No. 23A___

In the Supreme Court of the United States

DEANDRE GORDON,

Petitioner,

v.

HAROLD MAY,

Respondent.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM OCTOBER 9, 2023, TO DECEMBER 7, 2023

To the Honorable Brett M. Kavanaugh, as Circuit Justice for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner DeAndre Gordon respectfully requests that the time to file a petition for a writ of certiorari be extended 59 days from October 9, 2023, to and including December 7, 2023. The Sixth Circuit issued its initial, single-judge order denying Gordon's motion for a certificate of appealability (COA) on April 25, 2023. App. A, at 1. After Gordon petitioned for rehearing en banc, a panel split 2 to 1, with the majority concluding that the motion was properly denied, and the matter was then referred to all active members of the Sixth Circuit. App. B. The court of appeals denied the rehearing petition on July 10, 2023. App. C. Without an extension, the

petition for a writ of certiorari would be due on October 9, 2023.[1] This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. This Court will have jurisdiction to review the petition under 28 U.S.C. § 1254.

1. This case presents an important question dividing the circuits regarding when a certificate of appealability must issue, so that a state prisoner denied habeas relief by a federal district court may appeal. *See* 28 U.S.C. § 2253. This Court has established that to obtain a COA, a prisoner need only demonstrate that "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). In this case, the Sixth Circuit denied Gordon's petition for a COA in a 2-1 decision, in which one of the panel judges would have granted a COA on two of the habeas claims Gordon raised, as well as the magistrate judge who considered the federal habeas petition before the district court.

Respondent is the warden of the Ohio state prison where petitioner is serving an aggregate sentence of ten years imprisonment. App. A, at 1.

[1] Gordon's pro se rehearing petition, sent from prison, was considered by the Clerk's Office of the Sixth Circuit to be two days late. *See* Doc. 9. The Sixth Circuit gave "careful consideration" to the rehearing petition "referred to this panel" anyway, "for an initial determination on the merits," which the panel denied in a split decision and then referred "to all of the active members of the court for further proceedings on the suggestion for en banc rehearing." App. B. This Court's rules provide that "if a petition for rehearing is timely filed in the lower court … or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari … runs from the date of the denial of rehearing." Sup. Ct. R. 13.3. Ninety days from July 10, 2023, is Sunday, October 8, 2023. Thus, absent an extension, the petition is due on October 9, 2023. *See* Sup. Ct. R. 30.1.

In March 2015, Gordon was charged in Ohio state court with two counts of aggravated robbery, two counts of felonious assault, and one count of kidnapping, along with "firearm specifications as to each count." App. A, at 1. These charges arose from the robbery and shooting of Gordon's friend, Tevaughn Darling. *Ibid.* After an edited version of Darling's videotaped statement to police appeared on social media, Gordon was charged with witness intimidation. *Ibid.* The prosecution moved to join the two cases and to disqualify Gordon's retained counsel, because Gordon's chosen counsel in his robbery, assault, and kidnapping case would be a material witness in the intimidation case that arose after he was charged. *Ibid.* The trial court granted both motions over Gordon's objection to the disqualification of his counsel of choice. *Ibid.* A jury subsequently convicted Gordon of the crimes and associated firearm specifications he was originally charged with, but the jury acquitted Gordon of the intimidation charge brought in the second case, the joinder of which resulted in disqualification of his originally retained counsel. *Ibid.* Thus, while Gordon ultimately was not convicted of intimidating a witness, joining the cases deprived Gordon of the counsel he retained to represent him on the charges over which he was convicted. The trial court imposed an aggregate sentence of ten years of imprisonment. *Ibid.*

On direct appeal, the Ohio Court of Appeals reversed Gordon's convictions and ordered a retrial, finding that the trial court committed plain error in joining the two cases because joinder prevented him from retaining his counsel of choice, in violation of the Sixth and Fourteenth Amendments. *See* App. A, at 2. But the Supreme Court

of Ohio reversed and remanded for consideration of Gordon's other claims of error. *Ibid.* Finding no other error on remand, the Ohio Court of Appeals affirmed Gordon's conviction and sentence. *Ibid.*

Gordon filed a timely habeas petition in federal court arguing, among other claims, that he was denied counsel of choice by the improper joinder, and that he was provided ineffective assistance of both trial and appellate counsel regarding that claim. App. A, at 2. The magistrate judge recommended denying the petition but granting a certificate of appealability as to Gordon's denial-of-counsel claim. App. A, at 2-3. Instead, and over Gordon's objection, the district court denied the petition and declined to grant a COA. App. A, at 3.

Gordon thus moved for a COA in the Sixth Circuit. App. A, at 3. As further described below, a panel of the Sixth Circuit split 2 to 1, denying Gordon's application for a COA even though "Judge White would have granted a certificate of appealability" on three of his claims. App. B. The full court then denied Gordon's petition for rehearing en banc. App. C.

2. A state prisoner whose habeas petition is denied by a federal district court can appeal only if a judge issues a COA. Issuing a COA requires that the prisoner make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court has held that, to make such showing, the prisoner need only demonstrate that "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quotation marks omitted).

Put another way, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 580 U.S. 100, 115 (2018) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

The courts of appeals are deeply divided 4 to 4 on whether, under that standard, a COA must issue so long as at least one judge would vote to grant a COA, satisfying the requirement that "jurists of reason could disagree." *See Buck*, 580 U.S. at 115.

The Sixth Circuit in this case joined the Fifth, Eighth, and Eleventh Circuits, which will deny a COA even when one or more judges would vote to grant one. The Fifth Circuit's practice is to deny a COA over the dissent of a colleague on the panel. *See, e.g.*, *See Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014). That decision drew criticism from members of this Court, who believed "the Fifth Circuit was too demanding in assessing whether reasonable jurists could debate the District Court's denial of [the] habeas petition," given that two judges—one of the Mississippi Supreme Court justices in the prisoner's direct appeal and one of the Fifth Circuit judges on the panel considering the prisoner's motion for a COA—had "found [his] … claim highly debatable." *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg, J., and Kagan, J., dissenting from the denial of certiorari). And just recently, the Eighth Circuit went en banc to vacate a panel decision that granted a COA, and then denied the COA over the dissent of three circuit judges. *Johnson v. Vandergriff*, 2023 WL 4851623, at *1 (8th Cir. July 29, 2023), *cert. denied*, 143 S. Ct.

2551 (2023). Members of this Court criticized that decision, too, for having "too demanding" a standard "in assessing whether reasonable jurists could debate the merits of" a habeas petition, given that "three judges dissented when the en banc court vacated the panel's order" granting a COA. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J., joined by Kagan, J., and Jackson, J., dissenting from the denial of application for stay and denial of certiorari). The Eleventh Circuit's practice is also to deny a COA by split decision. *See, e.g.*, *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (denying COA over dissent that "would grant [prisoner] a certificate of appealability on his claim that the Eighth Amendment precludes the state from using his prior violent felony conviction, committed before his eighteenth birthday, to obtain a death sentence").

On the other hand, in the Third, Fourth, Seventh, and Ninth Circuits, a certificate of appealability will issue when at least one judge believes a COA is warranted for the claims to proceed on appeal. The Seventh Circuit has concluded that a COA cannot be denied unless a reviewing panel unanimously agrees that a COA is not justified. *Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003). So too, the Ninth Circuit will issue a COA when one member of a three-judge panel dissents from denying one, despite the panel majority finding no merit to the claim, explaining: "We are fully satisfied of the fairmindedness of our dissenting colleague, and so we have granted the COA." *See, e.g.*, *McGill v. Shinn*, 16 F.4th 666, 706 & n.14 (9th Cir. 2021).

In the Third Circuit, the local rules provide that "[a]n application for a certificate of appealability will be referred to a panel of three judges," and "if any judge on the

panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. Loc. App. R. 22.3 (2011). The Fourth Circuit similarly provides by rule that a "request to grant or expand a certificate … shall be referred to a panel of three judges," and 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." 4th Cir. Loc. R. 22(a)(3) (2023).

3. After the federal district court rejected the magistrate judge's recommendation that a COA should issue on his denial-of-counsel claim, Gordon filed a motion for a COA in the Sixth Circuit. App. A, at 2-3. In a single-judge order, the court of appeals denied Gordon's motion. App. A, at 1, 3. Acting pro se, Gordon petitioned the court to rehear en banc its single-judge order denying a COA, and the application was referred to a three-judge panel of the Sixth Circuit. App. B. The panel majority "conclude[d] that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, decline[d] to rehear the matter." *Ibid.* (citing Fed. R. App. P. 40(a)). "Judge White," however, "would have granted a certificate of appealability on the denial-of-counsel claim and the ineffective assistance claims related to that claim." *Ibid.*

The matter was then referred to all active members of the Sixth Circuit. App. B. At that point, the Federal Defenders Offices for the Northern and Southern Districts of Ohio moved to file an amicus brief in support of Gordon's rehearing petition. *See Amicus* Brief of the Offices of the Federal Public Defender for the Northern and Southern Districts of Ohio, in Support of Appellant DeAndre Gordon's Petition for

Rehearing, Doc. 19. The Federal Defenders argued that under the "reasonable jurist" standard set forth by this Court, the Sixth Circuit was required to grant a COA when any one judge would vote to grant one, "by definition" making it "debatable among reasonable jurists." *Id.* at 2-3. The Federal Defenders noted that the panel's denial of a COA conflicted with the rules and decisions of other federal courts of appeals. *Id.* at 6-8.

The Sixth Circuit denied the rehearing petition on July 10, 2023. App. C.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for 59 days for the following reasons:

1. The forthcoming petition is likely to be granted. The Sixth Circuit has deepened and entrenched a circuit split dividing the courts of appeals on an issue that has already drawn scrutiny from several of this Court's members. The Fifth, Sixth, Eighth, and Eleventh Circuits will deny certificates of appealability even when one or more judges would have voted to grant a COA. But the Third, Fourth, Seventh, and Ninth Circuits would issue a COA to the same applicant under those circumstances. That 4 to 4 circuit split is untenable and severely unjust to a prisoner like Gordon, who is deprived of the right to appeal the denial of habeas claims over which judges actually disagree, simply because he is imprisoned in Ohio rather than bordering states Indiana, Pennsylvania, or West Virginia.

And for the reasons already noted by members of this Court, the circuit courts that deny COAs even when judges debate the merits of the claim, like the Sixth

Circuit here, are misapplying this Court's precedents. *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan, J., and Jackson, J.). When judges actually "debate the merits of [a] habeas petition," that "'alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution'" of the claim. *Ibid.* (quoting *Jordan*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg, J., and Kagan, J.)). While the "COA requirement erects an important … barrier to an appeal," that barrier is "not insurmountable." *Ibid.*

"The only question before the [Sixth] Circuit was whether reasonable jurists could debate the District Court's disposition of [Gordon's] habeas petition." *See Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan, J., and Jackson, J.). "That question, in turn, depends on whether reasonable jurists could debate whether the [Ohio] Supreme Court contravened or unreasonably applied clearly established federal law." *See ibid.* (citing 28 U.S.C. § 2254(d)). "Here, reasonable jurists can and do have that debate." *See ibid.*

Two judges of the Ohio Court of Appeals found a violation of Gordon's right to counsel under the Sixth and Fourteenth Amendments, requiring retrial. *State v. Gordon*, No. 103494, 2016 WL 4399512, at *5 (Ohio Ct. App. Aug. 18, 2016) ("trial court committed plain error by joining the two cases for trial," requiring disqualification of retained counsel, because "Gordon sustained prejudice that outweighed the benefits of the joinder," violating his right to counsel of choice under *Faretta v. California*, 422 U.S. 806, 835 (1975), and *Von Moltke v. Gillies*, 332 U.S. 708 (1948)), *rev'd*, 98 N.E.3d 251, 534-36 (Ohio 2018); *see also Jordan*, 576 U.S. at

1076 (Sotomayor, J., joined by Ginsburg, J., and Kagan, J.) (considering state justice's dissent on direct appeal in reasoning that "[t]wo judges … found Jordan's vindictiveness claim highly debatable"). And the federal magistrate judge recommended granting a certificate of appealability on Gordon's denial-of-counsel claim. App. A, at 2-3. Judge White, too, would have granted a COA on three of Gordon's claims related to his denial of counsel. App. B. When four judges from three courts find merit to a prisoner's claim—two representing the views of state judges on direct appeal and two representing the views of federal judges on habeas—there should be no doubt that "jurists of reason could disagree," at the very least, on whether further proceedings are warranted, such that the prisoner has a right to appeal the denial of his habeas petition. *See Buck*, 580 U.S. at 115.

2. The press of other matters before this and other courts makes the existing deadline on October 9, 2023, difficult to meet. Gordon only recently retained undersigned counsel to assist in preparing the petition. Further time is needed to allow counsel to study the issues and prepare a concise petition for this Court's review. In addition to this case, counsel has two opening briefs due before the U.S. Court of Appeals for the District of Columbia Circuit on October 2, 2023, for which the deadline cannot be moved, and other court of appeals and district court filings due soon after.

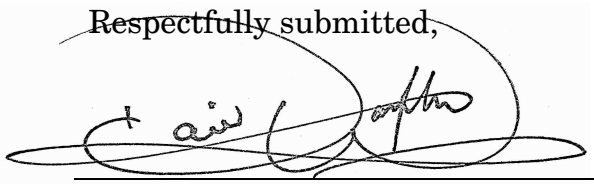
3. Whether or not the extension is granted, the petition will be considered—and, if the petition is granted, the case will be considered on the merits—this Term. The

extension thus will not substantially delay the resolution of this case or prejudice any party.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari should be extended for 59 days to and including December 7, 2023.

Respectfully submitted,



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