No. 23-629

In the Supreme Court of the United States

DEANDRE GORDON,

Petitioner,

v.

HAROLD MAY, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Federal law requires habeas petitioners to obtain a "certificate of appealability" before appealing habeas claims that the district court denied. Must the circuit courts apply procedural rules that require granting a certificate when one judge would do so over the dissent of two other judges?

LIST OF DIRECTLY RELATED PROCEEDINGS

The petition's list of related proceedings is complete and correct.

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INTRODUCTION

Though they share many attributes, the circuit courts are not a monolith. Each has its own set of local rules and operating procedures that impose different procedural structures on litigation in the circuits. While differences in legal substance sometimes call for intervention by this Court, differences in internal procedure generally do not.

DeAndre Gordon's petition seeks to remodel such a difference into a circuit split. This Court rejected a virtually identical proposition over half a century ago. *See Application of Burwell*, 350 U.S. 521, 522 (1956). In line with *Burwell*, the Circuits' varying approaches to processing requests for certificates of appealability is a matter of discretion—the circuit courts need not all follow the same path. There can be no "split" within the meaning of this Court's Rule 10 when different circuits lawfully adopt different procedures. So there is no need for this Court's intervention here.

STATEMENT

DeAndre Gordon robbed and shot his friend, who survived to testify against him. Pet.App.117a–118a. Before Gordon went to trial for that crime, police believed that he released a video of his friend that was edited to provoke a local gang and thus intimidate the friend. Pet.App.118a–119a. The prosecutor charged Gordon with witness intimidation and moved to consolidate the two cases, which the court did. Pet.App.119a–120a. Because Gordon's counsel was involved in providing the video to Gordon, the court disqualified the counsel—a potential witness—from involvement in the case. *Id.* Gordon never objected to the joinder of the two cases, and he waived

his right to appeal his counsel's disqualification. Pet.App.120a–121a. The jury convicted Gordon of the robbery-related charges but acquitted him of witness intimidation. Pet.App.121a. The court imposed ten years' imprisonment. Pet.App.2a.

On direct appeal, Gordon argued that joining the two cases wrongly deprived him of his counsel of choice. Pet.App.121a. Although he prevailed in the court of appeals, he lost in the Ohio Supreme Court. Pet.App.122a–129a. The Supreme Court found that Gordon failed to show that the joinder of the cases and disqualification of his counsel violated his rights. Pet.App.123a–129a. In the Court's words, if Gordon had objected to the joinder on these grounds, the "trial court could reasonably have determined that [Gordon's counsel] should be disqualified from both" the robbery and the intimidation cases even if the cases had not been joined. Pet.App.128a.

Gordon turned to federal court and petitioned for habeas relief. He raised seven grounds for relief, including the denial-of-chosen-counsel claim and related ineffective-assistance claims. Pet.App.3a–4a. The district court denied the petition and did not grant a certificate of appealability. Pet.App.4a. Gordon moved for a certificate of appealability in the Sixth Circuit. Pet.App.4a. A judge denied the request through a written opinion. He noted that Gordon's preferred counsel was a likely witness for both the robbery and intimidation charges because Gordon's video was relevant to both: for showing consciousness of guilt on the robbery charges and for showing the primary conduct in the intimidation charge. Pet.App.5a–6a, 14a.

Gordon petitioned for rehearing, which a panel denied with a recorded dissent but no separate opinion. Pet.App.159a–160a. The full court likewise denied en banc review. Pet.App.161a–162a.

REASONS FOR DENYING THE PETITION

DeAndre Gordon raises what he styles a circuit split, but it is nothing more than variable internal procedures. This Court, under virtually identical circumstances, has already sanctioned the circuits' use of different procedures to determine whether to grant a certificate that permits a further habeas appeal. So the differences exist, but the need for resolution does not. What is more, the standard Gordon requests is harmful to habeas petitioners writ large. Finally, this case is a poor vehicle even to address the question as Gordon frames it. His underlying habeas claim is meritless, so resolving exactly how the Sixth Circuit should have processed his request for a certificate of appealability will not set Gordon on the path to securing habeas relief. *Cf. Buck v. Davis,* 580 U.S. 100 (2017).

I. Circuits may adopt different certificate-of-appealability review procedures.

Procedural thresholds controlling habeas appeals are nothing new. Neither are attempts to constrain how circuit courts process requests for them. But for decades, this Court has afforded the circuit courts discretion about how each circuit handles such requests. Those longstanding differences are no reason to grant certiorari in this case.

A. Certificates of appealability guard the gate for habeas appeals.

Frivolous habeas petitions and appeals pose significant burdens on federal courts. Even though less than ten percent of state prisoners file for habeas relief each year, they can generate tens of thousands of petitions, the "great bulk" of which are "utterly unjustified" and yet "require a considerable expenditure of judicial time." Arthur R. Miller & Charles A. Wright, 17B Fed. Prac. & Proc. §4261 (3rd ed. 2023). More than that, federal habeas petitions for state prisoners have been "[p]erhaps the most controversial and friction-producing issue" in our dual-sovereignty court systems. *Id.* Congress has long recognized that burden and imposed screening mechanisms to ease the burdens on federal courts' workloads.

For much of the Twentieth Century, a habeas petitioner was required to get a "certificate of probable cause" before appealing denial of his petition. *Barefoot v. Estelle*, 463 U.S. 880, 892 & n.3 (1983). Since the statute did not specify any standard, this Court supplied one: a certificate would issue upon "a substantial showing of the denial of a federal right." *Id.* at 893 (quotation and brackets omitted). In other words, the petitioner had to "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n.4 (quotation and brackets omitted).

In 1996, Congress replaced the certificate of probable cause with the "certificate of appealability" and codified—with minor revision—the standard this

Court had applied to certificates of probable cause. *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000); 28 U.S.C. §2253(c)(1). A certificate of appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." §2253(c)(2).

B. Certificate-review procedures are matters of circuit administration.

Congress did not specify procedures for either the certificates of probable cause or the newer certificates of appealability. The circuits may fill that gap in different ways, a result blessed in both caselaw and statute.

Decades ago, this Court considered and rejected the idea that the circuit courts must adopt uniform approaches to sifting through these kinds of certificate requests. *See Application of Burwell*, 350 U.S. 521, 522 (1956). *Burwell* raised an issue identical to Gordon's, but in the context of a certificate of probable cause. It examined whether "all the judges, as judges, or some individual judge, or the court as a court" was the proper authority for considering the certificate. *Id.*

This Court answered that circuits were free to adopt whatever procedure they preferred. It rejected the "attempt to lay down a procedure for the Court of Appeals to follow." *Id.* "It is for the Court of Appeals to determine whether such an application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers." *Id.*

More recently, in a case involving a certificate of appealability, all nine Justices accepted the bottom line from *Burwell* that the circuits need not have a uniform approach to handling these certificates. *Hohn v. United States*, 524 U.S. 236, 243 (1998); *see id.* at 256 (Scalia, J., dissenting). And even more recently the Court has denied certiorari in cases raising questions much like Gordon's question presented. In one case, the Court turned aside a petition that asked whether an en-banc court can supersede a panel that had granted a certificate. *See* Pet. For Cert. in No. 23-5244, *Johnson v. Vandergriff*, at i, (July 31, 2023), *cert. denied*, *Johnson v. Vandergriff*, 143 S. Ct. 2551 (2023). In another, the Court declined to take up a case that pointed out the Eighth Circuit's practice of denying certificates over a dissenting vote. Pet. For Cert. in No. 14-87, *Johnson v. United States*, 2014 WL 3704551, at i (July 24, 2014), *cert. denied Johnson v. United States*, 574 U.S. 873 (2014).

These decisions all align with Congress's judgment as expressed in the same statute that introduced the certificates of appealability. Part of that law amended Federal Rule of Appellate Procedure 22 so that the circuits can handle requests for certificates to the court though "a circuit judge or judges as the court deems appropriate." Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132 §103, 110 Stat. 1214, 1218; *see also* Fed. R. App. P. 22(b). That permission to handle certificate requests as each circuit "deems appropriate" aligns Rule 22 with Appellate Rule 27, which empowers the "court" to "review the action of a single judge." Fed. R. App. P. 27(c). (In 1998, a rule amendment made the "stylistic" change from "as the court deems appropriate"

to "as the court prescribes." *See* Fed. R. App. P. 22, 1998 Adv. Cmte. Notes)

The circuit courts today exercise that "discretion vested in" them, *Burwell*, 350 U.S. at 522—through caselaw, statute, and rule—by adopting their own procedures for certificates of appealability. "[S]ome circuits have provided for COA determinations by a single judge, some by two judges, and some by three judges." *Santiago Salgado v. Garcia*, 384 F.3d 769, 774 (9th Cir. 2004). Each circuit's procedure is "an exercise of discretion rather than one mandated by statute or rule." *Id.* at 775.

Six of the circuits use full panels, but they have different vote thresholds. The First, Second, Eighth, and Tenth refer them to a panel and apply majority rule. *Bui v. DiPaolo*, 170 F.3d 232, 238 & n.2 (1st Cir. 1999); 2nd Cir. R. 22.1(a); *Miller v. United States*, No. 17-2929, 2018 WL 11397896, at *1 (2d Cir. Feb. 8, 2018); 2nd Cir. I.O.P. 47.1(c) (death-penalty certificate requests go to a single panel member, and if denied, then to majority vote); 8th Cir. I.O.P. (I)(D)(3); *Lee v. Crouse*, 451 F.3d 598, 611 (10th Cir. 2006) (Hartz, J., concurring in part and dissenting in part on the denial of certificate). The Third and Fourth refer them to a panel but require unanimity on the decision to deny a certificate. 3rd Cir. Loc. App. R. 22.3; 4th Cir. Loc. R. 22(a)(3).

Four other circuits use less than a full panel. The Fifth, Sixth, and Eleventh permit single judges to rule on certificates, subject to the court's review. 5th Cir. R. 27.2, 27.2.3; *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997); 6th Cir. R. 27(g); 11th Cir. R. 22-1(c), 27-1(d)(2). The Seventh allows a two-judge panel to unanimously deny. 7th Cir. I.O.P.

(1)(a)(1). That saves resources because the two panelists are "a majority of a three-judge panel," and if they agree on denying the certificate, they leave "no prospect of success on the merits" no matter how the third judge would vote. *Thomas v. United States*, 328 F.3d 305, 307 (7th Cir. 2003).

The Ninth Circuit cuts its own path. It generally sends certificates of appealability to panels of two judges. 9th Cir. Gen. Ord. Ch. VI, 6.2(b). But if the case has already been calendared, it sends motions to grant or expand a certificate to that panel—or two members of the panel—which can only deny if unanimous. *Id.* at 6.3(b), (g).

Despite this variation, one safety valve avoids any concern that procedure will get in the way of a potentially meritorious claim. In any circuit, if one circuit judge dissents on the ground that a certificate should issue, a judge who disagrees can supply a courtesy vote to let the appeal proceed. *See, e.g.*, *McGill v. Shinn*, 16 F.4th 666, 706 n.14 (9th Cir. 2021).

C. Gordon's and his amicus' arguments for uniformity are misplaced.

Gordon and his amicus counter that the circuits must handle certificates of appealability identically. None of these arguments counters the longstanding, and lawful, variability among the circuits.

First, Gordon's amicus is wrong that the certificate statute commands uniformity when it states that "a circuit justice or judge" can issue a certificate. Amicus for Pet. at 6 (quoting 28 U.S.C. §2253(c)(a)). That provision "permits the certificate to be issued by" a single judge, but the decision is still "the action

of the court of appeals to whom the judge is appointed" and subject to the circuit's rules. *Hohn v. United States*, 524 U.S. 236, 241 (1998). Those rules "would be meaningless if applications for certificates of appealability were not matters subject to the control and disposition of the courts of appeals." *Id.* at 243.

Indeed, that is why some circuits have adopted by rule the approach that Petitioner prefers—precisely because the statute does not independently do so. *See* Amicus for Pet. at 6 (citing 3d Cir. Loc. App. R. 22.3 (2011); 4th Cir. Loc. R. 22(a)(3) (2023)). (Petitioner's amicus cites *Thomas*, 328 F.3d at 309 in support of this approach, but the Seventh Circuit follows the modified-majority approach that permits two judges to deny a certificate without consulting a third judge, *see above* at 7–8.)

Gordon's interpretation of the statute also defies this Court's reading of the analogous statute for certificates of probable cause. That statute prohibited appeal "unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." 28 U.S.C. §2253 (1948); June 25, 1948, ch. 646, 62 Stat. 967. Yet this Court repeatedly denied certificates under that statute over a justice's dissent. *See, e.g.*, *Thomas v. Wainwright*, 475 U.S. 1113 (1986); *Knighton v. Maggio*, 468 U.S. 1229 (1984); *Taylor v. Maggio*, 465 U.S. 1075 (1984).

Second, Gordon and his amicus read too much into statements by Justice Sotomayor criticizing a too-high certificate standard, which they claim support the mandatory single-judge certification view. Pet. at 4–5, 14–15; Amicus for Pet. at 5. But calling out a circuit court for applying a too-high substantive standard for certification is not the same as saying

that they applied an illegal procedure. Indeed, Justice Sotomayor explicitly disavowed the idea "that a COA was definitely warranted" every time that "the Fifth Circuit has denied a COA over a dissenting opinion." *Jordan v. Fisher*, 576 U.S. 1071 n.2 (2015) (Sotomayor, J., dissenting from denial of certiorari).

Third, Gordon's amicus argues that the current rules for certificates create inefficiencies, Amicus for Pet. at 6–8, but the opposite is true. As the law stands today, circuits can manage their own procedures to balance the load of certificate requests in the best way for their unique circumstances. If a procedure stops working, the circuit can change it. Those that use a majority vote system reap the distinct benefit of weeding out cases that a majority can readily see are frivolous. This approach does not necessarily lead to "considerable split opinions"—for example, no circuit judge felt compelled to write separately in this case—and if the approach did, that would merely present an argument for the circuit to alter its rules. Amicus for Pet. at 6.

Finally, applying majority-vote rules to a certificate decision is not anti-collegial. *Contra* Amicus for Pet. at 8–10. Judges often disagree, and sometimes they express their reasons in separate writings. They do so even over standards that frame the question as whether an outcome should be "apparent to all reasonable jurists." *Lambrix v. Singletary,* 520 U.S. 518, 527–28 (1997). Yet few would say that differing opinions about whether such a standard is met reveal hostility to judicial colleagues. *See, e.g.*, *Chaidez v. United States*, 568 U.S. 342 (2013); *see id.* at 359 (Sotomayor, J., dissenting). Disagreement is not disrespect. Jurists of good faith may disagree,

even when applying a reasonable jurist or reasonable person standard. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 423 (2004) (Souter, J., dissenting) (comparing both standards).

* * *

The circuits' various procedures are not cause for alarm. They are the permissible result of each circuit's job to police its own procedures. As such, there is nothing for this Court to resolve.

II. Gordon's rule undermines the habeas standards.

Gordon believes that a certificate must issue any time "judges actually debate whether one should issue." Pet.4–5. In other words, the existence of a dissenter demonstrates debate, and debate means the claim is debatable among jurists of reason, so the certificate should issue. That approach conflicts with this Court's holdings about reasonable-jurist standards and would, perversely, undercut habeas *merits* cases.

First, the "jurists of reason" standard does not necessarily include any and all opinions a judge might assert. "[V]irtually all" judges "occasionally commit error; they make decisions that in retrospect may be characterized as 'unreasonable.'" *Williams v. Taylor*, 529 U.S. 362, 378 (2000). A reasonable-jurist standard does not mean that the "views of one such judge" must have "greater weight than the contrary, considered judgment of several other reasonable judges." *Id.* In other words, a reasonable-jurist standard does not mean "that the mere existence of a dissent suffices" to satisfy the standard. *Beard v.* 542 U.S. at 416 n.5.

Second, Gordon's approach would foreclose habeas relief in many cases, including his. Recall that Gordon believes the Sixth Circuit *had* to issue a certificate because "three state … judges" agreed with him on the merits of the claim. Pet. at 5. Those judges' opinions, Gordon says, prove that jurists could debate the merits, so Gordon passes the certificate threshold.

But Gordon's logic would doom all habeas claims on the merits. To win habeas relief in federal court, a "prisoner must demonstrate that … no fairminded jurist could have reached the same judgment as the state court." *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (internal quotation marks and brackets omitted).

If, as Gordon says, *any* jurist's opinion qualifies as reasonable, then federal courts must deny habeas relief because those state judges would have rejected the claim that is now the subject of the habeas petition. Naturally, the state-court judges would disagree with the suggestion that their decision was not fairminded or reasonable. Under Gordon's view of what qualifies as a fairminded or reasonable jurist, habeas petitioners could never succeed so long as the state court denied their claims on the merits. In sum, an expansive definition of the reasonable-disagreement standard—if applied consistently—is a double-edged sword. *See McGill*, 16 F.4th at 706 n.14.

Under Gordon's standard, this Court would have refused relief in cases where it found the state court adjudication unreasonable. For example, the Court in *Panetti v. Quarterman* would have denied relief, not for the reasons the dissent listed, but merely be-

cause the state court judges who denied further incompetency proceedings would count as fairminded, reasonable jurists. 551 U.S. 930, 948–54 (2007); *see also Brumfield v. Cain*, 576 U.S. 305 (2015). Likewise, this Court would have affirmed in *Wiggins v. Smith* because state-court jurists found no ineffective assistance of counsel—meaning, under Gordon's standard, that rejecting Wiggins's claim was necessarily fairminded and reasonable. 539 U.S. 510 (2003).

For these reasons, Gordon's proposed standard is not compelled by the language in 28 U.S.C. §2253, and indeed, it would upend the habeas standards courts use to decide the merits of the petitions.

III. This case is a poor vehicle for review because Gordon's claim for habeas relief is meritless.

Even if this Court were to take up this case, agree with Gordon's standard, and start the path to further review, it would find a road to nowhere. Gordon's underlying habeas complaint is meritless. Recall that Gordon's claim stems from the trial court joining the two cases—the robbery-related charges and the intimidation charge—and disqualifying counsel as a material witness. Pet.App.117a. Gordon claimed later that the joinder of those two cases deprived him of his right to his preferred counsel because, according to Gordon, his preferred counsel could have represented him on the robbery-related charges had the cases not been joined. *Id.* Gordon's counsel did not object at trial, so the Ohio Supreme Court reviewed his claim for plain error. *Id.*

Gordon's argument fails because, no matter how the charges went forward, Gordon's preferred counsel was a witness for both charges. Pet.App.127a–128a. On the robbery charges, counsel's testimony about the intimidation was relevant to consciousness of guilt. Pet.App.127a–128a. And for the intimidation charge, he was a witness to facts about the primary offense. *Id.* For that reason, the Ohio Supreme Court explained, "the trial court did not err in joining the two offenses" because Gordon's preferred counsel, "was a material witness in the intimidation case" and "also … in the robbery case." Pet.App.127a, 128a. That circumstance made it proper that he should be disqualified from both cases even without joinder." Pet.App.128a; *see* Ohio R. of Prof. Conduct 3.7(a).

Gordon never argued that the Sixth Amendment prevents a trial judge from disqualifying counsel who is a material witness or likely to become one, *see* Pet.App.126a–128a, nor could he. This Court has already held that the Sixth Amendment creates only "a presumption in favor of petitioner's counsel of choice" that "may be overcome not only by a demonstration of actual conflict [of interest] but a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164 (1988). Trial judges "must be allowed substantial latitude" when deciding whether to allow an attorney to represent a client on criminal charges when representation threatens to violate state rules of professional conduct against multiple representation. *Id.* at 163. That reasoning covers scenarios where, as here, representation would violate state rules of professional conduct against lawyers serving as both advocate and witness in the same case. *See* Ohio R. Prof. Conduct 3.7(a).

Beneath all the procedural history, the trial court committed no constitutional error. And the Ohio Supreme Court's affirmance, a straightforward application of Sixth Amendment principles, was neither contrary to, nor an unreasonable application of, clearly established federal law. Gordon's collateral attack on his convictions merits no further review.

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At bottom, this case fits Justice Stevens's observation that "[a] petition for certiorari seeking review of a denial of a COA has an objectively low chance of being granted. Such a decision is not thought to present a good vehicle for resolving legal issues, and error correction is a disfavored basis for granting review, particularly in noncapital cases." *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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MARCH 2024