No. 23-___

IN THE

Supreme Court of the United States

DEANDRE GORDON,

Petitioner,

v.

HAROLD MAY,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A state prisoner whose federal habeas petition is denied by a district court can appeal only if he obtains a Certificate of Appealability (COA), which requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "At the COA stage," this Court has long and repeatedly held that "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)).

Despite this Court's clear requirement that a COA issue when any reasonable jurist could disagree with the district court or conclude that the issues warrant further review, the circuit courts are deeply divided on whether, under that standard, a COA must issue if a circuit judge votes to grant one. The Third, Fourth, and Seventh Circuits, by rule, have established that a COA must be granted when any circuit judge votes that the claims deserve appellate evaluation. But the Sixth Circuit panel here denied petitioner a COA over the dissent of a colleague, following the standard established in published authority from the Fifth, Eighth, and Eleventh Circuits. The question presented is:

> Since a Certificate of Appealability must be granted when reasonable jurists could disagree on the resolution of a constitutional claim or conclude the issues presented are adequate to deserve encouragement to proceed further, must a COA issue when a circuit judge votes to grant one?

RELATED PROCEEDINGS

Direct:

State v. Gordon, Nos. CR-15-594287-A, CR-15-596591-A, Cuyahoga County Court of Common Pleas. Jury verdict and sentence imposed August 13, 2015.

State v. Gordon, No. 103494, Court of Appeals of Ohio, Eighth District, Cuyahoga County. Order granting new trial entered August 18, 2016.

State v. Gordon, No. 2016–1462, Supreme Court of Ohio. Order reversing and remanding entered January 16, 2018.

State v. Gordon, No. 103494, Court of Appeals of Ohio, Eighth District, Cuyahoga County. Order on remand entered April 26, 2018, amended nunc pro tunc May 1, 2018.

State v. Gordon, No. 103494, Court of Appeals of Ohio, Eighth District, Cuyahoga County. Order denying application to reopen entered December 19, 2018.

Federal habeas:

Gordon v. Wainwright, No. 1:19-CV-01642-DAP, U.S. District Court for the Northern District of Ohio, Eastern Division. Report and Recommendation entered August 22, 2022, opinion adopting in part and rejecting in part entered November 9, 2022.

Gordon v. May, No. 22-4003, U.S. Court of Appeals for the Sixth Circuit. Single-judge order entered April 25, 2023, panel order denying rehearing entered June 23, 2023, en banc order denying rehearing entered July 10, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioner DeAndre Gordon respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's single-judge order denying a Certificate of Appealability (Pet. App. 1a-14a) is unpublished but available at 2023 WL 3719068. The opinion of the district court (Pet. App. 15a-27a) is unpublished but available at 2022 WL 16835863. The magistrate judge's report and recommendation (Pet. App. 28a-100a) is unpublished but available at 2022 WL 16838015. The Court of Appeals of Ohio opinion reversing and remanding for a new trial (Pet. App. 101a-115a) is published at 2016-Ohio-5407 and available at 2016 WL 4399512. The Supreme Court of Ohio opinion (Pet. App. 116a-129a) is published at 98 N.E.3d 251. The Court of Appeals of Ohio opinion on remand (Pet. App. 139a-148a) is published at 2018-Ohio-1643 and available at 2018 WL 1976020. The Sixth Circuit's panel decision denying panel rehearing (Pet. App. 159a-160a) is unpublished. The Sixth Circuit's order denying rehearing en banc (Pet. App. 161a-162a) is unpublished.

JURISDICTION

The Sixth Circuit issued its opinion on April 25, 2023, denied panel rehearing on June 23, 2023, and denied en banc rehearing on July 10, 2023. On October 2, 2023, Justice Kavanaugh extended the time to file this petition to December 7, 2023. No. 23A288. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. const. amend. XIV provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***

28 U.S.C. § 2253 provides, in relevant part:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

***

(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.

(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).

INTRODUCTION

Petitioner DeAndre Gordon was convicted of state crimes and sentenced to ten years' imprisonment after the trial court unnecessarily disqualified Gordon's chosen counsel from representing him in his criminal trial. On direct review, the state court of appeals reversed and remanded for a new trial, holding that the trial court had violated Gordon's right to counsel under the Sixth Amendment. But in a split decision, the state supreme court reversed.

The district court denied Gordon's petition for federal habeas relief and declined to issue a Certificate of Appealability under 28 U.S.C. § 2253(c). So Gordon sought a COA from the Sixth Circuit to appeal the district court's decision. Judge Helene White voted to grant Gordon a COA on his denial-of-counsel claim and his related ineffective assistance of counsel claims. But the Sixth Circuit denied a COA over her dissent—following the standard established in the Fifth, Eighth, and Eleventh Circuits, which deny COAs over the dissent of a colleague when a majority of the panel votes to deny one.

If Gordon had sought a Certificate of Appealability in the Third, Fourth, or Seventh Circuits though—all jurisdictions bordering the State where he is imprisoned—his application would have been granted. By rule, those circuits require that a COA issue when any circuit judge votes to grant one. In recent published authority, the Ninth Circuit, too, appears to align itself with the Third, Fourth, and Seventh Circuits. That conflict is intolerable.

And as several members of this Court have explained, denying a COA when judges actually

debate whether one should issue violates this Court's clear precedents. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553-54 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of application for stay and denial of certiorari); *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari). The Court should grant the petition and resolve the question presented.

Besides Judge White and a federal magistrate judge—each of whom viewed Gordon's denial-of-counsel claim as deserving further review—two judges on the state court of appeals and a state supreme court justice voted to grant Gordon a new trial based on the claim. Because "reasonable minds could differ—*had differed*—on the resolution" of his claim, he should not have been denied his right to appeal. *See Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ.) (quoting *Jordan*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg and Kagan, JJ.). When three state and two federal judges on four different courts find merit to the claim, there should be no question that reasonable jurists "could differ" on the issue such that a petitioner is entitled to a Certificate of Appealability under 28 U.S.C. § 2253(c). *See ibid.*

STATEMENT OF THE CASE

I. Factual Summary

Petitioner DeAndre Gordon was convicted of robbing his friend Tevaughn Darling at gunpoint. Pet. App. 103a. Darling at first told police he had been carjacked and testified "that initially he lied to the police because he did not want to get Gordon in

trouble." Pet. App. 105a. But after the police investigated and found no evidence of the crime as described by Darling, he "testified that he changed his mind" and told the police that Gordon was the assailant. *Ibid.* He then recorded a statement to that effect for the police. *Ibid.*; Pet. App. 117a-118a.

A Grand Jury in Cuyahoga County, Ohio, indicted Gordon for the robbery and related charges. Pet. App. 118a. Gordon retained attorney Aaron T. Baker to represent him in the criminal trial. *Ibid.* As part of the discovery in the robbery case, Baker was provided the videotaped statement and showed it to Gordon, who was free on bond. *Ibid.* Baker later testified that Gordon was the only person to whom he'd shown the video. *Ibid.*

An edited version of Darling's statement later appeared on social media. Pet. App. 118a. According to the State, the video had been edited to make it appear as though Darling was voluntarily providing information to the police about a local gang rather than merely reporting what Gordon had done. *Ibid.* Thus, the State sought further charges against Gordon—this time for intimidation of a crime victim or witness. Pet. App. 119a. Gordon retained Baker to represent him in that case as well. *Ibid.*

As described below, Gordon was convicted of the robbery and related charges but ultimately found not guilty of the intimidation charge. Yet because the trial court unnecessarily joined the two cases and then disqualified Baker over Gordon's objection—based on Baker's testimony as a material witness on the intimidation charge—Gordon lost his counsel of choice entirely.

II. Procedural History

A. State criminal proceedings

In March 2015, petitioner DeAndre Gordon was charged in Ohio state court with the robbery and related charges. Pet. App. 103a. Three months later, Gordon was also charged in a second case with the intimidation charge. *Ibid.*

After the latter intimidation charge was added in June 2015, the prosecution moved to join the two cases and filed a motion to disqualify Baker as Gordon's retained defense counsel. Pet. App. 103a. The cases should be joined, prosecutors argued, because the offenses were connected and allegedly part of the same criminal conduct. *Ibid.* The State also argued that Gordon's defense counsel should be disqualified because he would be a material witness in the intimidation case. *Ibid.* No one argued that Baker would also be a material witness in the initial robbery case. *See ibid.*

Gordon objected to the disqualification, arguing that his chosen counsel was not a necessary witness at all. *See* Pet. App. 114a. But the trial court joined the two cases and, based solely on its finding that Baker would be a material witness in the intimidation case, disqualified Baker as Gordon's counsel in *both* cases. *See* Pet. App. 103a.

After the combined trial, the jury returned guilty verdicts as to the initial robbery and related charges but found that Gordon was not guilty of the witness-intimidation charge in the second case—the basis of Baker's disqualification in both. Pet. App. 108a. Gordon was sentenced to an aggregate of ten years in prison. *Ibid.*

B. State direct review

Gordon I. On direct review, the Court of Appeals of Ohio vacated Gordon's conviction and ordered a retrial.

Among other claims, Gordon argued that the trial court erred when it ordered joinder of the intimidation charge to the offenses in his robbery case, because the joinder prevented him from proceeding to trial with his retained counsel of choice, thus violating the Sixth Amendment. Pet. App. 109a. The court of appeals agreed and reversed. Pet. App. 112a-113a.

Writing for the panel majority, Judge Mary Eileen Kilbane, joined by Judge Patricia A. Blackmon, noted that although Gordon's counsel objected to the disqualification motion, he failed to object to the joinder of the indictments. Pet. App. 110a. Thus, the court of appeals reviewed the trial court's decision to join the indictments for plain error. *Ibid.* "Based on the unique circumstances of this case," the panel majority found "that Gordon was prejudiced as a result of the joinder." Pet. App. 111a. "Gordon was prejudiced and his constitutional right to counsel was violated," the court held, "when the trial court removed his originally retained defense counsel from his robbery case and ordered Gordon to proceed to trial with a different defense counsel." *Ibid.*

Although Baker was a material witness in the intimidation case, he "was not a material witness to the robbery case." Pet. App. 112a. "The separation of these two cases, which were indicted three months apart, would have allowed Gordon's originally retained counsel to represent Gordon on his robbery case," the court reasoned. *Ibid.* And citing this Court's

decisions in *Faretta v. California*, 422 U.S. 806, 835 (1975), and *Von Moltke v. Gillies*, 332 U.S. 708 (1948), the court noted that the "Sixth Amendment, as made applicable to the states through the Fourteenth Amendment, guarantees the accused in a state criminal trial the right to counsel." *Ibid.* "Once Gordon's originally retained counsel was removed from the robbery case," the court found "Gordon sustained prejudice that outweighed the benefits of joinder." *Ibid.*

The panel thus reversed and remanded for a retrial without addressing Gordon's other claims on appeal, over the dissent of one panel judge. *See* Pet. App. 113a-115a.

Gordon II. In another split decision, the Supreme Court of Ohio reversed and remanded for the state court of appeals to consider Gordon's other claims.

The state supreme court majority acknowledged that the "appellate court's finding of prejudice" was "based upon its conclusion that Gordon had been improperly denied counsel of his choice in the robbery case." Pet. App. 126a. And the majority acknowledge that under this Court's precedents, "the erroneous deprivation of a defendant's counsel of choice is structural error," meaning it requires no showing of prejudice. *See* Pet. App. 123a (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)).

But the majority found there was no error on a different ground, which the trial court never reached. According to the majority, because the trial court "*could* reasonably have determined" that Gordon's retained counsel "should be disqualified from both cases even without the joinder," there "was thus no

obvious defect in the trial proceedings that affected the outcome of trial." Pet. App. 128a. The court reversed and remanded for the state court of appeals to consider Gordon's remaining claims of error. Pet. App. 129a.[1]

Justice William O'Neill dissented. Pet. App. 129a.

Gordon III. On remand, the state court of appeals denied Gordon's other claims.

Among his other claims, Gordon argued that his trial counsel was constitutionally deficient for failing to object to the joinder together with the disqualification motion. *See* Pet. App. 133a. But "[i]n light of the Ohio Supreme Court's decision in *Gordon II*," the court of appeals held that "defense counsel was [not] ineffective with regard to the joinder." Pet. App. 148a (italicization added). The court rejected Gordon's other claims and affirmed the conviction. *Ibid.*

Gordon then filed a pro se application to reopen the court's judgment on remand, arguing in part that trial counsel was ineffective for not appealing the trial court's removal of his counsel of choice and that the trial court violated the Sixth Amendment by denying him counsel of choice. Pet. App. 150a-151a.

These "two assignments of error," the court found, were "variations on the same argument: the trial court erred by removing his retained counsel." Pet. App. 157a. And "because the Supreme Court of Ohio ha[d] determined that the trial court properly

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[1] The majority opined that absent the alternative ground for affirmance, Gordon would have had to show "that the error in joining the offenses affected the outcome of the trial," an issue the court never resolved. Pet. App. 127a.

disqualified his attorney," the court was bound to conclude that the "argument [wa]s not well founded." *See ibid.* The court thus denied Gordon's application to reopen. *Ibid.*

C. Petitioner's federal habeas case

After the state court of appeals denied his application to reopen the remand judgment, Gordon sought habeas relief in federal court under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *See* 28 U.S.C. § 2254.

1. The matter was referred to a magistrate judge, who recommended denying Gordon's habeas claims but granting him a Certificate of Appealability.

Although the judge believed that Gordon couldn't meet AEDPA's stringent standards to get habeas relief, the judge recommended that a COA should issue because "reasonable jurists could reach[] differing conclusions with regard to the Fourth Ground for Relief set forth in Mr. Gordon's Petition"—his claim that he was denied counsel of choice by the improper joinder of his separate criminal charges. Pet. App. 84a, 98a. "Indeed," the judge noted, "the Eighth District reached one conclusion regarding the propriety of the order disqualifying Attorney Baker" in *Gordon I*, "and the Supreme Court of Ohio reached another – with one Justice dissenting from that court's decision overturning *Gordon I*." Pet. App. 98a. "Thus," the judge concluded, "a COA should issue in this matter, limited to the Fourth Ground for Relief." *Ibid.*

2. The district court rejected the magistrate judge's recommendation that a COA should be granted.

The district court accepted that a COA must issue when "reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." Pet. App. 25a (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). But the district court believed that a COA was "unwarranted here because joinder and attorney disqualification are state evidentiary and procedural issues, not federal constitutional issues." Pet. App. 26a. In other words, the district court ruled that no matter how those purported evidentiary issues might affect a defendant's right to counsel under the U.S. Constitution, they were unreviewable. *Ibid.*

3. In a single-judge order written by Judge Alan E. Norris, the Sixth Circuit denied Gordon's application for a COA.

Judge Norris also recognized that a COA must issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Pet. App. 4a (quoting *Slack*, 529 U.S. at 484). But "[n]o reasonable jurist," he held, "could debate the district court's rejection of Gordon's counsel-of-choice claim." Pet. App. 6a.

4. Gordon petitioned for rehearing en banc, and a split panel of the Sixth Circuit denied the suggestion for rehearing over Judge White's dissent.

The "majority of the panel conclude[d] that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order." Pet. App. 160. "Judge White," though, "would have granted a certificate of appealability on the denial-of-

counsel claim and the ineffective assistance claims related to that claim." *Ibid.*

5. After the panel denied Gordon's petition by split decision, the suggestion for rehearing was referred to the full Sixth Circuit.

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 needed 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 Gordon's application for a COA conflicted with the rules and decisions of other federal courts of appeals. *Id.* at 6-8. Given the conflict in circuit authority, the Federal Defenders argued that rehearing was necessary to bring "proper, uniform application of standards governing certificates of appealability." *Id.* at 5 n.1.

Even so, the Sixth Circuit denied rehearing en banc. Pet. App. 161a-162a.

This petition follows.

REASONS TO GRANT THE PETITION

This case presents the important question whether a state prisoner seeking federal habeas relief is entitled to any federal appellate review when a district court denies relief. This Court has long and repeatedly held that the answer is yes, so long as the state prisoner can meet a minimal showing "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)).

Yet the circuit courts are deeply divided on whether that threshold is met, even when judges *actually disagree* as to either (a) whether the district court got the constitutional question wrong or (b) whether the issues deserve appellate review. The Third, Fourth, and Seventh Circuits correctly recognize that this threshold is necessarily met when *any* court of appeals judge votes to grant a Certificate of Appealability, such that the habeas petitioner may appeal. At the very least, this means that a jurist *could* conclude, because she *has concluded*, that "the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 580 U.S. at 115. But the Fifth, Eighth, and Eleventh Circuits, like the Sixth Circuit here, will deny applicants the right to appeal over the dissent of a colleague who believes the claims are adequate for further review. *Contra ibid.*

This question dividing the circuits is important, as evidenced by the fact that members of this Court have taken the extraordinary step of dissenting from the denial of certiorari when the courts of appeals have

denied a COA in a split decision. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553-54 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of application for stay and denial of certiorari); *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari). The circuit courts that deny a COA over the dissent of a panel colleague are "too demanding in assessing whether reasonable jurists could debate the merits" or believe "'the issues presented were adequate to deserve encouragement to proceed further.'" *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ.) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

And this case is an especially good vehicle to decide the question. Judge White lodged her dissent from the denial of a Certificate of Appealability. And there is no question that the full Sixth Circuit was aware of the circuit conflict and importance of the issue, given the amicus brief filed by both Federal Defenders Offices in Ohio in support of en banc review. Gordon is entitled to a COA, because "reasonable minds could differ—*had differed*—on the resolution" of his claim. *Jordan*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg and Kagan, JJ.).

I. The Circuit Courts Are Deeply Divided Over The Question Presented.

There is a deep and entrenched circuit split dividing the courts of appeals on an issue that has already drawn scrutiny from several of this Court's members. Through published local rules, the Third, Fourth, and Seventh Circuits require a COA to issue so long as any judge votes to grant one. And in a recent published opinion, the Ninth Circuit seems to agree

that a COA must issue so long as a circuit judge votes that the application should be granted. But the Fifth, Sixth, Eighth, and Eleventh Circuits deny certificates of appealability even over the reasoned dissent of a panel judge, so long as the panel majority votes against granting a COA.

That 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 disagree in fact, simply because he is imprisoned in Ohio rather than in its bordering States of Indiana, Pennsylvania, or West Virginia.

1. In the Third, Fourth, and Seventh Circuits, the courts by rule will grant a Certificate of Appealability when at least one judge believes a COA is warranted.

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).

The Seventh Circuit, too, has interpreted its rules to require that a COA must issue so long as any one judge votes to grant one. *See Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003) ("[A] certificate of

appealability will issue … if one of the judges to whom the application was referred under Operating Procedure 1(a)(1) concludes … that the statutory criteria for a certificate have been met.").

Notably, the Ninth Circuit in published authority has granted a Certificate of Appealability when a dissenting colleague concluded that the issues deserved further review. Despite the panel majority finding no merit to the applicant's claim, the majority explained: "We are fully satisfied of the fairmindedness of our dissenting colleague, and so we have granted the COA." *McGill v. Shinn*, 16 F.4th 666, 706 & n.14 (9th Cir. 2021). With this recent, published opinion, the Ninth Circuit would appear to align itself with the Third, Fourth, and Seventh Circuits.

2. In contrast, the Fifth, Sixth, Eighth, and Eleventh Circuits have established that COAs will be denied even when one or more judges vote to grant one, so long as a majority of the court's judges vote to deny the application.

The Fifth Circuit has adopted a legal rule that a COA need not issue simply because one member of a panel voted to grant the application. *See Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014), *cert. denied sub nom. Jordan v. Fisher*, 576 U.S. 1071 (2015). In published decisions, the Fifth Circuit will deny a COA even over the reasoned dissent of a colleague. *Ibid.*; *e.g.*, *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (published decision denying COA and motion for stay of execution over reasoned dissent of Judge James E. Graves (citing *Crutsinger v. Davis*, 929 F.3d 259, 266 (5th Cir. 2019) (Graves, J., dissenting); *Crutsinger v. Davis*, 930 F.3d 705, 709 (5th Cir. 2019) (Graves, J., dissenting))).

In *Jordan*, the panel majority acknowledged that "[a] petitioner satisfies" the COA standard "by demonstrating 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." 756 F.3d at 405. Yet it held that no reasonable jurist could so conclude despite the reasoned dissent of Judge James L. Dennis, who, believed one of the petitioner's claims "deserve[d] encouragement to proceed further." *Compare id.* at 405-11 (panel majority rejecting dissent's reasoning) *with id.* at 413-22 (Dennis, J., dissenting from the denial of COA).

Judge Dennis's dissent pointed out that the panel was "not called upon to make a decision on the ultimate merits of Jordan's claim of prosecutorial vindictiveness." *Jordan*, 756 F.3d at 416. "Rather," he noted, Jordan only needed to show that "'jurists of reason could disagree.'" *Ibid.* (quoting *Slack*, 529 U.S. at 484). And "any doubt as to whether a certificate should issue in a death-penalty case," he continued, should "be resolved in favor of the petitioner." *Ibid.* (quoting *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005)). The majority expressly rejected Judge Dennis's reasoning, addressing his dissent at length. *Id.* at 407 ("because the dissenting opinion addresses a presumption of vindictiveness claim," the majority "address[ed] why … any such argument is foreclosed by binding precedent" of the circuit). The majority then spent several pages of the federal reporter addressing the merits of the claim under prior Fifth Circuit precedent. *Id.* at 407-11.

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—Judges Jane L. Kelly, Lavenski Smith, and Ralph R. Erickson. *Johnson v. Vandergriff*, 2023 WL 4851623, at *1 (8th Cir. July 29, 2023), *cert. denied*, 143 S. Ct. 2551 (2023). Thus, despite a panel majority having already granted a COA to the applicant, and three judges of the en banc court dissenting in separate writings, a majority of the en banc Eighth Circuit concluded that "no reasonable jurist could disagree with the district court's resolution" of the constitutional claims or find that the issues warranted further review. *Compare ibid.* (Gruender, J., joined by Colloton, Benton, Shepherd, Grasz, Stras, and Kobes, JJ., concurring), *with id.* at *3-7 (Kelly, J., joined by Smith, C.J., and Erickson, J., dissenting), *and id.* at *7-8 (Erickson, J., joined by Kelly, J., dissenting).

That remarkable result follows from other published authority of the Eighth Circuit, denying a COA over the reasoned dissent of a circuit judge who would vote to grant one. *See, e.g.*, *Williams v. Kelley*, 858 F.3d 464, 475-80 (8th Cir. 2017) (denying COA over reasoned dissent of Judge Kelly); *see also, e.g.*, *Wade v. United States*, 2022 WL 839397, at *1 (8th Cir. Mar. 4, 2022) (denying COA over Judge Kelly's vote to grant the request); *Johnson v. Blair*, 2022 WL 2032929, at *1 (8th Cir. Jan. 21, 2022) (same), *cert. denied*, 143 S. Ct. 430 (2022); *Rhines v. Young*, 2018 U.S. App. LEXIS 37756, at *1 (8th Cir. Sept. 7, 2018) (same); *Taylor v. Bowersox*, 2014 U.S. App. LEXIS 3522, at *1-9 (8th Cir. Feb. 24, 2014) ("I would grant the petition for rehearing en banc in this case in order to grant a certificate of appealability to petitioner … and stay his execution until this issue could be decided

on the merits.") (Kermit E. Bye, J., joined by Kelly, J., dissenting from the denial of rehearing en banc); *Lotter v. Houston*, 2011 U.S. App. LEXIS 26993 (8th Cir. Aug. 23, 2011) (denying COA over Judge Bye's vote to grant the application).

The Eleventh Circuit has also decided that to obtain a COA, the applicant must convince a majority of the panel that one should issue. In a published opinion, the panel majority held that the applicant's claims were not "debatable," *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1235 (11th Cir. 2015) (William Pryor, J.), over Judge Beverly B. Martin's dissent that she "would grant [the 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," *id.* at 1237 (Martin, J., dissenting). The panel majority acknowledged that a COA must issue when "reasonable jurists would fine the district court's assessment of the constitutional claims debatable." *Id.* at 1236 (quoting *Slack*, 529 U.S. at 484). It nevertheless rejected the COA despite the well-reasoned dissent of Judge Martin.

See also, e.g., *Hutchinson v. Secretary, Fla. Dep't of Corr.*, No. 21-10508, ECF No. 12-1, at 4-6 (11th Cir. Apr. 29, 2021) (denying COA of Judge Adalberto Jordan's dissent reasoning that "the district court's ruling is debatable"); *Cromartie v. GDCP Warden*, No. 17-12627, ECF No. 26-1, at 17-18, 20 (11th Cir. Mar. 26, 2018) (denying COA over Judge Martin's dissent that a "reasonable judge" could debate the prisoner's ineffective-assistance claim); *Mann v. Palmer*, 713 F.3d 1306, 1317 (11th Cir. 2013) (Martin, J., concurring in part and dissenting in part) ("in another

case" prisoner had "pending in this court," the judge "dissented from the denial of a certificate of appealability in that case" (citing *Mann v. Moore*, No. 13-11322, ECF No. 27-1 (11th Cir. April 8, 2013)).

The Sixth Circuit's decision here is just the latest in a number of cases establishing that the court will deny COAs, even over the reasoned dissent of a colleague. *See, e.g.*, *Wellborn v. Berghuis*, 2018 U.S. App. LEXIS 22931, at *1-2 (6th Cir. Aug. 6, 2018) (denying COA over reasoned dissent of Judge Bernice Donald, who would have granted the rehearing petition and application for COA "as to his claim that *Weaver* [*v. Massachusetts*, 137 S. Ct. 1899 (2017)] altered the standard for establishing actual prejudice"); *Rafidi v. United States*, 2018 U.S. App. LEXIS 21327, at *1 (6th Cir. July 31, 2018) (denying COA over dissent of Judge White, who voted to "grant rehearing and issue the certificate of appealability").

II. The Question Presented Is Important.

The question presented is important, as reflected by the fact that members of the Court have repeatedly taken the extraordinary step of dissenting from the denial of certiorari to criticize the Sixth Circuit's side of the split. And this Court has granted review when the circuits are applying too stringent a standard in reviewing requests for Certificates of Appealability.

1. As noted above, the Eighth Circuit in *Johnson v. Vandergriff* went en banc to vacate a panel decision that had granted a COA, and then denied the COA over the dissent of three circuit judges. 2023 WL 4851623, at *1. That decision drew a scathing dissent chastising the court of appeals for denying a COA even though numerous judges debated the merits of the

claim. *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ.). 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 and Kagan, JJ.)). While the "COA requirement erects an important … barrier to an appeal," that barrier is "not insurmountable." *Ibid.*

"The only question before the Eighth Circuit was whether reasonable jurists could debate the District Court's disposition of Johnson's habeas petition." *See Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ.). "That question, in turn, depends on whether reasonable jurists could debate whether the Missouri Supreme Court contravened or unreasonably applied clearly established federal law." *See ibid.* (citing 28 U.S.C. § 2254(d)). Because "reasonable jurists can and do have that debate," three of this Court's members would have granted certiorari to give "Johnson a meaningful opportunity to be heard." *See id.* at 2556. "Put simply, it is beyond question that Johnson's habeas claim [wa]s 'reasonably debatable,'" because "[m]embers of this Court, the Eighth Circuit, and the Supreme Court of Missouri ha[d] already done so." *Id.* at 2255-56. "To nevertheless maintain that Johnson should be denied a COA because no reasonable jurist could debate the District Court's denial of his habeas petition defies common sense." *Id.* at 2556.

Members of this Court also dissented from the denial of certiorari to review the Fifth Circuit's decision in *Jordan v. Epps*, 756 F.3d at 413, described

above. *See Jordan v. Fisher*, 576 U.S. at 1071-78 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari). "Although the Fifth Circuit accurately recited the standard for issuing a COA, its application of that standard in th[e] case contravened" this Court's precedents. *Id.* at 1076.

"To start," the dissent admonished, "the Fifth Circuit was too demanding in assessing whether reasonable jurists could debate the District Court's denial of Jordan's habeas petition." 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg and Kagan, JJ.). On top of "Judge Dennis" of the Fifth Circuit, "Justice Banks" of the Mississippi Supreme Court had also "found Jordan's vindictiveness claim highly debatable." *Ibid.* "Those facts alone," according to several of this Court's members, "might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution of Jordan's claim." *Ibid.*

"The barrier the COA requirement erects is important, but not insurmountable." *Jordan*, 576 U.S. at 1078 (Sotomayor, J., joined by Ginsburg and Kagan, JJ.). "In cases where a habeas petitioner makes a threshold showing that his constitutional rights were violated," as here, "a COA should issue." *Ibid.*

2. This Court has previously granted certiorari when a petitioner has asserted a "'troubling' pattern of failing to apply the threshold COA standard required by this Court's precedent." *See* Petition for Writ of Certiorari at 26, *Buck v. Stephens sub nom. Buck v. Davis*, No. 15-8049, 2016 WL 3162257 (U.S. Feb. 4, 2016) (quoting *Jordan*, 576 U.S. at 1078 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari)).

In *Buck v. Davis*, the petitioner presented this Court with evidence of a "troubling pattern" that had "resulted in a demonstrable circuit split with respect to the application of the COA standard." Petition for Writ of Certiorari at 26, *Buck v. Stephens*, *supra*. "As described in Appendix F" to the petition for certiorari, the petitioner set forth "a review of electronically available capital § 2254 cases in the Fifth Circuit and two other nearby circuits (the Fourth and Eleventh) in the last five years, demonstrat[ing] a dramatic difference among the three circuits." *Ibid.* "In the Fifth Circuit," the petitioner noted, "a COA was denied on all claims by both the district court and the court of appeals 59% of the time." *Ibid.* "By contrast, during that same period, a COA was denied on all claims by both the district court and court of appeals in only 6.25% of capital § 2254 cases in the Eleventh Circuit and *0% of such cases in the Fourth Circuit*." *Ibid.* (emphasis added). This disparate treatment is further reason to grant the petition here.

Indeed, this Court granted the petition in *Buck*. And in a lopsided opinion, the Court held that although the "court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief," the court applied too stringent a standard in resolving that question. *Buck*, 580 U.S. at 115-16 (Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ.). "At the COA stage," this Court reaffirmed, "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.'" *Id.* at 115 (quoting *Miller–El*, 537 U.S.

at 327). So "when a reviewing court (like the Fifth Circuit here)" instead "inverts the statutory order of operations and 'first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner *at the COA stage*." *Id.* at 116-17 (quoting *Miller–El*, 537 U.S. at 336-37) (cleaned up).

Yet again, several circuits are placing too heavy a burden on applicants for Certificates of Appealability. This Court's guidance is required once more.

III. This Case Is A Good Vehicle To Decide The Question Deeply Dividing The Circuits.

This case is a good vehicle because the question is starkly presented. There is no question that Gordon would have been granted a COA had he been imprisoned in bordering states Pennsylvania (Third Circuit), West Virginia (Fourth Circuit), or Indiana (Seventh Circuit), given Judge White's vote to grant the application. *See supra* pp.12-13. And the question was clearly presented to the full Sixth Circuit, given the Federal Defenders' amicus brief at the en banc stage identifying the circuit conflict, the importance of the issue, and the correctness of the contrary rule.

There is also substantial merit to Gordon's claim that he is entitled to a Certificate of Appealability. Two judges of the Court of Appeals of Ohio found a violation of Gordon's right to counsel under the Sixth and Fourteenth Amendments, requiring retrial. Pet. App. 112a-113a (the "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)). Indeed, one of the Justices of the Supreme Court of Ohio dissented from the state high court's opinion reversing the state court of appeals' panel decision. Pet. App. 129a (O'Neill, J, dissenting). Thus, three state judges—two representing a majority of the court of appeals panel that would have granted Gordon a new trial, and one state supreme court justice reviewing the panel's decision—agreed with Gordon that the trial judge violated his Sixth Amendment right to counsel.

"When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011); *see Jordan*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg and Kagan, JJ.) (considering state justice's dissent on direct appeal in reasoning that "[t]wo judges … found Jordan's vindictiveness claim highly debatable"). And two federal judges would have granted Gordon a COA on the claim. The federal magistrate judge recommended granting a certificate of appealability to review Gordon's denial-of-counsel claim. Pet. App. 98a. Judge White, too, would have granted a COA on three of Gordon's claims related to his denial of counsel. Pet. App. 160a.

When five judges from four courts find merit to a prisoner's constitutional claim—three 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 habeas relief. *See Buck*, 580 U.S. at 115. For the reasons members of this Court have already highlighted, Gordon is right on the merits of the question presented. This Court should grant the petition.

CONCLUSION

This petition for certiorari should be granted.

Respectfully submitted,

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