No. 19-8644

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

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

DEATH PENALTY CASE

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Michael L. King respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). Mr. King replies to the Respondents' Brief in Opposition ("BIO") as follows:

I. Contrary to Respondents' assertions, the United States Courts of Appeals differ in their appellate review practices.

Respondents claim that when a court adopts or copies a party's pleading wholesale that there is no conflict between the United States Courts of Appeals on whether to subject the case to "more intense appellate scrutiny." *See* BIO pp. 11-12. However, some of the cases cited by Respondents even highlight that the appellate standard of review is not always the same under these circumstances. For example, Respondents cite to *Slade v. Billington*, 871 F.2d 155 (D.C. Cir. 1989) to argue that the clearly erroneous standard still applies in these situations. *See* BIO p. 11. Although that may be true, *Slade* clarifies:

> Nevertheless, as we noted in *Berger*, even under the clearly erroneous standard of review, 'when a trial judge abdicate[s] to a party his duty to provide a reasoned explanation for his decision' and merely copies submitted proposals, it is incumbent on this court to check the adopted findings against the record ***'with particular, even painstaking, care.'***

871 F.2d at 155 (quoting *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1408 (D.C. Cir. 1988)) (emphasis added).[1] Respondents also cite to *Kilburn v. United States*, 938 F.2d 666 (6th Cir. 1991) for the proposition that factual findings should not be more closely scrutinized. *See* BIO pp. 11-12. Although *Kilburn* does state that the findings should not be more

[1] The *Slade* court also reiterates its disfavor with "a district court's wholesale adoption of a party's proposed findings." 871 F.2d at 155 ("Notwithstanding the daunting caseload that our colleagues on the district court bear, our judicial system entrusts to them the fair and independent evaluation of the evidence in the first instance. That task can be compromised by even the appearance of uncritical acceptance of an advocate's proposed findings.")

closely scrutinized and are subject to the clearly erroneous standard, the *Kilburn* court goes on to say: "At the same time, the court, characterizing its mission as a 'Herculean task,' noted that '***the function of appellate review . . . in a case of this sort is substantially different (and more difficult) than what is normally required***.'" 938 F.2d at 673 (quoting *Berger*, 843 F.2d at 1408) (emphasis added). *Berger*, which was quoted in both *Slade* and *Kilburn*, details further:

> ***The "special care" we devote to reviewing "findings [that] were not initially penned by the district judge,"*** *Valentino v. United States Postal Serv.*, 674 F.2d 56, 60 n. 2 (D.C. Cir. 1982), ***differs from that which we ordinarily display,*** not in the test that we apply to a particular finding of fact—individual findings will only be reversed if *clearly* erroneous—but in the volume of evidence we sift in judging the correctness of such findings and in the number of discrete findings we review without benefit of express, thoroughly supported allegations of error by the opposing party. Although we undertake with great reluctance what in this case has proven a Herculean task, the District Court's inexplicable failure to reason independently and to address the defendants' leading arguments leave us no choice.

Berger, 843 F.2d at 1408 (bold emphasis added).

Other courts of appeals also approach the situation in a more critical manner. The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") even admits that their "circuit takes an even more critical approach." *California Offset Printers, Inc. v. Hampton Intern. Communications, Inc.*, 95 F.3d 1156 (9th Cir. 1996).[2] The Ninth Circuit has "stated that

[2] Before settling on its "more critical approach", the *California* court analyzes some of the differences between the circuit courts of appeals at the time:

> Many circuits take a middle-level approach to review of adopted findings which is consistent with the Supreme Court's application with expressed reservations. The Fifth, Third, and Eleventh Circuits, for instance, take into account the district court's lack of personal attention to factual findings in applying the clearly erroneous rule. *Amstar Corp v. Domino's Pizza*, 615 F.2d 252, 258 (5th Cir.), cert. denied, 449 U.S. 899 (1980); *Schlensky v. Dorsey*, 574 F.2d 131, 149 (3d Cir. 1978); *See generally, Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting former 5th Circuit precedent).

95 F.3d at 1156.

'[w]holesale adoption of the prevailing party's proposed findings' calls for ***'more careful scrutiny'*** due to 'the possibility that there was insufficient independent evaluation of the evidence.'" *Id.* (quoting *Photo Elecs. Corp. v. England*, 581 F.2d 772, 776–77 (9th Cir. 1978)) (emphasis added). The United States Court of Appeals for the Federal Circuit also agrees that the adoption of findings verbatim may result in ***"close scrutiny"*** but the clear error standard of review is applied. *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1359 (Fed. Cir. 2006) (emphasis added); *see also Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 313 (Fed. Cir. 1985) ("adoption of proposed findings verbatim may increase wariness on review"). Likewise, in the United States Court of Appeals for the Seventh Circuit, "when a district court adopts a party's proposed findings of fact, '***we examine the findings especially critically*** when deciding whether they are clearly erroneous.'" *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (7th Cir. 1985) (quoting *Coates v. Johnson & Johnson*, 756 F.2d 524, 533 n. 7 (7th Cir. 1985)) (emphasis added).

On the contrary, as Respondents pointed out, the United States Court of Appeals for the Third Circuit has "squarely held that a district court's findings, when adopted verbatim from a party's proposed findings, do not demand more stringent scrutiny on appeal." *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1215 (3d Cir. 1993).[3] Therefore, even if a court of appeals is not going so far as to review the adopted findings *de novo*, due to some courts of appeals reviewing with more scrutiny, a conflict between the circuit courts of appeals exists. Further, even if the Court only performed a cursory review of ***solely*** the cases cited by Respondents in its BIO, a conflict on this important matter still appears to be present because *Slade* and *Kilburn*

[3] The facts of Mr. King's case are arguably worse than *Lansford* because in the instant case, the United States District Court for the Middle District of Florida ("District Court") adopted nearly verbatim the opposing advocate's ***brief*** and not just proposed findings as occurred in *Lansford*, 4 F.3d at 1215.

discuss that their respective courts of appeals must perform their review differently and with more care. Accordingly, the Court should restore due process and impartiality by prohibiting the highly admonished practice of wholesale adoption and nearly verbatim adoption of a party's proposed findings or brief as the court's order.

II. In light of the District Court's nearly verbatim replication of the Respondents' Response, Respondents' attempt to minimize the injustice suffered by Mr. King is inappropriate.

First and foremost, Respondents continuously refer to the partial actions of the District Court as merely copying "large portions" of the Respondents' Response to Petition for Writ of Habeas Corpus and Memorandum of Law ("Response"). *See* BIO pp. i, 5, 7, 8, 17. Mr. King submits that Respondents' characterization does not accurately describe the biased injustice that has occurred in the instant case. Mr. King invites the Court to compare the Respondents' Response with the District Court's Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Order") to see for itself that the Order is almost entirely a verbatim reproduction of the Respondents' Response, complete with the same tone and advocacy exhibited by the Respondents. *Compare* Appendix B, *with* Appendix C. However, at the very least, Respondents do concede that the District Court's "order reproduced large portions of the State's response verbatim." *See* BIO p. 8; *see also* BIO p. 17.

Second, Respondents argue that no misconduct occurred. *See* BIO pp. 7-8. Although Mr. King does not ***definitively*** have knowledge that no misconduct occurred on the Respondents' behalf or whether the Respondents were asked to ghost write the Order, at this time, there has been no evidence brought to light of those acts occurring. Nonetheless, Mr. King is taking the facts at face value: that the Respondents filed their Response and then the District Court copied it as its Order instead of independently and impartially reviewing and deciding the issues on its own.

Regardless of whether misconduct occurred, the result remains the same. Mr. King was denied due process, which in his case is literally a matter of life or death.

Respondents also attempt to improperly inflate the importance of which grounds from the petition for a writ of habeas corpus under 28 U.S.C. § 2254 were appealed to both this Court and the Eleventh Circuit. *See* BIO pp.13-16. However, if the Court grants a writ of certiorari regarding the violation of Mr. King's due process rights under the Constitution and remands his case, he would finally receive the impartial, independent review that he is entitled to on all of the grounds he raised. Therefore, even if Mr. King had appealed all of his other grounds, the remaining grounds would likely become moot because each would be adjudicated in an impartial and unbiased manner upon remand.

Further, Respondents argue that Mr. King's case would not be an ideal vehicle to prohibit the lower courts from adopting a party's brief nearly verbatim as its order due to the deference owed to the state court ruling under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* BIO p. 13; *see also* 28 U.S.C. § 2254. However, this point is inconsequential because Mr. King argued in his petition for a writ of habeas corpus under 28 U.S.C. § 2254 that the state court's decision "involved an unreasonable application of, clearly established Federal law" and was also "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Therefore, if the Court decided to remand Mr. King's case and the lower court found that either of those circumstances were satisfied, the AEDPA deference would not be applicable. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."); *see also Miller-*

El v. Cockrell, 537 U.S. 322, 340 (2003) (the Court held in another capital case that "deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.").

III. Mr. King's case is distinguishable from cases cited by the Respondents.

Respondents claim that in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) the Court rejected subjecting a ruling where the judge adopts proposed findings verbatim to more stringent appellate review. *See* BIO pp. 9, 11. However, *Anderson* only states: "Nonetheless, our previous discussions of the subject ***suggest*** 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." *Id*. at 572 (emphasis added). Further, Respondents fail to acknowledge that Mr. King's case is distinguishable from *Anderson* because the circumstances are different. The *Anderson* Court noted that

> the District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party. The 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. ***Under these circumstances***, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules.

Id. at 572-73 (emphasis added). Conversely, the District Court's Order in Mr. King's case does contain uncritically accepted findings that the District Court did not provide the framework for. Mr. King was also not provided a meaningful opportunity to respond at length. The District Court did not issue any preliminary memorandum or make any essential findings in advance; therefore, Mr. King was unaware that the District Court was going to adopt Respondents' Response as its order. Mr. King's Reply to Respondents' Response to his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Reply") cannot be regarded as a significant opportunity to respond because the District Court's 91-page Order was issued only five days after the Reply was filed. As the Order was a nearly verbatim reproduction of the Respondents' Response brief, clearly the District Court failed to give Mr. King's Reply any meaningful consideration. Notably, the findings the District Court ultimately issued in the Order in the instant case ***do not*** "vary considerably in organization and content from those submitted by" the Respondents in its Response brief. *Anderson*, 470 U.S. at 572-73. Mr. King respectfully submits that under the circumstances that occurred in his case, a different result from *Anderson* should follow.

In addition, Respondents cite to *In re Doe*, 640 F.3d 869 (8th Cir. 2011) to argue that no judicial misconduct occurred in Mr. King's case. *See* BIO pp. 7-8. *Doe* is distinguishable from Mr. King's case for a multitude of reasons. *Doe* was not a petition for a writ of habeas corpus under 28 U.S.C. § 2254, as it was a case related to a "judicial complaint filed by a civil litigant" regarding the dismissal of a civil lawsuit. *In re Doe*, 640 F.3d at 871. Also, *Doe* was decided by the Judicial Counsel of the Eighth Circuit, ***not*** the Eighth Circuit Court of Appeals. *Id.* In *Doe*, there were unfounded allegations of an improper relationship and conflict of interest between the district judge's law clerk and the defendant's law firm, where the complainant asserted that the relationship should have been disclosed and the judge should have recused himself. *Id*. Notably,

Doe even stated that the "complainant's proper remedy is to seek relief from the Eighth Circuit Court of Appeals or the Supreme Court of the United States." *Id*. Allegations of plagiarism and conspiracy were also present in *Doe*. *Id*. at 872-73. However, unlike the Order in the instant case which contained the tone of Respondents' advocacy, *Doe* specifically noted that the "dismissal order here [was] detailed, careful, thorough, and balanced in tone." *Id*. at 873. In addition, only 55-65% of the brief in *Doe* was alleged to be plagiarized, which is significantly less than the amount of reproduction that occurred in the Order in Mr. King's case. *Id*. at 872. Accordingly, whether the Judicial Counsel of the Eighth Circuit thought the less severe acts present in *Doe* constituted judicial misconduct is inapposite to whether Mr. King was deprived of due process and fair and impartial review of his case.

CONCLUSION

Mr. King is a capital defendant who has been deprived of his constitutional rights to due process and to a fundamentally fair and impartial tribunal. The compelling question presented by Mr. King should be settled by the Court in order to prevent a miscarriage of justice. For all of these reasons above, along with the reasons detailed in Mr. King's petition, 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,

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July 21, 2020
Dated