forma pauperis exceeded the five-dollar filing fee, the magistrate denied his motion so to proceed. ROA.38. Without any motion having been filed by Counsel asking the district court to reconsider this order, nine days after the magistrate's order was issued, the district court judge entered an order granting Johnson's motion to proceed as a pauper and thereby overturning the order issued by the magistrate nine days earlier. ROA.41. That the district court entered no such superseding order with respect to the scheduled entered by the magistrate indicates the district court agreed Johnson's time to prepare his petition should be so limited.

III. Because of what has been learned about the unreliability of future dangerousness predictions since this Court last addressed the issue, this Court should revisit the question of whether the future dangerousness special issue is constitutional.

Respondent is correct that this Court has previously found Texas' future dangerousness special issue to be permissible. BIO at 29-33. The point of Counsel's raising this issue in this Petition is that Counsel respectfully suggests this Court should revisit the issue of future dangerousness because its earlier ruling has been undermined by subsequent developments in law and social science, as well as by the data. In 1983, this Court held in *Barefoot v. Estelle*, 463 U.S. 880 (1983), that, while difficult, it is possible to predict whether a defendant will commit dangerous acts in the future. *Barefoot*, 463 U.S. at 899. Justices on the *Barefoot* Court appear to have believed that predictions of future dangerousness were correct approximately one-third of the time. *Barefoot*, 463 U.S. at 900-01 & n.7. Of course, Counsel for Barefoot was not able to present to this Court the studies now available (and cited in Johnson's Petition) which make clear that predictions of future dangerousness are not nearly that reliable. Studies conducted since this Court issued its opinion in Barefoot make clear that predictions of future dangerousness are wrong more than 95% of the time. *See* Jessica L. Roberts, Note, *Futures Past: Institutionalizing the Re-Examination of Future Dangerousness in Texas Prior to Execution*, 11 Tex. J.C.L. & C.R. 101, 121 (2005); *see also* Pet. at 25-31. Regardless of whether the Court's conclusion in *Barefoot* was wrong when the Court issued its opinion in 1983, it is now clear that the conclusion is wrong, and that clarity is a result of various studies that were simply not available forty years ago. This Court has not been hesitant to

revisit long ago decided decisions when it is persuaded that those decisions were wrong. *See, e.g.*, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Counsel respectfully suggest that *Barefoot* should similarly be revisited.

Conclusion and Prayer for Relief

Petitioner requests this Court grant certiorari and schedule the case for briefing and oral argument.

DATE: January 26, 2024

Respectfully submitted,

/s/ David R. Dow

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