No. _____

IN THE

Supreme Court of the United States

MICHAEL L. KING,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

LISA M. BORT
COUNSEL OF RECORD
FLORIDA BAR NUMBER 119074
BORT@CCMR.STATE.FL.US

LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 NORTH TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
(813) 558-1600

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

When a court shows partiality and bias by adopting nearly verbatim the prevailing party's brief as its order or opinion, particularly in capital cases, whether it violates due process under the Fifth and Fourteenth Amendments to the United States Constitution and deprives the party of an impartial and disinterested tribunal?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Michael L. King, a death-sentenced Florida prisoner, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Secretary, Department of Corrections, and Attorney General, State of Florida, were the appellees in the United States Court of Appeals for the Eleventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Michael L. King respectfully petitions for a writ of certiorari to review the errors in the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit").

OPINIONS BELOW

This is a petition regarding the errors of the Eleventh Circuit in affirming the United States District Court for the Middle District of Florida's ("District Court") denial of Mr. King's 28 U.S.C. § 2254 petition for a writ of habeas corpus. The opinion at issue is reproduced at Appendix A and is reported at *King v. Sec'y, Dep't of Corr.*, 793 Fed. Appx. 834 (11th Cir. 2019). The unpublished Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus from the District Court ("Order") is reproduced at Appendix B.

JURISDICTION

The opinion of the Eleventh Circuit was entered on October 25, 2019. Mr. King timely filed a Petition for Panel Rehearing and Rehearing En Banc, which was denied on January 10, 2020. On the morning of March 19, 2020, Mr. King timely filed an Application for a Sixty Day Extension of Time to File Petition for a Writ of Certiorari. However, later that day, the Court issued an order extending the deadline to file a petition for a writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing which would be June 8, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides, in relevant part: No person shall be . . . deprived of life, liberty, or property, without due process of law . . . U.S. Const. amend. V.

The Fourteenth Amendment provides, in relevant part:

> 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.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner, Michael L. King, is currently incarcerated under a sentence of death at the Union Correctional Institution in Raiford, Florida. He was charged by a consolidated indictment and information in Sarasota County, Florida with the first-degree murder, kidnapping, and sexual battery of Denise Amber Lee. Jury selection took place on August 17-21, 2009. The guilt/innocence phase of the trial took place on August 24-28, 2009. On August 28, 2009, the jury returned guilty verdicts for all three counts. Following the penalty phase trial, on September 4, 2009, the jury unanimously recommended death. A hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993) was held on October 28, 2009.

> On December 4, 2009, the trial judge sentenced King to death for the murder of Denise Amber Lee. In pronouncing King's sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of four statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel (HAC), *see* § 921.141(5)(h), Fla. Stat. (2007) (great weight); (2) the murder was cold, calculated, and premeditated (CCP), *see* § 921.141(5)(i), Fla. Stat. (2007) (great weight); (3) the murder was committed for the purpose of avoiding lawful arrest, *see* § 921.141(5)(e), Fla. Stat. (2007) (great weight); and (4) the murder was committed while King was engaged in the commission of a sexual battery or kidnapping, *see* § 921.141(5)(d), Fla. Stat. (2007) (moderate weight).
>
> The trial court concluded that King established the existence of two statutory mitigating circumstances: (1) King's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, *see* § 921.141(6)(f), Fla. Stat. (2008) (moderate weight); and (2) his age at the time of the offense (thirty-six years old), *see* § 921.141(6)(g), Fla. Stat. (little weight). The trial court found thirteen nonstatutory mitigating circumstances, which included: (1) a head injury in 1978 (moderate weight); (2) a PET scan with abnormal findings in the frontal lobe demonstrating a brain injury (moderate weight); (3) an IQ in the borderline range between low average and mentally retarded (moderate weight); (4) repeating grades in school and being placed in special education classes (little weight); (5) being despondent and depressed and attempting to address his bankruptcy, unemployment, a failed marriage, an

> impending foreclosure on his home, and breaking up with his girlfriend (little weight); (6) a history of nonviolence (moderate weight); (7) being a cooperative inmate (some weight); (8) never abusing drugs or alcohol (some weight); (9) having a thirteen-year-old son whom he helped raise and for whom he cares (little weight); (10) being a good father (little weight); (11) being a devoted boyfriend (little weight); (12) being a good worker (little weight); and (13) having a close relationship with family and friends (little weight).
>
> The trial court concluded that the aggravating circumstances established in this case substantially outweighed the mitigating circumstances and imposed a sentence of death upon Michael King.

King v. State, 89 So. 3d 209, 219-22 (Fla. 2012) (footnotes omitted). On direct appeal, the Florida Supreme Court affirmed the convictions and sentences imposed by the trial court. *Id.* at 212. Mr. King's petition for a writ of certiorari was denied on October 15, 2012. *King v. Florida*, 568 U.S. 964 (2012).

On September 4, 2013, Mr. King filed a motion for postconviction relief pursuant to Fla. R. Crim. P. Rule 3.851. An evidentiary hearing was granted and was held June 23, 2014. The postconviction court denied relief to Mr. King and the Florida Supreme Court affirmed the denial on January 26, 2017. *King v. State*, 211 So. 3d 866, 870 (Fla. 2017).

Mr. King filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the District Court on April 27, 2017. Mr. King filed a Memorandum of Law in Support of his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus on August 25, 2017. *See* Appendix D. The Respondents filed a Response to Petition for Writ of Habeas Corpus and Memorandum of Law ("Response") on December 1, 2017. *See* Appendix C. Mr. King filed a Reply to Respondents' Response to his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Reply") on January 31, 2018. *See* Appendix E. Five days later, on February 5, 2018, the District Court issued a 91 page order denying Mr. King's 28 U.S.C. § 2254 petition for writ of habeas corpus that essentially mirrored the Respondents' Response in substance and form. *See* Appendix B. Judgment was

entered on February 6, 2018. Mr. King filed a Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) on March 5, 2018. However, the District Court denied the motion. A notice of appeal from the final order entered by the District Court denying habeas relief in this cause was timely filed. In denying Mr. King's habeas petition the District Court also declined to issue a certificate of appealability ("COA").

On May 8, 2018, Mr. King filed an Application for a COA in the Eleventh Circuit. On January 9, 2019, the Eleventh Circuit entered an order granting Mr. King's Motion for a COA and issued a briefing schedule. Mr. King timely filed his principal brief on February 19, 2019 and his reply brief on April 9, 2019. Oral argument was held before a panel of three Eleventh Circuit judges on September 26, 2019. On October 25, 2019, the panel issued an opinion affirming the denial of relief by the District Court. *See* Appendix A. Mr. King filed a Petition for Panel Rehearing and Rehearing En Banc on November 14, 2019. On January 10, 2020, the Eleventh Circuit denied Mr. King's Petition for Rehearing En Banc and his Petition for Panel Rehearing.

REASONS FOR GRANTING THE WRIT

I. In light of the District Court's biased and partial Order, Mr. King did not receive the rights he is entitled to under the Due Process Clause.

Mr. King's due process rights under the Fifth and Fourteenth Amendments were violated when the District Court abused its discretion by reproducing the Respondents' Response nearly verbatim as its Order denying the petition for writ of habeas corpus. As a result, the District Court failed to issue independent and impartial findings and legal conclusions and even failed to address all of Mr. King's arguments. This practice is fundamentally unfair and deprived Mr. King of an unbiased and disinterested tribunal. Whether it is proper for a District Court to incorporate and adopt the Respondents' Response brief nearly verbatim as its order is undoubtedly a question of

exceptional importance that the Court needs to address. This practice is especially problematic in capital cases such as Mr. King's where the decision is literally a matter of life or death.

As the Court noted in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980): "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." More recently, the Court explained that

> [a]n insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.

Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016). When a court copies a prevailing party's brief nearly verbatim as its order, absolutely no appearance of neutrality or impartiality exists.

The Due Process Clause also requires that individuals receive a "meaningful opportunity to be heard" that is "appropriate to the nature of the case." *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). Further, as detailed below, a heightened standard of reliability is imperative in capital cases. *See infra* pp. 13-14. Undoubtedly, the District Court replicating the Respondents' Response brief almost verbatim is not the meaningful opportunity to be heard that the Due Process Clause mandates. The biased and partisan practice employed by the District Court certainly does not satisfy the heightened standard of reliability.

II. All of the United States Courts of Appeals disapprove of wholesale adoption; however, their standards of review vary.

The Court has addressed similar issues in the past and criticized the practice of verbatim adoption. *See Jefferson v. Upton*, 560 U.S. 284, 293–94 (2010) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985)) ("Although we have stated that a court's 'verbatim adoption of findings of fact prepared by prevailing parties' should be treated as findings of the court, we have also criticized that practice."); *see also United States. v. El Paso Nat. Gas Co.*, 376

U.S. 651, 656-57 & n.4 (1964); *see also United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n. 13 (1974). However, in the past, the Court has stopped short of actually prohibiting the practice. In light of the Court's criticism, each of the United States Courts of Appeals have also expressed their concerns. The result follows that if all of the Courts of Appeals are against the practice, which has already been criticized repeatedly by the Court, the Court should issue the guidance the Courts of Appeals require. The Court should finally condemn the lower courts from wholesale adoption or nearly verbatim reproduction of the prevailing party's proposed findings of fact and conclusions of law, in the form of briefs or otherwise, as its order or opinion.

The United States Court of Appeals for the First Circuit ("First Circuit") has explained that "[t]he independence of the court's thought process may be cast in doubt when the findings proposed by one of the parties winds up as the court's opinion and the courts have not looked with favor upon the practice." *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970) (footnotes omitted). A narrow exception is carved out for "extraordinary cases where the subject matter is of a highly technical nature requiring expertise which the court does not possess." *Id*.

The United States Court of Appeals for the Second Circuit ("Second Circuit") has discussed the topic multiple times. "We certainly do not wish to in any way condone the verbatim adoption of proposed findings of fact. While recognizing the time pressures on district court judges, we have expressed our displeasure with this procedure in the past." *Allied Chem. Intern. Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 481 (2d Cir. 1985). More recently, the Second Circuit has reiterated that "[t]he very nature of advocacy creates a need for the court to be wary of wholesale adoption of a party's proffers." *Miranda v. Bennett*, 322 F.3d 171, 177 (2d Cir. 2003).

In the United States Court of Appeals for the Third Circuit ("Third Circuit") it is disapproved of to adopt proposed findings of fact and conclusions of law and it held that it is improper for the district court to adopt a party's proposed opinion or order. *Bright v. Westmoreland County*, 380 F.3d 729, 731–32 (3d Cir. 2004) ("When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions. We, therefore, cannot condone the practice used by the District Court in this case."). The Third Circuit reasons that "[a]ny degree of impropriety, or even the appearance thereof, undermines our legitimacy and effectiveness." *Id*. at 732.

The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has expressed its disdain for the practice of verbatim and near-verbatim adoption in numerous cases and has "expressed varying degrees of disaffection with and disapproval of the general practice." *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 368 (4th Cir. 1983) (internal citations omitted). Notably, in *Miller*, the Fourth Circuit even stated that "we are bound to note the strong possibility that the practice as followed here may have contributed significantly to the mistakes in the fact-finding process we have identified." *Id*. at 369. Accordingly, the Fourth Circuit has reiterated that it "is not the preferred practice" and referred to it as "less than ideal." *Travelers Ins. Co. v. Austin Ins. Agency, Inc.*, 39 F.3d 1178 (4th Cir. 1994); *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 677 (4th Cir. 1989).

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") explains that "[a] district court's acceptance of the findings of fact and conclusions of law prepared by the prevailing party to a suit, while not prohibited, should be discouraged since it leaves the reviewing court with doubt concerning the actual basis of the trial judge's decision." *Midland Telecasting Co. v. Midessa Television Co., Inc.*, 617 F.2d 1141, 1144 n.5 (5th Cir. 1980) (citing *Amstar Corp. v. Domino's*

Pizza, Inc., 615 F.2d 252, 257–58 (5th Cir. 1980)). The Fifth Circuit has also noted that '"[t]he appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered"' when factual findings were not the product of personal analysis and determination by the trial judge." *Amstar Corp.*, 615 F.2d at 258 (quoting *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir. 1977)).

The United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") properly notes that "[a]ppellate courts generally frown on the wholesale adoption by the district court of findings of fact and conclusions of law submitted by one of the parties" and reiterates that the Court has also "expressed its displeasure with this practice." *Kilburn v. United States*, 938 F.2d 666, 671 (6th Cir. 1991) (citing *Anderson*, 470 U.S. at 572). More specifically, the Sixth Circuit "expressly disapprove[s] of a court's verbatim adoption of findings of fact submitted by counsel." *Mactec, Inc. v. Bechtel Jacobs Co., LLC*, 346 Fed. Appx. 59, 70 (6th Cir. 2009).

In the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"), it is noted that there is "no rule prohibiting a district court from adopting findings substantially or entirely as proposed by one party," but the practice is criticized. *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (7th Cir. 1985); *see also Matter of X-Cel, Inc.*, 776 F.2d 130, 133 (7th Cir. 1985) ("This court has on several occasions indicated its preference for independent findings."). Notably, the Seventh Circuit has also repeatedly admonished the practice in the very same situation as the instant case. "The district judge's adoption of the statement of facts in one party's brief as the court's findings of fact is unfortunate" and it is "an especially serious problem when the judge adopts language from a brief." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986). The Seventh Circuit explains in more detail why adopting an advocate's brief nearly verbatim, as the District Court did in Mr. King's case, is problematic:

> A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. E.g., *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313–14 (7th Cir. 1986); *In re X–Cel, Inc.*, 776 F.2d 130 (7th Cir. 1985). ***Judicial adoption of an entire brief is worse.*** It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.

DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990) (emphasis added).

The United States Court of Appeals for the Eighth Circuit also cautions against the practice. "This practice has been severely criticized as 'the failure of the trial judge to perform his judicial function and when it occurs without notice to the opposing side, as in this case, it amounts to a denial of due process.'" *Bradley v. Maryland Cas. Co.*, 382 F.2d 415, 423 (8th Cir. 1967) (quoting *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir. 1961)).

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") disapproves of the practice of wholesale adoption because it "raise[s] the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves." *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978). It also "complicates the problems of appellate review." *Id*. at 776.

The United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") has "condemned this mechanical adoption of a litigant's findings" because "where the district court adopts a party's proposed findings of fact wholesale or verbatim, the resulting findings are 'not the original product of a disinterested mind.'" *Everaard v. Hartford Acc. & Indem. Co.*, 842 F.2d 1186, 1192 (10th Cir. 1988) (quoting *Andre*, 774 F.2d at 800) (internal citations omitted in original). The Tenth Circuit has also stated that "verbatim adoption of proposed findings is almost

never desirable." *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 469 (10th Cir. 1980). It has also been noted that "almost verbatim" adoption "provides 'little aid on appellate review.'" *Avila v. Jostens, Inc.*, 316 Fed. Appx. 826, 831 (10th Cir. 2009) (quoting *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 830 (10th Cir. 2005)).

The United States Court of Appeals for the District of Columbia Circuit ("District of Columbia Circuit") "strongly disapprove[s] of the District Court's wholesale adoption of the [prevailing party's] proposed findings." *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407 (D.C. Cir. 1988), *on reh'g*, 852 F.2d 619 (D.C. Cir. 1988). The District of Columbia Circuit detailed that "adopting verbatim such prepared findings is rarely the best approach because it tends to undermine the functions of such findings in aiding the trial court's own decisionmaking process and revealing that process to the reviewing court." *Afshar v. Dep't of State*, 702 F.2d 1125, 1144 (D.C. Cir. 1983). The District of Columbia Circuit has also explained that it "cannot endorse" the district court "extensively copying the proposed findings of fact and conclusions of law prepared by" the prevailing party because "[c]onfidence in the integrity of the judicial process inevitably suffers when judges succumb wholesale to this practice." *S. Pac. Communications Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 995 (D.C. Cir. 1984).

The United States Court of Appeals for the Federal Circuit ("Federal Circuit") has also cautioned against the practice. *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1375 (Fed. Cir. 1986). It also "stated that the likelihood of clear error in those findings increases in such a situation." *Id*. (citing *Lindemann Maschinenfabrik GMBH v. Am. Hoist & Derrick Co.*, 730 F.2d 1452, 1457 (Fed. Cir. 1984)).

The Eleventh Circuit, the Court of Appeals that Mr. King's case originated from, has repeatedly disapproved of the practice of wholesale adoption. *Hamm v. Comm'r, Alabama Dept.*

of Corr., 620 Fed. Appx. 752, 757 n.3 (11th Cir. 2015) ("we take this opportunity to once again strongly criticize the practice of trial courts' uncritical wholesale adoption of the proposed orders or opinions submitted by a prevailing party"); *see also In re Colony Square Co.*, 819 F.2d 272, 274–75 (11th Cir. 1987) ("This circuit and other appellate courts have repeatedly condemned the ghostwriting of judicial orders by litigants. The cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion.") (internal citations omitted). Even in Mr. King's opinion, the Eleventh Circuit again cautioned against the practice and noted that "although we do not endorse district courts indiscriminately incorporating a party's brief into their orders, there is no prohibition on the District Court from including in its order portions of a party's brief that are supported by the evidence." *King v. Sec'y, Dep't of Corr.*, 793 Fed. Appx. 834, 841–42 (11th Cir. 2019).

As illustrated above, the practice of wholesale or nearly verbatim adoption is a continuing widespread problem that has repeatedly required examination in each and every Court of Appeals for decades. Definitively barring this practice would finally end the litigation that ensues each time a court engages in verbatim or nearly verbatim adoption. Currently, limited judicial resources continue to be exhausted as the appellate courts review this same issue over and over again. Accordingly, the Court should address the issue and prohibit this biased and fundamentally unfair practice.

Worse yet, the Courts of Appeals differ on the standard of appellate review applicable when a district court adopts wholesale the prevailing party's proposed findings and conclusions. For example, both the Sixth Circuit and the Seventh Circuit review such practices "to determine whether the district court abused its discretion." *Kilburn*, 938 F.2d at 671 (citing *Andre*, 774 F.2d at 800). However, in these situations the Sixth Circuit does not "more closely scrutinize its factual

findings" to determine if the findings are clearly erroneous. *Kilburn*, 938 F.2d at 672. Conversely, the Seventh Circuit does "examine the findings especially critically," as do many other Courts of Appeals. *Andre*, 774 F.2d at 800. The District of Columbia Circuit also reviews the District Court's "findings against the record with particular, even painstaking, care." *Berger*, 843 F.2d at 1408 (quoting *S. Pac. Communications Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 984 (D.C. Cir. 1984)). The First Circuit has held that "the greater the extent to which the court's eventual decision reflects no independent work on its part, the more careful we are obliged to be in our review." *In re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970). The Ninth Circuit also echoes that sentiment and "call[s] for more careful scrutiny of adopted findings." *Photo Elecs. Corp.*, 581 F.2d at 777. The Federal Circuit notes that the adoption of findings verbatim may result in "close scrutiny" but the clear error standard of review is still applied. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1359 (Fed. Cir. 2006); *see also Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 313 (Fed. Cir. 1985). However, some Courts of Appeals such as the Tenth Circuit, agree with the Sixth Circuit and also do not alter the standard of review in these circumstances. *Avila*, 316 Fed. Appx. at 831. Furthermore, in the Court of Appeals that Mr. King's appeal arises from, the Eleventh Circuit, a party must demonstrate that the judge's process was fundamentally unfair. *In re Colony Square Co.*, 819 F.2d at 276. Although this summary only details a brief survey of some of the different standards employed, without question, the Courts of Appeals are handling appellate review of this disapproved of practice in very different ways.

Currently, even though all of the Courts of Appeals speak negatively regarding the practice of wholesale adoption and nearly verbatim adoption, there is no guidance from the Court specifically prohibiting it. As a result, there are no repercussions when lower courts copy a party's brief nearly verbatim as its order. Not only does this practice violate due process and show

partiality, but it also complicates appellate review. Without the appearance of bias inherent in this practice, there would be no question regarding the standard of review or whether the party was entitled to a more stringent appellate review. Accordingly, the split that exists between the Courts of Appeals would be resolved if the Court prohibited the unconstitutional practice entirely. Most importantly, the Court's resolution of this issue would force lower courts to issue orders and opinions containing impartial findings and legal reasoning that are the product of a disinterested mind, just as the Due Process Clause requires.

III. A court's nearly verbatim adoption of the prevailing party's brief as its order or opinion in a capital case presents an even greater issue.

In capital cases such as the instant case, this issue is of great consequence because the outcome is literally a matter of life or death. The Court has recognized

> that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). A decade later, the Court reiterated the point and stated:

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.

Ford v. Wainwright, 477 U.S. 399, 411 (1986) (internal citations omitted). The appearance of bias and partiality that is present when a court adopts the prevailing party's brief nearly verbatim absolutely does not satisfy the requirement of heightened reliability that the Court mandates in capital cases.

In capital cases, "the severity of the sentence mandates careful scrutiny." *See Zant v. Stephens*, 462 U.S. 862, 885 (1983). Accordingly, the Court should, at the very least, prohibit the lower courts from copying briefs nearly verbatim as its orders or opinions in cases involving capital defendants and require the courts to independently and thoughtfully draft unbiased and impartial orders and opinions. Due to the District Court reproducing the Respondents' brief nearly verbatim as its Order in Mr. King's case, it is as if the Respondents (the parties who are zealously advocating to execute Mr. King) actually drafted the Order themselves. It would be oppressive to allow Mr. King's death sentence to be upheld based on this Order that was practically written by the Respondents, who are, in essence, the same parties responsible for executing individuals who are sentenced to death.

IV. Mr. King's case is the ideal vehicle to address the question presented.

Mr. King's case is one of the most egregious examples of a court adopting proposed findings of fact and legal conclusions nearly verbatim as its order because the District Court's Order actually wholesale adopted practically all of the Respondents' ***Response brief***. The Order is nearly identical in substance, form, and advocacy as the Response. As a result, the District Court failed to meaningfully consider, analyze, or address all of the arguments raised by Mr. King and blatantly ignored the arguments and counter-arguments presented by Mr. King in his Reply. The nearly verbatim adoption of Respondents' Response was a partial and biased abuse of discretion that denied Mr. King due process. The District Court should have rendered its own impartial and independent findings instead of copying both the findings of fact and legal reasoning from the Response.

In the instant case, the District Court issued a 91 page order denying Mr. King's petition for writ of habeas corpus only ***five*** days after Mr. King filed his Reply to Respondents' Response.

See Appendix B; *see also* Appendix E. The District Court abused its discretion because its order denying the petition for writ of habeas corpus is essentially a nearly verbatim reproduction of Respondents' Response. *Compare* Appendix B, *with* Appendix C. Factual citations, legal arguments, and case citations from the Response are reproduced throughout the Order, in most instances comprised of the exact wording and tone of advocacy. In several areas, paragraphs are broken up differently and some footnotes from the Response are reproduced in the body of the District Court's Order instead, but overall, the Order is largely a wholesale adoption of the Respondents' Response in both organization and content. *See* Standard of Review (*Compare* Appendix B pp. 4-5, *with* Appendix C pp. 31-32)[1]; Ground One (*Compare* Appendix B pp. 6-23, *with* Appendix C pp. 33-60); Ground Two (*Compare* Appendix B pp. 24-43, *with* Appendix C pp. 61-89); Ground Three (*Compare* Appendix B pp. 44-45, *with* Appendix C pp. 89-90); Ground Four (*Compare* Appendix B pp. 45-54, *with* Appendix C pp. 91-102); Ground Five (*Compare* Appendix B pp. 54-74, *with* Appendix C pp. 102-32); Ground Six (*Compare* Appendix B pp. 74-90, *with* Appendix C pp. 132-54). Moreover, as a result of the District Court apparently already having its mind made up to adopt the Response wholesale, it completely failed to acknowledge or address any of the arguments and counter-arguments raised by Mr. King in his Reply. *Compare* Appendix B, *with* Appendix E. Instead of the District Court taking its time to issue a well-reasoned order addressing all of Mr. King's arguments and counter-arguments, the District Court quickly issued an order that was almost identical to the Respondents' Response and did not quite match what was pled by Mr. King.

[1] References made to page numbers of the Response (Appendix C) and the Reply (Appendix E) refer to the page numbers notated on the bottom of each page.

Due process requires the appearance of neutrality and the reality of ***impartial*** justice. *See Williams v. Pennsylvania*, 136 S. Ct. at 1909. Instead, the District Court's Order embraces Respondents' "zeal and advocacy" and does not impart impartial and disinterested findings of fact or conclusions of law. *See United States. v. El Paso Nat. Gas Co.*, 376 U.S. at 656-57 & n.4; *see also Jefferson*, 560 U.S. at 292–94 (remanding for the lower federal courts to address Petitioner's argument that the state court's "process" of adopting findings drafted by the state attorney precludes a finding of a presumption of correctness under AEDPA); *see also Miranda v. Bennett*, 322 F.3d at 177 ("[W]e nonetheless heed the cautionary note repeatedly sounded by the Supreme Court as to the imprudence of wholesale adoption of a party's position" and note that "[t]he very nature of advocacy creates a need for the court to be wary of wholesale adoption of a party's proffers"). When adopting the Response nearly verbatim, the District Court's Order actually reproduced the Respondents' tone of advocacy in many places. One of the most egregious examples is found in Ground Five, a claim regarding violation of Mr. King's right to present his defense and cross-examine a witness. Respondents contended that "[t]here was no evidence presented to support any of the 'facts' contained in those questions." *See* Appendix C p. 122. By the Respondents enclosing the word "facts" in quotation marks, they insinuate that the facts Mr. King referred to were not actually facts. Instead of being neutral and impartial, the District Court adopted the Respondents' tone of advocacy by copying this sentence into its Order and even enclosed the word "facts" in quotation marks too. *See* Appendix B p. 67. Another example is found in Ground One (an ineffective assistance of penalty phase trial counsel claim) of the Order and states: "Moreover, even now, with the benefit of unlimited time and after meticulous review of the prospective juror questionnaires, collateral counsel has not found a single appropriate comparator."

See Appendix B p. 42. This zealous advocacy is taken almost word for word from the Respondents' Response. *See* Appendix C p. 86.

By reproducing the Response nearly verbatim without additional findings of fact and conclusions of law, the District Court failed to meaningfully consider, analyze, or address all of Mr. King's arguments. This issue is most evident in Ground Six, Mr. King's *Hurst*[2] claim. Notably, in both his memorandum of law and his Reply, Mr. King made arguments related to *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), but neither case was even ***mentioned*** by the District Court in its Order. Worse yet, the District Court did not analyze or address any of the arguments Mr. King raised in his Reply. *Compare* Appendix B, *with* Appendix E. Mr. King spent almost all of his Reply discussing his counter-arguments regarding the *Hurst* claim, of which a substantial portion discussed arguments in light of *Caldwell v. Mississippi*. *See* Appendix E pp. 7-39. However, the District Court still failed to acknowledge or analyze any of those points. In addition, Mr. King explained his counter-arguments regarding *Hurst* retroactivity, and whether the *Hurst* decision announced a substantive rule,[3] in great detail in his Reply, but the District Court did not even acknowledge Mr. King's arguments, let alone make "independent and impartial" findings and conclusions. *See* Appendix E pp. 9-16; *see also Forrester v. White*, 484 U.S. 219, 227 (1988). Instead, the District Court adopted nearly verbatim the corresponding section of Respondents' Response. *Compare* Appendix B pp. 85-87, *with* Appendix C pp. 146-51. Furthermore, in largely wholesale adopting Respondents' Response, the

[2] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

[3] At the time of the District Court's Order which ignored Mr. King's arguments regarding the *Hurst* decision announcing a substantive rule, the Eleventh Circuit had not yet issued its opinion in *Knight v. Florida Dep't of Corr.*, 936 F.3d 1322, 1337 (11th Cir. 2019) (concluding that *Hurst* "announced a procedural rule, and not a substantive one" and was not retroactive).

District Court neglected to consider key facts regarding Ground Two[4] that were highlighted in Mr. King's Reply which Respondents' had omitted from its Response. *See* Appendix E pp. 4-5.

As the District Court reproduced the Respondents' ***Response brief*** nearly verbatim, the bias and partiality present in Mr. King's case is more severe than previous cases where the Court has addressed wholesale adoption. The District Court's nearly verbatim reproduction of a brief, which was prepared solely with the intent to provide zealous advocacy, inserted the advocate's words into the Order and exuded the appearance of bias and partiality instead of neutral and disinterested judicial conduct. *See Walton,* 786 F.2d 303 at 313-14; *see also DiLeo*, 901 F.2d at 626. Accordingly, the facts of Mr. King's case are distinguishable from the facts of *Anderson v. City of Bessemer City, N.C.* for multiple reasons. In *Anderson*,

> [t]he court itself provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's proposed findings: the findings it ultimately issued—and particularly the crucial findings regarding petitioner's qualifications, the questioning to which petitioner was subjected, and bias on the part of the committeemen—vary considerably in organization and content from those submitted by petitioner's counsel.

Anderson, 470 U.S. at 572–73. Unlike *Anderson*, the District Court in the instant case did not provide any framework for proposed findings and did not merely request parties submit more detailed findings in support. In fact, Mr. King was not provided an opportunity to respond to any proposed findings at all, let alone at length. In the instant case, after findings were already entered and Mr. King realized that the District Court essentially reproduced Respondents' Response nearly verbatim, he filed a Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e)

[4] A claim related to ineffective assistance of trial counsel in light of *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

requesting that the District Court reconsider its ruling and address the arguments and counter-arguments he pled. However, the District Court declined the invitation to reconsider, therefore failing to analyze many of the arguments and counter-arguments raised by Mr. King. Most importantly, in Mr. King's case, the District Court issued findings that did not "vary considerably in organization and content" from Respondents' Response brief. *Anderson*, 470 U.S. at 572–73. In addition, Mr. King's case is also distinguishable from *U. S. v. El Paso Nat. Gas Co.*, 376 U.S. at 656, because the District Court did not announce its decision and then request proposed findings. Based on the District Court's abuse of discretion in nearly wholesale adopting Respondents' entire ***Response brief***, not merely adopting proposed findings after the court set forth its own essential findings, Mr. King was denied an impartial tribunal and his due process rights were violated. *See generally Anderson*, 470 U.S. at 572–73.

Mr. King is entitled to the right to have a meaningful opportunity for all of the grounds of his petition for writ of habeas corpus to be heard and decided by an impartial and disinterested tribunal with a heightened standard of reliability just like other similarly situated capital defendants. The District Court's Order created the appearance of bias and partiality instead of availing Mr. King of the legitimate judicial process that he has a right to under the Due Process Clause. The Court's criticism of the practice, but still allowing it, has perpetuated the issue. The Court must finally issue a prohibition to the lower courts. In order to prevent manifest injustice and to preserve Mr. King's right to due process and a fundamentally fair and impartial tribunal, it is vital that the Court grant the writ, resolve this issue in favor of Mr. King, and prohibit the lower courts from wholesale adopting briefs nearly verbatim.

CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari and order further briefing, or vacate and remand this case to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

/s/ Lisa M. Bort
Lisa M. Bort
Counsel of Record
Assistant CCRC
Florida Bar Number 119074
Email: bort@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601

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