No. 23-629

IN THE

Supreme Court of the United States

DEANDRE GORDON,

Petitioner,

v.

HAROLD MAY,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Public Defense (NAPD) consists of more than 25,000 professionals who deliver legal services across the United States. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel in a wide range of criminal matters. NAPD members are not only advocates in courtrooms and jails, but also deeply involved in the day-to-day realities of law practice and community engagement. Our collective expertise encompasses state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, as well as in dedicated juvenile, capital, and appellate offices.

NAPD has a strong interest in the appeal at bar because its members regularly litigate appeals throughout the country and seek Certificates of Appealability on behalf of clients in a range of cases.

SUMMARY OF ARGUMENT

This Court should grant the petition for four key reasons: First, the central issue in this case is critically important in a range of constitutional and criminal law contexts that recur throughout the nation and is practically significant for public defenders and the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution. Pursuant to Rule 37.2(a), counsel for the parties received notice of *amicus*' intent to file this brief at least 10 days prior to the deadline to file.

clients they represent. Second, the Sixth Circuit's standard for COAs cannot be squared with this Court's precedent or the plain text of 28 U.S.C. § 2253, which refers in the singular form to "a circuit justice or judge." Third, Respondent's view of the COA standard would result in considerable inefficiencies, namely by generating split opinions as well as petitions for rehearing, rehearing en banc, and to this Court – which constitute a profound and counterproductive expenditure of time and resources for what is supposed to be a threshold determination. Fourth, the Sixth Circuit's standard risks undermining collegiality in the judiciary by repeatedly disregarding the views of particular judges and transforming what should be a threshold legal assessment into contested territory about whether a fellow jurist is "reasonable." This Court should adopt a rule for COAs that ensures that all judges are heard and the work of the courts of appeals is done in ways that respect the voice and expertise of every jurist.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE IT INVOLVES A NATIONALLY IMPORTANT ISSUE AND THE SIXTH CIRCUIT'S RULE IS WRONG, INEFFICIENT, AND PROBLEMATIC FOR THE JUDICIARY.

In light of the unique significance of the question presented and the existence of a concrete circuit split, Pet. 16-21, *amicus* respectfully urges the Court to grant the petition for four key reasons:

1. The core issue in this case is critically important in a wide variety of constitutional and criminal law contexts that recur throughout the nation. The availability of a Certificate of Appealability (COA)

arises primarily under 28 U.S.C. § 2253 in habeas corpus proceedings. *See also* F.R.A.P. 22 (discussing section 2255 proceedings). State prisoners regularly bring federal habeas petitions in federal district courts in every state and, if denied, seek an appeal pursuant to 28 U.S.C. § 2253(c)(2). For a sense of scale, there were approximately 2,800 federal habeas actions brought in 2022. *See* Administrative Office of the Courts, *Judicial Business of the U.S. Courts 2022*, Tables B-1A, https://www.uscourts.gov/sites/default/files/data_tables/jb_b1a_0930.2022.pdf. Earlier statistical analyses confirm that, on average, COAs are infrequently granted, particularly in non-capital cases:

> Of the terminated non-capital cases, 737 included a CoA ruling. In 711 (96%) of these, a CoA was denied on all claims; in only 26 (3.5%) did the judge grant a CoA on at least one claim.
>
> The median interval from final order to a ruling on a CoA was just under one month (26 days), the average was more than five weeks (38 days). In 90% of the cases with a CoA ruling, that ruling was entered 84 days or less after the judgment. The longest period extended over two years (792 days). In nearly 37% of these cases the CoA ruling and case termination were simultaneous.

See Nancy King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* at 54 (Aug. 21, 2007) (research supported by a Department of Justice grant), https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf. In capital cases, the rate of granting a COA can be higher, although the average timeframe for deliberation is roughly similar:

> District courts reached a decision on a CoA in 193 cases, 133 of them from Texas. Of the 60 cases filed outside of Texas, judges granted a CoA in 70%. Texas district courts granted a CoA on any claim in 21% of the capital cases concluded.
>
> The median time between termination and a CoA ruling by the district judge in these 193 cases was 32 days. There was great variation among the districts, ranging from a few days to several months. Texas cases averaged 27 days from judgment to a CoA ruling; cases in other states averaged 42 days.

Id. *See also* Pet. 24 (noting that the "disparate treatment [of granting COAs in different circuits] is further reason to grant the petition here") (citing Petition for Writ of Certiorari at 26, Appendix F, *Buck v. Stephens sub nom. Buck v. Davis*, No. 15-8049, 2016 WL 3162257 (U.S. Feb. 4, 2016)).

For public defenders and the clients they represent, the ability to obtain a COA is pivotal in any given case. Practically speaking, the COA standard can make the difference between whether criminal defendants can raise constitutional claims, re-open their proceedings, or prove actual innocence – or whether their claims will effectively never be heard in a federal court of appeals. The vast majority of habeas actions are brought pro se, which makes it all the more difficult to bring a 2253 action and navigate the COA process. *See generally* Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. Pa. J. Const. L. 1219, 1254 (2012) (92% of non-capital habeas petitions are filed pro se).

The application of the COA standard regularly recurs and involves a range of criminal statutes and underlying constitutional claims. For example, habeas petitions often feature claims rooted in the Fourth, Fifth, Sixth, Eighth, and / or Fourteenth Amendment. *See e.g.,* A JAILHOUSE LAWYER'S MANUAL 269 (12th ed., 2021), https://jlm.law.columbia.edu/files/2021/02/20.-Chapter-13.pdf.

For these reasons and others, "the certificate of appealability (COA) requirement has been a source of significant confusion and has engendered a number of circuit splits." Margaret A. Upshaw, *The Unappealing State of Certificates of Appealability*, 82 U. Chi. L. Rev. 1609, 1609 (2015). For the sake of clear guidance alone, the NAPD urges this Court to grant and resolve the circuit split here.

2. On the merits of the instant case, it seems impossible (or confounding at best) to square the Sixth Circuit's standard for COAs with this Court's precedent and the language of 28 U.S.C. § 2253.

As a legal matter, this Court has repeatedly required that "[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)). A wide majority of this Court has also been attentive to applications of the COA standard that are proper in theory, but fatal in fact. *See Buck*, 580 U.S. at 115-16 (Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) ("court below phrased its determination in proper terms," but applied too stringent a standard in resolving that question).

As a matter of statutory interpretation, the plain text of section 2253 refers in the singular form to "a circuit justice or judge." 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"). Congress could have said "all" or a "majority" of circuit judges, but it chose not to. Likewise, several local rules governing the application of the COA standard refer to "any judge" in the singular form. *See e.g.*, 3d Cir. Loc. App. R. 22.3 (2011); 4th Cir. Loc. R. 22(a)(3) (2023). *See also Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003) (interpreting Operating Procedure 1(a)(1) to mean "if one of the judges").

As a logical matter, when a petitioner has raised a constitutional issue that is sufficiently substantive to garner the vote of an Article III judge, then that should be fairly understood to constitute a "substantial showing" under section 2253(c)(2). Several members of this Court have underscored this core logic: 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. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ.) (quoting *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari)).

3. As a procedural matter, Respondent's view of the COA standard would result in considerable inefficiencies for the judicial system and defendants alike.

The Sixth Circuit's standard tends to generate considerable split opinions, with dissents and majorities each explaining their distinct views on

whether the COA should issue in the first place. Ironically, while the judges in the majority and dissent may disagree about whether a claim deserves encouragement, they may ultimately agree on the merits. *See also Miller-El,* 537 at 338 ("We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim may 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"). This is a needless waste of judicial resources.

Moreover, when one judge in a panel votes for a COA (as Judge White did below) in a circuit that requires multiple judges to do so, then the only way to get the COA granted is for that circuit court to grant rehearing or rehearing en banc (which is what the Petitioner here sought to do, unsuccessfully). That requires a considerable expenditure of time, briefing, and resources by public defenders, judges, and other court staff. For example, judges must deliberate, exchange internal letters, vote, and potentially write separate opinions on a petition for rehearing or rehearing en banc – all about the preliminary determination of whether to hear an appeal in the first place. A petition for certiorari to the Supreme Court may also ensue, as it has here.

That is an incredible expenditure of time and resources for what is supposed to be a threshold determination. As the Court stressed in *Miller-El*, "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." 537 U.S. at 336–37. Moreover, in *Buck*, this Court warned that "when a reviewing court" 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." 580 U.S. at 116-17 (quoting *Miller–El*, 537 U.S. at 336-37).[2]

By contrast, in circuits that only require one judge on the panel to issue a COA, the results are considerably more efficient: the court can simply set the case for briefing. A panel can then directly decide the underlying constitutional claim – and with or without oral argument. A court need not be burdened by endless procedural wrangling when a simple adjudication on the merits can suffice. For example, under that rule, in *Buck v. Davis,* if the two judges who would have granted a COA in the court of appeals had been listened to (*see Buck v. Stephens*, 630 Fed. App'x 251 (5th Cir. 2015) (Graves and Dennis, dissenting)), then the COA would have been granted without necessitating a cert. petition and utilizing this Court's time and resources. In these ways, being faithful to a straightforward application of section 2253 will also conserve valuable judicial resources.

4. Lastly, the Sixth Circuit's standard for COAs risks undermining collegiality in the judiciary by repeatedly disregarding the views of particular judges. It

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[2] Judge Dennis in the Fifth Circuit raised similar concerns: a panel is "not called upon to make a decision on the ultimate merits of [a] claim," *Jordan v. Epps*, 756 F.3d 395, 416 (5th Cir. 2014) (Dennis, J., dissenting from the denial of COA), *cert. denied sub nom. Jordan v. Fisher*, 576 U.S. 1071 (2015). "Rather," a petitioner need only show that "'jurists of reason could disagree.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Moreover, "any doubt as to whether a certificate should issue in a death-penalty case" should "be resolved in favor of the petitioner." *Id.* (quoting *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005)).

generates split opinions and turns what is supposed to be a threshold legal determination into contested territory about whether a fellow jurist meets the basic requirement of being "reasonable." *See generally Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (a petitioner satisfies the COA requirement when he can show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong") (citations omitted).

For example, the Eighth Circuit has a practice similar to the Sixth Circuit's heightened standard for COAs. The Eighth Circuit has also repeatedly denied COAs over the dissent of Judge Jane Kelly, who has extensive expertise in criminal law and years of prior experience as a federal public defender. *See e.g., Williams v. Kelley*, 858 F.3d 464, 475-80 (8th Cir. 2017) (denying COA over dissent of Judge Kelly); *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). *See also* Thomas Hopson, *Potential nominee: Judge Jane Kelly, former public defender*, SCOTUSblog (Mar. 7, 2016), https://www.scotusblog.com/2016/03/potential-nominee-judge-jane-kelly-former-public-defender/.

Other circuits have experienced similar dynamics for judges with varying professional backgrounds. For example, Judge Martin on the Eleventh Circuit, who was a former prosecutor, repeatedly dissented on the denial of COAs. *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); *Melton v. Sec'y, Fla.*

Dep't of Corr., 778 F.3d 1234, 123 (11th Cir. 2015) (Martin, J., dissenting).

NAPD is concerned that systematically refusing to weigh the vote of certain jurists in these matters undermines valuable expertise for the court of appeals in handling petitions brought under section 2253. It may also inadvertently leave the impression that the views of certain judges are so inconsequential that they are not even "reasonable" and do not justify even *considering* a federal appeal. That would not be constructive, either internally for the court of appeals or externally for the public's faith in the fairness and regularity of the appellate process.

This Court should adopt a rule that ensures that all judges are heard and the work of the courts of appeals is done in ways that respect the voice and expertise of every jurist. When former public defenders become Article III judges, their professional experiences and subject matter knowledge are an asset to the court, irrespective of how any given criminal appeal turns out. Members of this Court have reflected similar sentiments about the benefits of varied professional and personal experiences for the judiciary. *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1991-1992) ("all of us come to the Court with our own personal histories and experience"); *id.* ("At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us").

All told, NAPD respectfully urges this Court to consider the downsides of the Sixth Circuit's rule and the downstream implications for the criminal justice system, judicial efficiency, and collegiality among appellate jurists.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Gordon's petition for certiorari.

Respectfully submitted,

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