

OCTOBER TERM 2017

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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DENNIS MILLER,

Petitioner,

v.

SECRETARY OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS,  
SUPERINTENDENT SCI-GREENE AND SUPERINTENDENT SCI-ROCKVIEW,

Respondents.

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

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**PETITION FOR WRIT OF CERTIORARI**

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Leigh M. Skipper  
Chief Federal Defender  
Samuel J.B. Angell\*  
Assistant Federal Defender  
Federal Community Defender Office  
for the Eastern District of Pennsylvania  
601 Walnut St., Suite 545W  
Philadelphia, PA 19106  
(215) 928-0520  
Samuel\_Angell@fd.org

Counsel for Petitioner, Dennis Miller

\* member of the bar of this Court

Dated: June 11, 2018

## **QUESTION PRESENTED**

In deciding whether to grant a certificate of appealability (“COA”) under 28 U.S.C. § 2253, what effect should a federal court give to the fact that, on post-conviction review, the state high court was divided as to the merits of the constitutional claim on which COA is sought?

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## **PETITION FOR WRIT OF CERTIORARI**

In this federal habeas proceeding under 28 U.S.C. § 2254, Petitioner Dennis Miller respectfully prays that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Third Circuit denying a certificate of appealability on the claim set forth herein and subsequently entering judgment against Mr. Miller.

### **OPINIONS BELOW**

On December 6, 2017, the United States Court of Appeals for the Third Circuit denied Mr. Miller's Application for Certificate of Appealability and, on January 30, 2018, it denied his application for panel rehearing. *Miller v. Comm'r Pa. Dept. of Corr., et. al.*, C.A. No. 16-9002 (3d Cir.).

The United States District Court for the Eastern District of Pennsylvania granted the writ of habeas corpus as to Mr. Miller's rape conviction and death sentence, but denied relief on Petitioner's claims challenging his conviction of first degree murder. *Miller v. Beard*, 214 F. Supp.3d 304 (E.D. Pa. 2016).<sup>1</sup>

During state post-conviction proceedings, the Pennsylvania Supreme Court denied Mr. Miller relief in an opinion reported at *Commonwealth v. Miller*, 987 A.2d 638 (Pa. 2009).

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on December 6, 2017, and the Third Circuit denied rehearing on January 30,

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<sup>1</sup> Respondents cross-appealed the District Court's decision vacating Petitioner's death sentence and rape conviction. However, on March 13, 2018, Respondents filed a motion to withdraw their appeal which the court of appeals granted. *Miller v. Commissioner, Pa., Dep't of Corr., et. al.*, No. 16-9003 (3d Cir.).

2018. Justice Alito granted Petitioner two extensions of time to file this petition for writ of certiorari, permitting him to file it on or before June 11, 2018. This petition is timely filed.

### **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED**

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments as well as the provision of the federal habeas statute concerning issuance of certificates of appealability:

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

And 28 U.S.C. § 2253(c)(2) provides in relevant part: "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

### **STATEMENT OF THE CASE**

1. Mr. Miller waived his right to a jury as to both guilt and sentencing phases of the trial. At a bench trial, he was convicted of first degree homicide and related charges, including rape and indecent assault. *Commonwealth v. Miller*, No. 61-96 (Chester County C.C.P.) (Hon. Howard F. Riley, Jr., presiding).

The prosecution's case was that Mr. Miller raped his wife and, during the commission of the rape, stabbed her to death. Trial counsel argued a heat of passion defense, *see* NT 10/1/97, 267-268, but presented no evidence to show that the decedent had provoked Mr. Miller

immediately prior to the assault on her.<sup>2</sup> Counsel presented no lay witness or expert testimony in support of the heat of passion defense.

The trial court convicted Mr. Miller of first degree murder and the other charges, and sentenced him to death. The rape conviction was the sole aggravating circumstance supporting the death sentence. The Pennsylvania Supreme Court affirmed. *Commonwealth v. Miller*, 724 A.2d 895 (1999) (“*Miller-1*”).

Petitioner filed a counseled state post-conviction petition and the trial court held an evidentiary hearing. At the evidentiary hearing, Petitioner presented lay witness and expert testimony in support of the heat of passion defense, as well as expert testimony challenging the rape and first degree murder convictions. All of this evidence was available, but unrepresented, during the guilt-phase of the trial. Mr. Miller was denied state post-conviction relief.

*Commonwealth v. Miller*, 987 A.2d 638 (Pa. 2009) (“*Miller-2*”).

In federal habeas proceedings, the District Court ruled that the state court decision on the heat of passion claim was not unreasonable, but granted relief as to the rape conviction and the death sentence. *Miller v. Beard*, 214 F. Supp.3d 304 (E.D. Pa. 2016) (“*Miller-3*”). In a separate order, the District Court denied a certificate of appealability as to the claims on which it had

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<sup>2</sup> Under Pennsylvania law, an intentional homicide is reduced from first degree murder to voluntary manslaughter when, at the time of the offense, the defendant was “acting under a sudden and intense passion resulting from serious provocation by ... the individual killed.” 18 Pa. C.S. § 2503(a). The statutory term “passion” includes “both anger and terror provided they reach a degree of intensity sufficient to obscure temporarily the reason of the person affected.” *Commonwealth v. McCusker*, 292 A.2d 286, 289 (Pa. 1972); see *Commonwealth v. Harris*, 372 A.2d 757, 758-59 (Pa. 1977) (heat of passion includes emotions such as “anger, rage, sudden resentment or terror”).

denied relief (including the heat of passion claim). *Miller v. Beard*, No. 10-3469, Order (Oct. 6, 2016).

Mr. Miller appealed to the Third Circuit. He sought a COA with regard to the heat of passion claim on the ground, *inter alia*, that Justice Saylor's dissent from the state court decision showed that reasonable jurists would debate the merits of the claim, and therefore that Petitioner had "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In his application to the court of appeals, Mr. Miller cited *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011), that states "[w]hen a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." *Miller, v. Sec'y, Pa. Dep't of Corr.*, No. 16-9002, App'n for Cert. of Appealability, 34 (filed May 5, 2017). In a brief order, the Third Circuit denied COA, indicating that Petitioner could not meet the "reasonable jurists would not debate" standard with respect to prejudice on the ineffectiveness claim "in light of his decision not to testify at trial."

2. On November 18, 1995, Dennis and Sherry Miller dropped off their children at his mother's house so they could go on a date. NT 9/29/97, 19-22.<sup>3</sup> A witness at a local bar testified that the couple appeared to be in "good spirits" and "seemed to be getting along" when they first arrived. NT 9/30/97, 210. While at the bar both drank a few beers and used methamphetamine. NT 9/30/97, 200, 212, 215-216. During the course of the evening at the bar, Mrs. Miller had one of the bartenders page Sean Smith, a man whom she had dated while Mr.

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<sup>3</sup> Transcribed portions of the state court proceedings are cited as "NT" followed by the date and page number. Unless otherwise indicated, all emphasis in this Petition is supplied. References to documents contained in the Appendix to Mr. Miller's Memorandum of Law filed in District Court on March 28, 2012 are cited as "A\_\_\_\_\_."

Miller had been in jail. Mrs. Miller spoke with Mr. Smith on the phone while at the bar. *Id.* at 214. Also, that night, Mr. Miller got angry when another man at the bar spoke with his wife, but he calmed down before he and his wife left. *Id.* at 198.

The couple left the bar to go home at 12:30 a.m. On November 19, 1995, the couple failed to pick up their children and did not attend Sunday brunch at Mr. Miller's mother's house. NT 9/29/97, 22-24. On November 20, 1995, when they were not heard from, the families contacted the police. NT 9/29/97, 25-29. The police eventually entered the home and found Mrs. Miller dead in the couple's bedroom from multiple stab wounds. NT 9/28/97, 39, 43-47. There was evidence of sexual intercourse. NT 9/30/97, 128.

Mr. Miller left a note in the house essentially admitting his responsibility and expressing his anger towards his wife and her friends, including male friends. *Miller-1*, 724 A.2d at 898 n.3. The admissions contained in the note, together with the fact that the decedent had been stabbed numerous times, themselves supported the intent element of first degree murder under Pennsylvania law. *See Miller-1*, 724 A.2d at 899. In addition, there was testimony from Michael Torres, a cellmate of Mr. Miller, that shortly before his release from jail in September 1995, Mr. Miller indicated he would be back for killing his wife. NT 9/29/97, 183.

In support of the rape charge, the prosecution presented testimony from the medical examiner suggesting that the stabbing and the alleged sexual assault took place at virtually the same time. NT 9/30/97, 156. This testimony was inconsistent with a defense theory that the couple had consensual sex followed by a conversation or other incident that provoked Mr. Miller to attack his wife.

The defense challenged Torres' testimony, presenting testimony from another prisoner, Eric Blevins, that Torres admitted he was going to lie about Mr. Miller's plans to kill his wife so

he (Torres) could try to get out of jail. NT 10/1/97, 233. Aside from Blevins's testimony, the defense presented no defense to the first degree murder charge. As a result, conviction was virtually inevitable, and Mr. Miller was convicted on all charges.

3. At penalty phase, the defense presented expert testimony and other evidence showing that counsel was aware that Mr. Miller was likely to react with rage to rejection by his wife, and that Mr. Miller had repeatedly indicated that he had consensual sex with his wife, after which she told him that he would have to move out and be replaced by one of her boyfriends, provoking him to attack her. Although aware of such evidence, trial counsel did not attempt to use it to support a heat of passion defense.

Before trial, psychologist Dr. Gerald Cooke had provided trial counsel with a report concluding that Mr. Miller's personality was "consistent with an explosive rage," which was triggered by his wife's rejection of him. A8-9. Dr. Cooke testified that, when he evaluated Mr. Miller, Mr. Miller said that he and his wife had sex on the evening she was killed. Afterwards, while still in bed, she told him he would have to move out, and that her boyfriend Sean would be moving in. Mr. Miller said he "went into a rage and grabbed a knife that was by the side of the bed." He blacked out during the homicide and, when he came out of it, he was straddling his wife, having stabbed her and killed her. NT 10/2/97, 301.

Trial counsel had Mr. Miller handwrite a statement to the judge before sentencing. In it, Mr. Miller described the relationship with his wife. He recounted the events leading to the homicide and how, after they had sex, he asked his wife if she was talking with Sean on the phone at the bar. "She said yes I was and your [sic] moving out and he is moving in." A33.

4. In post-conviction, Mr. Miller presented family members to support his heat of passion defense. His daughter, Barbara, testified that her mother cheated on her father with

Larry Brown, a man mentioned in the note left at the scene. NT 10/28/03, 378. There were quite a few break-ups between her mom and dad. Sherry Miller had another man, Sean Smith, over to her house frequently and for extended periods of time. When Mr. Miller was in prison, Smith stayed at their house. *Id.* at 379-82. Barbara testified that there were two knives kept in the bedroom where Mrs. Miller was killed, a steak knife and a bigger knife possibly used for drugs.

Helen Pennington, Mrs. Miller's sister, testified at the hearing that she took Sherry to have an abortion. NT 10/29/03, 513. Sherry told Helen that the father was not Mr. Miller, but Larry Brown. *Id.* at 513, 517. A year or two before the homicide Mr. Miller told his sister, Brenda, that Sherry had an abortion of another man's child. Brenda could tell this made Mr. Miller extremely upset. NT 10/29/03, 428.

Mr. Miller's mother, Agnes Miller, testified that shortly before Sherry was killed, Mr. Miller got out of jail and came to live with Agnes. Thereafter, he moved back and forth between his mother's house and the house where his wife and children lived. Each time he stayed with Agnes, Sherry called or came to the house and begged him to go with her. Mr. Miller told Agnes he loved Sherry and was going back with her and their kids. NT 10/28/03, 364-66. While Mr. Miller was living with Sherry, she obtained a child support order against him a few days before the night she was killed.

In post-conviction, Petitioner also called mental health experts who could have testified to support the heat of passion defense.<sup>4</sup> The defense penalty phase expert at trial, Dr. Cooke,

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<sup>4</sup> Expert testimony regarding the defense of heat of passion is permitted under Pennsylvania law. "[W]here a defendant asserts that he acted in the heat of passion, . . . any evidence – lay or psychiatric – pertinent to that defense should be admissible." *Commonwealth v. McCusker*, 292 A.2d 286, 290-91 (Pa. 1972); *accord Commonwealth v. Shaver*, 460 A.2d 742, 744-45 (Pa. 1983)

found that Mr. Miller was in an explosive rage when he killed his wife, and that the homicide occurred during the heat of passion. Dr. Cooke based his opinion upon the child support order; Mrs. Miller's affair with Sean Smith and calls to him the night she was killed; Mrs. Miller's demand that Mr. Miller move out; and Barbara's testimony that her mother kept a knife in the bedroom. *Id.* at 445-46.

Psychiatrist Julie Kessel, M.D., also testified in support of the heat of passion defense. She pointed to a number of sequential stressors on the Millers' relationship. NT 10/29/03, 544. These included Mrs. Miller's involvement with two other men and the escalation of drug abuse by the Millers. At the time of her death, they were living in a house where the electric bill was in Sean Smith's name. They had gone on a date and had sex. Immediately before the offense, Mrs. Miller told her husband that she had been on the phone with Sean Smith and made the statement to Mr. Miller that Mr. Miller would have to move out, while Smith would move in. *Id.* at 544-47. Dr. Kessel concluded that, in response to this conversation and the series of events that preceded it, Mr. Miller experienced a "sudden and intense rage that caused him to lose control of his behavior." *Id.* at 544.

Suffolk County, New York Medical Examiner, Dr. Charles Wetli, testified that the number and location of the wounds in this case are typical of a very angry, emotionally charged assailant. Frequently, wounds with these characteristics indicate someone in a love relationship. NT 10/28/03, 334. Peter R. DeForest, Crim.D, a professor of criminalistics, testified similarly, that this was "one of these frenzied-type attacks." *Id.* at 314. Drs. Wetli and DeForest also both

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(at murder trial, psychiatrist testified about extended provocation in support of heat of passion defense).

testified that there was no evidence of rape in this case. NT 10/28/03, 285 (Dr. DeForest); *id.* at 330 (Dr. Wetli). Additionally, in a signed post-conviction declaration, the prosecution's trial expert, Dr. Callery, averred that he could not testify to a reasonable degree of medical and scientific certainty that Mrs. Miller was subjected to forcible intercourse. A18.

The District Court ultimately found that trial counsel was ineffective for failing to challenge the rape conviction with testimony like that provided by Drs. Wetli and DeForest. *Miller-3*, 214 F. Supp.3d at 332-40. Such testimony would also have supported a heat of passion defense, by showing that Mr. Miller's account – in which consensual sex was followed by provocative statements by his wife, in reaction to which he assaulted her – was consistent with the physical evidence.

The trial court denied all post-conviction relief and the Pennsylvania Supreme Court affirmed. *Miller-2*. With respect to the heat of passion claim, the state supreme court majority ruled that the post-conviction evidence “fails to establish . . . [a] serious provocation caused by the victim contemporaneously with the killing.” *Miller-2*, 987 A.2d. at 650. The majority concluded, “While Appellant's psychological makeup may have rendered him unable to handle his wife's infidelity and the couple's marital difficulties, absent some evidence that his wife committed an act sufficiently provocative at the time of or very shortly before the killing, the testimony of the expert witnesses was irrelevant.” *Id.* at 652. Thus, there was no prejudice with respect to the heat of passion claim.

Justice Saylor dissented. He observed that “the majority opinion does not sufficiently address material arguments or conform to prevailing law in a number of areas.” *Id.* at 676. With respect to the heat of passion claim, Justice Saylor noted that the majority did not take into consideration a number of factors including “[Mr. Miller's] daughter's, the victim's, and her

sister's alleged efforts to entreat him back into a relationship with the victim; the service of a support order on Appellant on the day of the killing; . . . the allegation that the victim previously had aborted another man's child during the marriage; and/or the number and nature of the victim's wounds, which tend to support his theory that he lost control." *Id.* at 676. Rebutting the majority's statement that "the record is devoid of evidence that . . . [Mr. Miller] was acting under a sudden or intense passion," *Miller-2*, 987 A.2d at 650, Justice Saylor pointed to Mr. Miller's statements to the mental health evaluators at trial and in post-conviction, as well as the handwritten statement provided to the trial judge at the time of sentencing. *Id.* at 676 n.1. In those instances, Mr. Miller "related that the event immediately precipitating the killing was the victim's indication – just after having engaged in sexual relations with [Mr. Miller] – that he was to leave the marital residence and that another man would be moving in with her." *Id.*

5. Following the decision in *Miller-2*, Petitioner filed a federal habeas petition. The parties briefed the case and the District Court held oral argument. The District Court issued an Opinion and Order vacating Mr. Miller's rape conviction and death sentence because of trial counsel's ineffective assistance. *Miller-3*. It denied all claims challenging the first degree murder conviction.

The District Court held it was reasonable for the Pennsylvania Supreme Court not to rely on experts' testimony in support of the heat of passion defense, given that Mr. Miller did not testify. *Miller-3*, 214 F. Supp.3d. at 331. The District Court asserted that the post-conviction evidence simply elaborated on the trial evidence describing Mr. and Mrs. Miller's unstable relationship and "did not shed any light on what occurred immediately before the murder." *Id.* The District Court characterized the note left at the scene as recounting how Mr. Miller

perceived he had been wronged but, the District Court asserted, the note did not support the heat of passion defense. *Id.* at 332.

Mr. Miller timely filed a Notice of Appeal from the denial of guilt phase relief. Dist. Ct. Dkt. No. 65. Mr. Miller requested a certificate of appealability (“COA”) from the Third Circuit to address, among other things, the following question: Whether Mr. Miller’s Sixth Amendment rights were violated because trial counsel was ineffective for failing to adequately investigate, prepare, and present evidence that Mr. Miller acted in the heat of passion.

On December 6, 2017, the Third Circuit denied Mr. Miller’s request for a COA on that question. It stated:

We hereby deny Appellant’s COA application, for he has failed to show that reasonable jurists would debate the District Court’s denial of these three claims or conclude that any of these claims is adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). With respect to Appellant’s first claim, reasonable jurists would not debate that, in light of his decision not to testify at trial, he could not show that he was prejudiced by [Attorney] Kalmbach’s alleged failure to sufficiently investigate, prepare, and present a heat-of-passion defense. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

*Miller v. Comm’r Pa. Dept. of Corr., et al.*, No. 16-9002 (3d Cir. Dec. 6, 2017).

On January 30, 2018, the court of appeals denied Mr. Miller’s application for panel rehearing. *Miller v. Comm’r Pa. Dept. of Corr., et al.*, C.A. No. 16-9002 (3d Cir. Jan 30, 2018). After rehearing was denied, Respondents filed a motion to withdraw their cross-appeal, which the Third Circuit granted.

## REASONS FOR GRANTING THE WRIT

### **I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A FEDERAL COURT SHOULD GRANT COA WHEN THE STATE HIGH COURT REACHED A SPLIT DECISION ON THE CONSTITUTIONAL CLAIM AT ISSUE.**

#### **A. Circuit Court Decisions Reveal Division and Confusion Regarding the Appropriate Weight to be Given in the COA Analysis to the Fact that an Appellate Judge Has Found a Claim to Have Merit.**

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a habeas petitioner whose claims of constitutional error have been denied “does not enjoy an absolute right to appeal.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Rather, the petitioner must “first obtain a COA from a circuit justice or judge.” *Id.* (citing 28 U.S.C. § 2253(c)(1)). The petitioner is entitled to a COA on a claim only if he makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The only question at the COA stage is whether the petitioner 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.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see also* *Buck*, 137 S. Ct. at 773; *Tennard v. Dretke*, 542 U.S. 274 282 (2004).

Because the COA requirement acts as a gateway through which the habeas petitioner must pass in order to obtain an appeal, questions regarding the scope and procedure on review of COA applications arise frequently. An overly restrictive approach to COA review would result in potentially meritorious claims going unheard after denial by the district court. This Court has repeatedly granted certiorari to correct such overly restrictive approaches to COA review.

This Court has made clear that COA review is a threshold inquiry into a petitioner’s claims, not a full merits review of the claims. For example, in *Miller-El*, this Court granted

certiorari to consider whether the Fifth Circuit erred in denying a COA on a claim pursuant to *Batson v Kentucky*, 476 U.S. 79 (1986). *Miller-El v. Cockrell*, 535 U.S. 903 (2002).

This Court reversed the denial of a COA. It held that when determining whether to grant COA an appellate court should consider:

the District Court’s application of AEDPA to petitioner’s constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This 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.

*Miller-El*, 537 U.S. at 336.

Similarly, in *Tennard v. Dretke*, 540 U.S. 945 (2003), the Court granted certiorari in part to consider whether the Fifth Circuit erred in resolving a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), “by denying a COA rather than granting a COA and giving the substantive issue the merits consideration it deserves.” *Tennard v. Cockrell*, No. 02-10038, Pet. for Writ. of Cert., 2003 WL 26456202, \*i (U.S. filed April 3, 2003). This Court found that the Fifth Circuit had erred by merely “paying lipservice to the principles guiding issuance of a COA . . . .” *Tennard v. Dretke*, 542 U.S. at 283.

Again, in *Buck*, this Court granted certiorari, *Buck v. Stephens*, 136 S. Ct. 2409 (2016), in part to consider whether the Fifth Circuit had applied an “improper and unduly burdensome” COA standard. *Buck v. Stephens*, No. 15-8049, Pet. for Writ of Cert., 2016 WL 3162257, \*I (U.S. filed Feb. 4, 2016). And again, while the Fifth Circuit had phrased its COA review properly, it reached the decision that Buck’s claim was not debatable “only after essentially deciding the case on the merits.” *Buck v. Davis*, 137 S. Ct. at 773.

The lesson of *Buck*, *Miller-El*, and *Tennard* is that the COA review process is a crucial step in federal habeas review, and that questions regarding the proper application of the COA review standard are worthy of this Court’s review. This case presents such a question.

In this case, the state supreme court was divided on the constitutional claim at issue. Compare *Miller-2*, 987 A.2d at 650-52 (no prejudice with respect to heat of passion claim), with *id.* at 676-77 (Saylor, J., dissenting) (Petitioner presented post-conviction evidence supporting a viable heat of passion defense). Petitioner argued to the Third Circuit that Justice Saylor’s dissent – by itself and together with the facts and record of the case – showed that the issue was debatable among jurists of reason. *Miller v. Sec’y, Dep’t of Corr.*, No. 16-9002, Appl’n for Cert. of Appealability, 34 (3d Cir. filed May 5, 2017) (citing and quoting *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011)). Nevertheless, the Third Circuit denied COA, without discussion of this argument, Justice Saylor’s dissent, or *Jones*. *Miller v. Comm’r Pa. Dept. of Corr., et al.*, No. 16-9002 (3d Cir. Dec. 6, 2017).

What effect to give in the COA review process to the fact that one or more judges have already found merit to the claim at issue is a question that continues to confuse and divide the federal circuit courts of appeal. The Fifth and Seventh Circuits have recognized that a COA should always or almost always be granted where a state judge has found merit in the claim.

In *Jones*, the Seventh Circuit granted COA on a claim that the admission of evidence reciting a hearsay tip violated the Confrontation Clause. The state appellate court was divided on the Confrontation Clause claim, with one judge issuing a dissenting opinion. The Seventh Circuit held that “[w]hen a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.” *Jones*, 635 F.3d at 1040.

The Fifth Circuit reached a similar result in *Rhoades v. Davis*, 852 F.3d 422 (5th Cir. 2017). In *Rhoades*, the petitioner claimed that the trial court had unconstitutionally excluded relevant mitigating evidence. The Texas Court of Criminal Appeals had divided on the issue. The Fifth Circuit granted COA based on the divided state court ruling. *Id.* at 428-29 (quoting *Jones*). See also *Tankleff v. Senkowski*, 135 F.3d 235, 242 (2d Cir. 1998) (pre-AEDPA habeas petitioner entitled to certificate of probable cause to appeal, where intermediate state appellate court split three to two on the *Miranda* issue and the propriety of the prosecutor's summation).

A related issue arises when one judge on a three judge circuit court of appeals panel rules in favor of granting COA.<sup>5</sup> On that issue, too, the circuits are divided and confused. Paradoxically, although the Fifth Circuit in *Jones* recognized that when a state appellate court is divided, issuance of a COA “should ordinarily be routine,” *Jones*, 635 F.3d at 1040, the Fifth Circuit has denied COA over a dissent. Compare *Jordan v. Epps*, 756 F.3d 395, 405-11 (5th Cir. 2014) (denying COA on prosecutorial vindictiveness claim) with *id.* at 416-20 (Dennis, J., dissenting) (merits of claim are at least debatable).<sup>6</sup> Like the Fifth Circuit, the Eleventh Circuit has denied COA over the dissent of a federal appellate judge. Compare *Cromartie v. GDCP Warden*, No. 17-12627-P, Order at 5-13 (11th Cir. Mar. 26, 2018) (attached) (denying COA on

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<sup>5</sup> In one respect, the two situations are identical. Where at least one appellate judge has found merit to the claim, by definition it would appear that the claim is debatable among jurists of reason. Cf. *Beard v. Banks*, 542 U.S. 406, 415 (2004) (“there is no need to guess” whether *Mills v. Maryland*, 486 U.S. 367 (1988), was compelled by prior decisions, because “four Justices dissented” in *Mills*).

<sup>6</sup> *Jordan* sought certiorari review of the Fifth Circuit’s denial of a COA. This Court denied certiorari, *Jordan v. Fisher*, 135 S. Ct. 2647 (2015), over a dissent by three Justices, who argued that COA should have been granted when one of the judges on the federal court of appeals dissented from denial of COA and a state appellate judge dissented from rejection of the claim. *Id.* at 2651 (Sotomayor, J., dissenting) (citing and quoting *Jones*).

ineffectiveness claim) *with id.* at 18-32 (Martin, J., dissenting from denial of COA on that claim). And, while it denied COA in this case, the Third Circuit has an appellate rule requiring that COA be granted if a single judge on a three judge panel votes for COA. *See* Third Circuit Local Appellate Rule 22.3 (“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.”).

Thus, in this case the Third Circuit apparently gave no weight in its COA analysis to Justice Saylor’s dissent, while in the Fifth and Seventh Circuits that dissent would have required that COA be granted. Conversely, the Fifth and Eleventh Circuits in practice deny COA over the vote of a dissenting judge, while (by rule) in the Third Circuit the vote of a single judge requires that COA be granted. Given the importance of COA analysis, this kind of confusion and division should not be allowed to persist.

#### **B. Petitioner Should Have Been Granted COA.**

In *Jones*, the Seventh Circuit explained that a “court could deny a certificate of appealability on the issue that divided the state court only in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable doubt.” *Jones*, 635 F.3d at 1040 (citing (*Slack*, 529 U.S. at 484)). Applying this analysis here, Justice Saylor’s dissent is certainly not erroneous beyond any reasonable doubt. His opinion is much more firmly grounded in the record than is the decision of the state court’s majority. The majority asserted that the “record [wa]s devoid of evidence” that Mr. Miller was acting under a heat of passion at the time of homicide. *Miller-2*, 987 A.2d at 650. Justice Saylor pointed out, however, that Mr. Miller recounted what had happened “to the trial judge at the penalty phase, and [to] the penalty-phase and post-conviction experts.” *Id.* at 676 n.1 (Saylor, J. dissenting). Specifically, Mr. Miller “related that the event immediately precipitating the killing was the victim’s indication – just

after having engaged in sexual relations with [Mr. Miller] – that he was to leave the marital residence and that another man would be moving in with her.” *Id.*

Justice Saylor added that there were a number of factors weighing on Petitioner at the time of the homicide, including:

Appellant’s release from incarceration a short time before the killing; his initial residence with his mother; Appellant’s daughter’s, the victim’s, and her sister’s alleged efforts to entreat him back into a relationship with the victim; Appellant’s emotional uncertainty but eventual acquiescence; the service of a support order on Appellant on the day of the killing; the allegation that the victim previously had aborted another man’s child during the marriage; and/or the number and nature of the victim’s wounds, which tend to support his theory that he lost control.

*Id.* at 676.

Because Justice Saylor’s dissent is not unreasonable, but instead grounded in the record, Mr. Miller’s claim that counsel was ineffective for failing to present available evidence of heat of passion was debatable among jurists of reason and is worthy of further encouragement. Moreover, the District Court’s uncontested ruling that counsel was ineffective in failing to challenge the rape conviction also supports granting a COA in this case. Respondents do not contest the District Court’s vacation of the rape conviction. The District Court held that trial counsel was ineffective for failing to rebut the prosecution’s expert testimony that Mr. Miller raped his wife while he was killing her. *Miller-3*, 214 F. Supp.3d at 332-42. But for counsel’s deficient performance in that regard, there is a reasonable probability that Mr. Miller would have been acquitted of rape. *Id.*

The claims about counsel’s ineffective handling of the rape and murder charges are closely related: the prosecution’s expert claimed that Mr. Miller raped his wife as he stabbed her. The evidence Petitioner presented in post-conviction supports the defense that Mr. Miller

did not rape his wife as he stabbed her. Instead, as the District Court held, the evidence supports the defense that Mr. and Mrs. Miller had consensual sex and then something took place that triggered the assault.

As the District Court concluded, professionally reasonable counsel would have disproven – or cast substantial doubt on – the rape scenario, thereby rendering the fact pattern one that was wholly consistent with a killing in the heat of passion. The Third Circuit wholly ignored the link between the two claims in denying COA.

### CONCLUSION

WHEREFORE, for all the reasons set forth above, Mr. Miller respectfully requests that the Court grant his petition for a writ of certiorari to address the question whether COA should have been granted, given the division with respect to this claim on the state high court and the evidence supporting Petitioner's claim.

Respectfully submitted,

/s/ Samuel J.B. Angell

LEIGH M. SKIPPER

Chief Federal Defender

SAMUEL J.B. ANGELL\*

Assistant Federal Defender

Federal Community Defender Office

for the Eastern District of Pennsylvania

601 Walnut Street, Suite 545 West

Philadelphia, PA 19106

Samuel\_Angell@fd.org

(215) 928-0520

Counsel for Petitioner

\*Counsel of record

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