CASE NO. 19-8644

IN THE UNITED STATES SUPREME COURT

MICHAEL L. KING,

Petitioner,

vs.

MARK S. INCH, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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[Capital Case]

QUESTION PRESENTED

Whether a district court violates due process by incorporating large portions of the State's response to the habeas petition in its order denying relief where there is no allegation of *ex parte* contact with the State and the Eleventh Circuit's decision presents no important or unsettled question of constitutional law?

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CITATION TO OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at King v. Secretary, Department of Corrections, 793 Fed. App'x 834 (11th Cir. 2019) (unpublished) (Pet. App. A).

JURISDICTION

This Court has jurisdiction pursuant to Title 28, United States Code, Section 1254(1) to review the decision of the Eleventh Circuit Court of Appeals. However, Respondents submit that no question contained in the petition is worthy of this Court's consideration.

STATEMENT OF THE CASE AND FACTS

Facts

Petitioner, Michael L. King, is a Florida inmate under a death sentence imposed for the first-degree murder of [D.L.]. The Florida Supreme Court's direct appeal opinion in King v. State, 89 So. 3d 209, 212-22 (Fla. 2012), recites the facts of King's convictions for the kidnapping and sexual battery of the victim, [D.L.].

On the early afternoon of January 17, 2008, King abducted a young mother, [D.L.] from the home where she was watching her two children, a toddler and a baby. He took [D.L.] to his house, leaving the two children unattended, where he bound, raped and sodomized her. After the ordeal at King's residence, King drove

his car with [D.L.], still bound and alive in the backseat of his car, to his cousin's house to borrow items to dispose of her body, including a flashlight, shovel and gas can. At some point the victim obtained King's phone and begged for help to a 911 operator. On the call, [D.L.] is heard crying and begging to be saved so that she could see her husband and children again. As noted by the Florida Supreme Court, this is a rare case that a court and jury could hear the terror faced by a murder victim prior to their death. "In this case, anyone who listens to the 911 call placed by [D.L.] will hear the abject terror she was experiencing plus her panicked, frantic pleas to the 911 dispatcher (for help) and King (to be returned home). This murder was unquestionably cold and cruel." King, 89 So. 3d at 232.

After a prolonged and torturous ordeal, King drove the victim to a remote area and shot her in the face and buried her. The State presented a compelling array of eyewitness and forensic testimony establishing King's guilt.

King was apprehended in his car with the phone the victim called for help from, in the vicinity of the burial site. King was still wet and muddy from digging the hole in which [D.L.'s] body was ultimately found. DNA and fingerprint evidence

established that [D.L.] was held in King's car. The physical evidence included DNA from blood and hair, matched conclusively to [D.L.],[1] and [D.L.'s] palm print on the driver's side window. D.L's wedding/engagement ring was also found on the back seat of King's car when King was apprehended. DNA testing confirmed that sperm cells inside of [D.L.'s] vagina and on her shorts found at the burial site matched King at all 13 loci, to the exclusion of all other person's on the planet, or 1 in one quadrillion Caucasians.[2] (V24/2465-67).

Following a penalty phase proceeding, a unanimous jury recommended that King be put to death for the murder of [D.L.] The trial court agreed. "In pronouncing King's sentence, the trial court determined that the State had proven beyond a

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[1] Hair from the back seat of King's car matched [D.L.] at all 13 locations, or the odds of it coming from anyone other than [D.L.] leaving that hair was one in 110 trillion Caucasians. (V24/2472). A blanket recovered from the back seat of King's Camaro had a blood stain which matched [D.L.'s] DNA profile to the exclusion of all other people on the planet." (V25/2748). Blood on the hood of King's car, also matched [D.L.] at 10 of 13 locations, sufficient to conclude that the blood came from [D.L.]. (V24/2472-73). Similarly, a swabbing of material or fluid on the bra of King's Camaro matched [D.L.'s] profile at 8 of 13 locations, sufficient for the analyst to conclude it came from [D.L.]. (V24/2473-74).

[2] [D.L.'s] boxer shorts, found a short distance from her burial site, contained a mixture stain, from which King's sperm cells were separated and positively matched to King. The DNA match yielded population statistics of "one person in 3.5 trillion individuals." (V25/2756).

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) [fn6]; (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)." King, 89 So. 3d at 221.[3]

Lower Court Decisions

Following his direct appeal, King unsuccessfully challenged his convictions and sentences pursuant to Florida Rule of

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[3] In mitigation, "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). [fn7]; 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 also found a number of non-statutory mitigators based upon King's background and below average IQ. King, 89 So. 3d at 221-222. The single statutory mitigator found by the trial court (other than age [36]) was based upon evidence King had suffered from brain damage. The thrust of Dr. Joseph Wu's testimony was that frontal lobe damage can render an individual prone to impulsive acts or violent outbursts, especially during periods of stress. (DR27/3190-93).

Criminal Procedure 3.851. See King v. State, 211 So. 3d 866 (Fla. 2017). King subsequently filed a habeas petition in the Middle District of Florida on April 27, 2017. On February 5, 2018, the district court issued its order denying habeas relief. King filed a motion to alter or amend on March 5, 2018. In this motion King challenged the district court's copying large portions of the state's habeas response in the order denying habeas relief.

In denying King's motion to alter or amend under Federal Rule of Civil Procedure 59(e), the district court stated that "King's major complaint is that this Court relied on the Respondent's arguments in denying his petition." (Resp. App. A3). The court found that "[t]his argument is not a basis for granting a Rule 59(e) motion." (citation omitted). "In fact, a district court may incorporate a party's arguments to serve as its explanation for its ruling, so long as those arguments, in conjunction with the record, provide the Court of Appeals an opportunity to engage in meaningful review." (citing United States v. Valencia-Trujillo, 462 F. App'x 894, 897 (11th Cir. 2012)). (Resp. App. A3)

Conflicting expert testimony was offered by the State through Dr. Michael Gamache. (DR29/3578 - DR30/3605).

King appealed to the Eleventh Circuit, challenging the district court's copying of the State's habeas response nearly verbatim in its order denying relief.[4] The court issued its opinion on October 25, 2019, affirming the denial of habeas relief. King v. Sec'y, Dep't of Corr., 793 Fed. App'x 834, 836 (11th Cir. 2019) (unpublished) (Pet. App. A). The court held that King's due process claim failed "because a court's adoption of portions of a party's brief does not render its decision fundamentally unfair." The court cautioned district courts against this practice, but citing this Court's precedent, held that the district court's findings were not to be rejected "out-of-hand" and would stand if supported by the evidence. Id. (citing United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964)).

[4] King also raised two claims of ineffective assistance of counsel.

REASONS FOR DENYING THE WRIT

Petitioner's due process challenge to a federal district court order denying habeas relief which incorporated large portions of the State's habeas response poses no important or unsettled question for this Court's review.

Petitioner does not seek review of the Eleventh Circuit's decision on some important or unsettled question of constitutional law, but on his challenge to the district court's order rejecting his claims on the basis the court copied or adopted large portions of the State's habeas response. This question does not merit certiorari review. There is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding the denial of relief.

There was no judicial misconduct alleged.

While King frames his question for review in terms of the denial of due process and judicial bias, there was never an allegation of, much less proof of judicial misconduct. King's accusation of bias stems entirely from the fact the district court apparently found the State's arguments persuasive enough to adopt them nearly verbatim. This is not judicial misconduct. In re Doe, 640 F.3d 869, 873 (8th Cir. 2011) (Even though the district judge relied on defendants' briefs, "often in verbatim fashion" [] "[s]uch judicial appropriation is not judicial

misconduct."). There was no allegation of, much less an admission of, *ex parte* contact with the State. The State was not asked to ghost write the district court's order.

King was able to present his claims to the district court which decided his case based upon the law and the facts. "[T]the District Court set forth its reasons for denying each of Mr. King's six claims in a 91-page order." King, 793 Fed. App'x at 841. That the court's order reproduced large portions of the State's response verbatim is of no consequence. As the district court observed below, circuit precedent did not prohibit or restrict the court from adopting a party's arguments and that "King's main argument is that this Court found the Respondent's arguments persuasive." (Resp. App. A2).

This Court's longstanding precedent does not prohibit a court from adopting a party's argument or findings.

King has cited no authority suggesting that an "independent review" requires a district court to re-draft otherwise proper legal discussions or conclusions from a party's pleading. In its habeas response the State provided quotations and analysis from lower court opinions and facts from the post-conviction evidentiary hearing in state court. That the court's order repeats or quotes portions of the State's response is understandable. As the Eleventh Circuit recognized below, this

Court's precedent does not prohibit even the wholesale adoption of the findings of a party. "[T]he findings contained in the District Court's order, 'though not the product of the workings of the district judge's mind, are formally [hers]; they are not to be rejected out-of-hand, and they will stand if supported by evidence.'" King, 793 Fed. App'x at 841 (quoting United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964)).

In Anderson v. City of Bessemer City, NC, 470 U.S. 564, 571-72 (1985), this Court rejected the suggestion that adoption of findings as presented by the prevailing party should subject a ruling to more stringent appellate review, particularly when the opposing party has had the opportunity to respond to the proposed findings. This Court stated that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." While this Court has criticized a lower court's wholesale adoption of a parties brief, it has recognized such findings "are nonetheless the findings of the District Court []" and those findings "must stand or fall depending on whether they are supported by evidence." United States v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944).

King's reliance upon Jefferson v. Upton, 560 U.S. 284, 294 (2010), is misplaced. (Petition at 5, 16). In Jefferson, this Court applied the pre-AEDPA version of § 2254, holding that the state court had denied the death-penalty petitioner a fair and adequate hearing because the state court adopted factual findings drafted exclusively by the state's attorneys. The state court adopted a proposed order that it had obtained *ex parte* from the State, without notice to Jefferson. In addition to *ex parte* contact, the findings ultimately proposed by the State and adopted by the court recounted evidence from a non-existent witness. Jefferson, 560 U.S. at 292.

In this case, there is no allegation of any improper *ex parte* contact as in Jefferson. Moreover, while King criticizes the tone of the district court's order, he has not pointed to non-supported findings of the district judge which were adopted or copied from the State's pleading.

There is no evidence the district court failed to consider King's arguments before rejecting them. King had the opportunity to object to the findings made by the district court below. There is no allegation of, much less any evidence of judicial impropriety or *ex parte* contact with the State. The district court committed no cognizable error in this case. King's

Petition raises no serious or important question for this Court's review.

Courts are not split on this question.

King asserts that there is a conflict among the courts of appeal over the treatment of a lower court's adoption of a party's pleading or proposed findings. However, the courts of appeal are entirely consistent in disfavoring the practice of adopting or copying wholesale a party's pleading or findings, but also consistently reject calls to reverse such decisions or subject them to more intense appellate scrutiny. See Slade v. Billington, 871 F.2d 155 (D.C. Cir. 1989) (unpublished) (holding that "even where the district court adopts verbatim a party's proposed findings" the court would apply the "clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure.") (citing Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1215 (3d Cir. 1993) (rejecting claim that the lower court's "verbatim adoption" of the prevailing party's proposed factual findings required more stringent review of those findings) (citing Anderson v. Bessemer City, N.C., 470 U.S. 564 (1985)); Kilburn v. United States, 938 F.2d 666, 672 (6th Cir. 1991) (rejecting claim that "because the district

court adopted the defendant's findings of facts and conclusions of law, we should more closely scrutinize its factual findings."); New England Health Care Employees Pension Fund v. Woodruff, 512 F.3d 1283, 1290 (10th Cir. 2008) (holding that "findings of fact and conclusions of law supplied by a party and adopted verbatim by a district court will not automatically render a decision reversible and are held to the normal appellate standards."); United States v. Valencia-Trujillo, 462 Fed. App'x 894, 897 (11th Cir. 2012) (unpublished) (observing that while a district court ruling should contain a sufficient explanation of its reasoning to allow for meaningful review, that "does not prohibit a district court from incorporating a party's arguments as the basis and explanation for its ruling").

While King asserts that this Court's guidance is needed, the courts of appeal are consistent in handling this issue exactly as the Eleventh Circuit did below – by following this Court's decisions in Anderson and United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). No further guidance is needed. Since there is no conflict on an important issue of law among the various courts of appeal, there is no basis for certiorari review.

In this absence of any misconduct on the part of the district court, there is no reason to reverse and remand this case simply because the district court incorporated the State's arguments into its order denying habeas relief. Further, to the extent King urges this Court to accept review to articulate a new rule prohibiting and sanctioning a district court's adoption of part of a party's pleading, this case would present a particularly poor vehicle to do so. The district court in this case was not making original factual findings but reviewing a made state court record under the AEDPA --- which provides considerable deference to state court rulings.[5] See Brown v. Payton, 544 U.S. 133 (2005) (AEDPA constrains federal review of state court decisions). Certiorari should be denied.

There is no significant or fairly debatable underlying constitutional claim.

The Eleventh Circuit's opinion on appeal addressed two claims other than the district court order due process claim. It is quite telling that while King challenges the district court's order, he presents no argument in support of any significant or

[5] "The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, 'imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.'" Hardy v. Cross, 565 U.S. 65, 66 (2011) (quoting Felkner v. Jackson, 562 U.S. 594, 598 (2011)).

even colorable underlying constitutional claim. King's guilt was proven by absolutely overwhelming evidence and his death sentence supported by powerful and unchallenged aggravation. King abducted a young wife and mother from her home and sexually brutalized her before taking her to a remote area where he shot her in the face and buried her. Her terror was recorded on a 911 call for help while in King's car, using his phone.

There was no fairly debatable claim for habeas relief in either the guilt or penalty phases of King's trial. Nevertheless, King's Petition alludes to several claims which he asserts were given short shrift by the district court. However, he attacks the "tone of advocacy" by the district court on those claims and conspicuously avoids mentioning, much less challenging either the facts or legal rationale the court used in rejecting them. (Petition at 16-17). For example, King asserts the district court copied the term 'facts' from the state's habeas response on a claim the defense was precluded from presenting a defense. (Petition at 16). That claim, however, was frivolous.

This claim encompassed the trial court instructing the jury to disregard three cross-examination questions of a single state witness. King complained that this evidentiary ruling deprived

him of his right to present a defense. As for the merits of King's argument, it suffered from several fatal flaws. First, there was no evidence to support the facts defense counsel insinuated into his questions of witness Salvador. At no point did the defense present any evidence to support those facts, or, even an inference or logical supposition to support those facts from anything learned at trial or in pretrial discovery. When challenged, trial defense counsel failed to allude to, much less cite a statement, record, report, hearsay statement, or, even double hearsay statement from which the specific facts asserted in those three questions could have been derived. Even when pressed by the trial court, defense counsel did not cite any source for those facts, not even King. Nor, despite appellate counsel's best efforts, did he offer any factual basis for those questions on appeal in state court. See King v. State, 89 So. 3d 209, 222-26 (Fla. 2012) (In addition to having no factual basis, the facts insinuated into those questions were "highly implausible."). Consequently, the district court placing the term 'facts' in quotes when referring to those questions was entirely supported by the record. Notably, King chose not to challenge that decision on appeal to the Eleventh Circuit.

King also complains the district court adopted the State's argument on the retroactivity of Hurst v. Florida, 136 S. Ct. 616 (2016), without acknowledging or addressing to his satisfaction the argument that Hurst announced a substantive, rather than procedural rule. Yet, under Teague v. Lane, 489 U.S. 288 (1989), the retroactivity of Hurst in federal court was not a difficult question in light of this Court's decision in Schriro v. Summerlin, 542 U.S. 348, 358 (2004) --- holding that Ring[6] announced a procedural rule that was not retroactive on collateral review. The district court's analysis of this question and finding the State's response persuasive on this point is hardly controversial or unexpected. See McKinney v. Arizona, 140 S. Ct. 702, 708 (2020) (Observing that "Ring and Hurst do not apply retroactively on collateral review.") (citing Schriro v. Summerlin, 542 U.S. 348, 358 (2004)). Again, King chose not to challenge this decision on appeal to the Eleventh Circuit.

In sum, the parties below submitted their arguments to the district court for consideration. There is no evidence the district court failed to consider King's arguments or committed any judicial misconduct. The district order stands or falls on the basis of its merit. King's habeas challenges lacked merit,

[6] Ring v. Arizona, 536 U.S. 584 (2002)

and, the district court copying or adopting verbatim large portions of the State's response did not deprive King of a fair proceeding. The court's order recited relevant lower court rulings and applied the deference owed to them under the AEDPA.

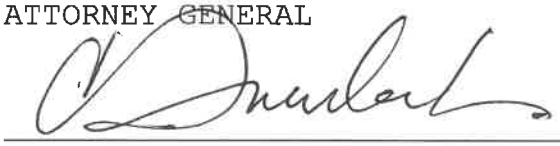
King fails to demonstrate that the Eleventh Circuit's opinion decided an important question of federal law in a manner that conflicts with a decision of this Court. See Sup. Ct. R. 10. Consequently, this Court should decline to exercise its certiorari jurisdiction.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL



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