NO. 14-8035
IN THE UNITED STATES SUPREME COURT

October 2014 Term

RICHARD GERALD JORDAN, *Petitioner*

versus

MARSHALL L. FISHER, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL

MARVIN L. WHITE
SPECIAL ASSISTANT ATTORNEY GENERAL
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CAPITAL CASE

QUESTION PRESENTED

I. IS A COURT OF APPEALS REQUIRED TO GRANT A CERTIFICATE OF APPEALABILITY ANY TIME THERE IS A DISSENT FROM THE DENIAL OF THE CERTIFICATE BY A MEMBER OF THE PANEL CONSIDERING THE ISSUE.

II. THE COURT BELOW DID NOT ERR IN APPLYING ITS OWN PRECEDENT TO THE PRESUMPTIVE VINDICTIVENESS QUESTION, AND DID NOT CREATE A CONFLICT OF THE CIRCUITS, THEREFORE, CERTIORARI SHOULD BE DENIED.

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BRIEF IN OPPOSITION

The respondent, Marshall L. Fisher, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied in this case.

OPINIONS BELOW

The opinion for the Fifth Circuit denying petitioner's certificate of appealability is published as *Jordan v. Epps*, 756 F.3d 395 (5th Cir. 2014), and is attached to the petition as Appendix A. The orders denying the petition for rehearing and rehearing en banc are attached to the petition as Appendix C. The decision of the United States District Court for the Southern District of Mississippi denying habeas corpus relief is published as *Jordan v.*

Epps, 740 Fed. Supp. 2d 802 (S.D.Miss. 2010). This opinion is attached to the petition as Appendix B. The decision of the Mississippi Supreme Court denying post-conviction relief is published as *Jordan v. State,* 912 So.2d 800 (Miss. 2005), and is attached to the petition as Appendix F. The decision of the Mississippi Supreme Court affirming the sentence of death is published as *Jordan v. State*, 786 So.2d 987 (Miss. 2001). This opinion is attached to the petition as Appendix G. The Mississippi Supreme Court's order vacating the life without parole sentence is attached to the petition as Appendix H.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court, pursuant to the authority of 28 U.S.C.A. § 1254. He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the United States Constitution, Amendment Fourteen and 28 U.S.C. § 2253 (1) in this case.

STATEMENT OF THE CASE

A. Statement of Facts

The facts of this kidnapping murder have been recounted by the Mississippi Supreme Court on three occasions and the district court twice and this Court once. The facts as reflected by the transcript of this case show that on January 10, 1976, Jordan left Baton Rouge, Louisiana, after obtaining a 38-caliber revolver. He traveled to Gulfport, Mississippi, and got a room the Twin Star Motel where he registered as "Jack Wilson." Putting his plan

in to operation, Jordan called Gulf National Bank and expressed a desire to speak to the commercial loan officer. He was referred to Mr. Marter. Jordan then looked in the local telephone directory and found only one listing of the name "Marter." After obtaining the Marter address from the directory, Jordan drove by the Marter residence noticing several cars parked in the driveway. After all but one of the cars was driven away, Jordan dialed the Marter residence telephone number and Mrs. Marter answered.

Then, dressed in a sport coat, tie and knit pants, and carrying a manilla folder, Jordan went to the Marter residence. He rang the doorbell and was greeted by Mrs. Marter whom he told that his electrical company had received information of defective circuit breakers in the area which he was investigating. Mrs. Marter admitted him inside, whereupon he kidnapped Mrs. Marter at gunpoint and took her away, leaving her three-year-old son asleep in the house. At his command, she drove him into a remote wooded area of the DeSoto National Forest. He ordered her out of the car. Jordan told Mrs. Marter she would be released when he obtained some money from her husband. Jordan then shot her in the back of the head, killing her. Jordan then went to a telephone and called Mr. Marter at the bank, told him that "[w]e have your wife . . .", demanded $25,000, for her return and gave instructions where to deliver the money. Marter was to drop the money on the side of Highway 49 where he saw a coat lying beside the road. Marter quickly obtained the money, but was unable to deliver the money because Jordan, fearing Marter was being followed, did not place a coat by the roadside, which was to be the signal where to leave the money.

Before arranging a second delivery, Jordan threw the murder weapon into the Big Biloxi River. Mr. Marter contacted the authorities, FBI agents recorded the serial numbers of the cash and made microfilm copies. Jordan again contacted Mr. Marter by telephone about 9:00 a.m. on January 13. Jordan assured Marter that his wife was all right, and demanded that Marter drop the money on Interstate Highway 10. Marter proceeded as Jordan directed; this time he found the coat and dropped the money on it. Two officers, Deputy Sheriff Larkin Smith and FBI Agent Shepherd, having been made aware of the new delivery point, positioned themselves near the scene of the drop and saw Jordan place a coat there. Soon they saw him pick up the money, after which they gave chase at high speed. During the chase, Jordan rammed his car into the officers car, forcing them off the road. The officers shot at Jordan as he fled in his car. Jordan's car was damaged in the ramming episode the damage to his car caused the bent fender of his car to come into contact with the tire. Because the car could not be steered, Jordan abandoned his vehicle at a shopping center, hid the money in some nearby woods, and then went to another shopping center. There he purchased a red jump-suit which he donned before leaving the store. He got a taxi at the shopping center and instructed the driver to take him to the Twin Star Motel. Not knowing that Jordan was the man for whom a large search was under way, the taxi driver told Jordan that roadblocks were up and that the officers were looking for someone. On the way to the motel, the taxi was stopped and an officer identified Jordan from a picture obtained by the FBI. The officer arrested Jordan and turned him over to the FBI. On that same afternoon,

January 13, 1976, Mrs. Marter's body was found a remote wooded area of Harrison County. The next day a diver from the Gulfport Fire Department retrieved the murder weapon from the river. *See Jordan v. State*, 786 So.2d 987, ¶¶ 1-7 (Miss. 2001). Additional factual recitations are found in *Jordan v. State*, 365 So.2d 1198, 1199-1200 (Miss. 1978); *Jordan v. State*, 464 So.2d 475, 477-78 (Miss. 1985); and *Jordan v. Watkins*, 681 F.2d 1067, 1069 (5th Cir. 1982); *Jordan v. Epps*, 740 F.Supp.2d 802, 808-09 (S.D.Miss. 2010); and *Jordan v. Epps*, 756 F.3d 395, 399 (5th Cir. 2014).

B. Procedural History

Jordan was originally convicted and automatically sentenced to death in a single proceeding for the January 13, 1976, kidnapping and murder of Edwina Marter in the Circuit Court of Jackson County, Mississippi on July, 1976.[1] Within the time for the granting of a motion for a new trial, the Mississippi Supreme Court, following the dictates of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), held in *Jackson v. State*, 337 So.2d 1242 (Miss. 1976), that Mississippi's statute requiring automatic imposition of the death penalty on a finding a defendant guilty of capital murder was unconstitutional. The Court further judicially construed the Mississippi statute as constitutional by creating a bifurcated procedure requiring that issue of sentence be determined separately from the issue of guilt. *Id.* Following the dictates of *Jackson*, the trial court granted petitioner's motion for a new trial. Jordan was again put to trial under the judicially bifurcated trial procedures. The

[1]On motion of the defendant venue had been changed to Jackson County, Mississippi from Harrison County, Mississippi.

jury again convicted Jordan of capital murder and sentenced him to death in a separate proceeding on March 2, 1977. The Mississippi Supreme Court affirmed the conviction and sentence on direct appeal and rehearing was denied. *Jordan v. State*, 365 So.2d 1198 (Miss. 1979), *cert. denied, Jordan v. Mississippi*, 444 U.S. 885 (1979).

Jordan then filed his first federal habeas corpus petition on January 3, 1980, with the United States District for the Southern District of Mississippi. Those proceedings were stayed pending exhaustion of all claims in the state court. After receiving a stay Jordan filed a motion for post-conviction relief with the state supreme court. This application for leave to file a petition for writ of error coram nobis was denied. *In re Jordan*, 390 So.2d 584 (Miss. 1980).

After the denial of state post-conviction relief the federal district court proceeded with the consideration of Jordan's first habeas petition. This first habeas petition was denied on March 19, 1981, by the district court in an unpublished opinion. *Jordan v. Watkins*, No. S80-0234(C). On appeal, the Fifth Circuit affirmed in part, reversed in part, and in doing so it affirmed the conviction of capital murder and vacated the sentence of death, and granted the writ as to the sentence phase of the trial. *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.), *reh. and reh. en banc denied sub nom, Jordan v. Thigpen*, 688 F.2d 396 (5th 1982).

Thereafter, a new sentencing hearing was conducted in state court and a sentence of death again imposed by the jury on April 29, 1983. Jordan took his automatic appeal of the sentence to the Mississippi Supreme Court which once again affirmed the sentence of death

by the Court. *Jordan v. State*, 464 So.2d 475 (Miss. 1985).

Jordan filed a petition for writ of certiorari from the affirmance of the reimposition of the sentence of death with the state court. This Court granted the petition for writ of certiorari on May 5, 1986, vacated the death sentence and remanded the case to this Court for reconsideration in light of *Skipper v. South Carolina*, 476 U.S. 1 (1986). *See Jordan v. Mississippi*, 476 U.S. 1101 (1986).

While the state court was considering the case on remand, the petitioner filed a second state post-conviction petition again challenging his original conviction on the basis that his confession had been improperly admitted in the guilt phase of the trial. The state court held that the question was barred from relitigation. *Jordan v. State*, 518 So.2d 1186, 1189 (Miss. 1987). In addition, the Court remanded the case for retrial of the sentence phase based on the *Skipper* error. Jordan filed another petition for writ of certiorari with this Court challenging the ruling of the Mississippi Supreme Court holding that the resolution of the confession was *res judicata*. Certiorari was denied on October 3, 1988. *Jordan v. Mississippi*, 488 U.S. 818 (1988).

On June 12, 1989, Jordan filed a successive petition for writ of habeas corpus once again challenging the admission of his confession with the United States District Court for the Southern District of Mississippi. This petition for writ of habeas corpus was denied by the district court on September 24, 1990, in an unpublished opinion. *Jordan v. Black*, No. S89-0542(G). The district court denied Jordan's motion for a certificate of probable cause

to appeal on October 15, 1990. Jordan then requested that a CPC be granted by the Fifth Circuit. *See Jordan v. Black*, No. 90-1866. On March 22, 1991, this Court granted Jordan's motion for CPC. Briefs were filed and set for oral argument. Prior to oral argument in the Fifth Circuit, Jordan entered into a plea agreement waiving his right to seek parole or further litigate his case in exchange for the State not seeking the death penalty on resentencing. On December 2, 1991, Jordan was sentenced to life imprisonment without parole pursuant to the terms of the plea agreement. On November 29, 1991, Jordan filed a motion in the Fifth Circuit to dismiss his appeal of the case. This voluntarily motion to dismiss the appeal was granted by the Fifth Circuit in an unpublished order on December 2, 1991.

On April 26, 1994, Jordan filed a motion for post-conviction relief with the Circuit Court of Harrison County, Mississippi, challenging his life without parole sentence and asking that it be corrected or amended to a sentence of life with parole citing the state court's decision in *Lanier v. State*, 635 So.2d 813 (Miss. 1994), as authority for granting relief. The circuit court conducted a hearing on the motion and denied relief on April 5, 1995. Jordan then timely appealed the denial of relief to the Mississippi Supreme Court. On July 17, 1997, the Mississippi Supreme Court reversed the circuit court and vacated the life without parole sentence imposed pursuant to the plea agreement as against public policy on the precedent found in *Patterson v. State*, 660 So.2d 966 (Miss. 1995) and *Lanier v. State*, 635 So.2d 813 (Miss. 1994). *See* Pet. Appendix G. The state court then ordered a new sentencing trial be conducted in which Jordan could again face the death penalty. The

resentencing hearing was conducted on April 20-24, 1998, and Jordan was again sentenced to death. On April 24, 1998, the jury returned a sentence of death in proper form, as follows:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1.) That the defendant actually killed Edwina Marter.
>
> Next, We, the jury, unanimously find that the aggravating circumstances of:
>
> 1.) Richard Jordan committed the Capital Murder while engaged in the crime of kidnapping Edwina Marter
>
> 2.) Richard Jordan committed the Capital Murder for pecuniary gain.
>
> 3.) Richard Jordan committed a Capital Offense which was especially heinous, atrocious & cruel & whether the murder was conscienceless & pitiless. In support of this circumstance the State claims that Edwina Marter was murdered in execution style & that she was subjected to extreme mental torture caused by her abduction from the home wherein she was forced to abandon her unattended three year old child & removed to a wooded area at which time she was shot in the back of the head by Jordan.
>
> Exist beyond a reasonable doubt & are sufficient to us to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the defendant should suffer death.
>
> C.P. at 338-39.

The circuit court set Jordan's execution date for May 26, 1998. That execution date was stayed pending his automatic appeal to the Mississippi Supreme Court.

In his direct appeal Jordan raised thirty-three claims of error. On April 26, 2001, the

state supreme court affirmed the sentence of death in a written opinion. A timely petition for rehearing was filed and later denied on June 28, 2001. *See Jordan v. State*, 786 So.2d 987 (Miss. 2001). A petition for writ of certiorari was filed which contained three questions, they were:

> I. Did the Mississippi Supreme Court improperly extend the rule of *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989), to a case in which the defendant offered to forgo a new sentencing hearing and accept a negotiated sentence after securing the reversal of the same sentence which had been illegally imposed upon an earlier, negotiated guilty plea but his offer was rejected by the prosecutor, who vindictively sought a great sentence at resentencing despite the circumstances that (1) the resentencing hearing was necessitated by the prosecutor's intransigence, not by the defendant's election, and (2) no evidence was presented, nor any reason urged, for the greater sentence that had not been available to the same prosecutor at the time he agreed to the initial, lower sentence, except that the defendant had appealed and invalidated the initial, lower sentence?
>
> II. Does the U.S. Constitution permit the collateral estoppel doctrine to be applied against a criminal defendant?
>
> III. May a State prevent a defendant at a capital resentencing hearing from defending himself with respect to a statutory aggravating circumstance which was found by the jury at the guilt-innocence phase of the previous trial but which the prosecution is required under state law to reprove at the resentence hearing?
>
> Petition at I.

On January 2, 2002, this Court denied certiorari. *See Jordan v. Mississippi*, 534 U.S. 1085 (2002).

Jordan then filed an application for leave to file a motion for post-conviction relief in the trial court with the Mississippi Supreme Court , raising twenty-eight claims for relief

challenging his sentence of death. Petitioner later amended this petition for post-conviction relief adding two additional claims. On March 10, 2005, the Mississippi Supreme Court denied post-conviction relief. Petitioner filed a motion for rehearing which was later denied on June 2, 2005. *See Jordan v. State*, 912 So.2d 800 (Miss. 2005). No petition for writ of certiorari was filed with this Court following the denial of state post-conviction relief.

On May 24, 2005, petitioner filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi. *See* Dkt# 1. On August 30, 2010, the district court issued a memorandum opinion denying habeas corpus relief and a separate judgment. *See* Dkt# 41; 42. The district court also entered an order denying a COA on all claims. Dkt# 43. On September 27, 2010, petitioner then filed a motion to alter or amend judgment and a motion for reconsideration of the denial of COA. Dkt# 44. On September 30, 2010, the district court denied the motion to alter or amend and the motion to reconsider the denial of COA. On October 27, 2010, petitioner filed a timely notice of appeal.

On February 3, 2011, petitioner filed a motion asking the Fifth Circuit to grant COA on three issues:

I. Petitioner Was Denied His Rights Guaranteed By The Eighth And Fourteenth Amendments As A Result Of Prosecutorial Vindictiveness And/Or The Trial Court's Refusal To Sentence Petitioner To Life Imprisonment Without Possibility Of Parole.

II. Petitioner Was Denied The Effective Assistance Of Counsel Due To Counsel's Failure To Investigate And Rebut The State's Theory Of An Execution-Style Slaying And Blood Spatter Testimony.

III. Petitioner Was Denied The Effective Assistance Of Counsel When Trial Counsel Failed To Ensure That Petitioner Received A Reliable And Adequate Mental Health Evaluation.

Application for COA at 2.

The respondent filed its response on April 15, 2011. On June 25, 2014, the Fifth Circuit entered an opinion denying the requested COA with a written opinion. *See Jordan v. Epps*, 756 F.3d 395 (5th Cir 2014). Petitioner filed a petition for rehearing and a petition for rehearing en banc. These petitions were denied on October 20, 2014.

Petitioner has now filed a petition for writ of certiorari with this Court requesting that a petition for writ of certiorari be issued to the court below.

REASONS FOR DENYING THE WRIT

There is no precedent of this Court holding that when there is a dissent on a panel of a court of appeals considering an application for certificate of appealability that a that court is required to grant the requested certificate of appealability. Therefore, the court below was not required to grant a certificate of appealability when one member of the panel dissented from the denial of the certificate of appealability. The discussion of the merits of the issue in question was not a decision on the merits of the claim as most of that discussion was addressing the opinion of the dissent.

There is no conflict of the circuits present in this case. Petitioner's reliance on a procedural decision of another circuit granting an evidentiary hearing in a 1988 case is not precedent that the court below was bound to follow. Following that decision would not have

granted petitioner relief from his death sentence as he asserts.

ARGUMENT

I. IS A COURT OF APPEALS REQUIRED TO GRANT A CERTIFICATE OF APPEALABILITY ANY TIME THERE IS A DISSENT FROM THE DENIAL OF THE CERTIFICATE BY A MEMBER OF THE PANEL CONSIDERING THE ISSUE.

Petitioner contends that because one member of the three judge panel that considered his case in the court below dissented from the denial of a certificate of appealability (COA) then the court was required to grant a certificate of appealability on that issue.

First, in order to obtain a COA a petitioner must meet the requirement of 28 U.S.C. § 2253(c) that a COA may issue only upon the "substantial showing of the denial of a constitutional right." In *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), the Court held:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.
>
> 529 U.S. at 484.

The district court decided this issue on the merits under the parameters of 28 U.S.C. 2254 (d) in this case. The Mississippi Supreme Court also decided this issue on the merits.

Later in *Tennard v. Dretke*, 542 U.S. 274 (2004), this Court further held:

> A COA should issue if the applicant has "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which we have interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims

> debatable or wrong." *Slack v. McDaniel*, 529 U.S., at 484, 120 S.Ct. 1595; *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) ("Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further"'"). *The petitioner's arguments ultimately must be assessed under the deferential standard required by 28 U.S.C. § 2254(d)(1): Relief may not be granted unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.*"
>
> 542 U.S. at 282. [Emphasis added.]

Petitioner relies on *Tennard* as authority for his position. However, petitioner's claim that the panel majority narrowly relied on circuit precedent which overlooked precedent of this Court. However, that is not the case here. Petitioner instead relies on a 1988 case from the Ninth Circuit as the precedent that the Fifth Circuit should have followed. He fails to recognize that in order to be found unreasonable a state court decision must be a contrary or unreasonable application of the precedent of this Court, not that of another circuit. *See Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 1399 (2011); *Greene v. Fisher*, ___ U.S. ___, 132 S.Ct. 38, 44 (2011); *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). Therefore, the precedent of the Ninth Circuit is not precedent that the Fifth Circuit had to follow in reaching its opinion.

Tennard was an application of the decision found in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) where the Court held:

> A COA will issue only if the requirements of § 2253 have been satisfied. "*The COA statute establishes procedural rules and requires a*

threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S., at 482, 120 S.Ct. 1595; *Hohn v. United States*, 524 U.S. 236, 248, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). As the Court of Appeals observed in this case, § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack, supra*, at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot, supra*, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to 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. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot, supra*, at 893, n. 4, 103 S.Ct. 3383.

Our holding should not be misconstrued as directing that a COA always must issue. Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas

corpus to state prisoners. *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("'AEDPA's purpose [is] to further the principles of comity, finality, and federalism'" (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000))); *Williams v. Taylor*, 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion of O'CONNOR, J.). The concept of a threshold, or gateway, test was not the innovation of AEDPA. Congress established a threshold prerequisite to appealability in 1908, in large part because it was "concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process ...." *Barefoot, supra*, at 892, n. 3, 103 S.Ct. 3383. By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. *It follows that issuance of a COA must not be pro forma or a matter of course.*

A prisoner seeking a COA must prove " 'something more than the absence of frivolity' " or the existence of mere "good faith" on his or her part. *Barefoot, supra*, at 893, 103 S.Ct. 3383. *We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus.* Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

537 U.S. at 336-338.

Respondents can find no precedent of this court which requires the result that petitioner contends is required. In *Miller-El*, this Court set forth the manner in which an application for COA should be considered by the court. The requirements of § 2253 must be satisfied. Quoting *Slack v. McDaniel*, 529 U.S. 473 (2000), the Court stated that a petitioner must show

"that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner *or that the issues presented were 'adequate to deserve encouragement to proceed further.*' 529 U.S. at 484." [Emphasis added.] *Miller-El*, 537 U.S. at 336. The Court went on to hold that a court must conduct an "overview of the claims and a general assessment of their merits." *Id.* That is what the panel majority in the Fifth Circuit did in this case. The panel majority did not make a determination that petitioner could not demonstrate an entitlement to relief. The petitioner had to show the court below that the district court's assessment of his claim was debatable or wrong. 537 U.S. at 338. At no point in the *Miller-El* opinion do we find any suggestion that the presence of a dissent at some point in the proceedings requires the issuance of a COA.

The court below set forth the proper standard under which an application for COA should be considered. The court held:

> "[A] prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller–El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (quoting 28 U.S.C. § 2253(c)(2)). "A petitioner satisfies this standard by demonstrating 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.*" *Id.* (citing *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)). "[A] petitioner need not show that an appeal will succeed in order to be entitled to a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Cardenas v. Dretke*, 405 F.3d 244, 248 (5th Cir.2005) (citations and internal quotation marks omitted).
>
> In making the COA determination, "we view the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Druery v. Thaler*, 647 F.3d 535, 538 (5th Cir.2011) (alteration and internal

quotation marks omitted). Under § 2254(d)(1), a state prisoner's application for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

"A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system. Where 28 U.S.C. § 2254 applies, our habeas jurisprudence embodies this deference." *Miller–El*, 537 U.S. at 340, 123 S.Ct. 1029. "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* (citing 28 U.S.C. § 2254(d)(2)).

756 F.3d at 405. [Emphasis added.]

Clearly, there is an alternative to the debatability requirement. That would be the issue presented is adequate to deserve encouragement to proceed further. Respondent would assert that the issue presented in this petition was not adequate to deserve encouragement to proceed further.

Petitioner cites to several opinions of other courts of appeals as authority for his position. Looking to the Seventh Circuit's opinion in *Jones v. Basinger*, 635 F.3d 1030, 1039-40 (7th Cir. 2011), we find that court relying on *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), to reach its conclusion. When we look to that portion of *Slack* we find nothing about dissenting opinions requiring the issuance of a COA.

Petitioner next cites to *Johnson v. Moore*, 164 F.3d 624 (Table), 1998 WL 708691 (4th Cir. 1998). There the court merely states that Johnson's request for a certificate of

appealability is granted because at least one judge on the panel concluded that Johnson "has made a substantial showing of the denial of a constitutional right." 1998 WL 708691, *1. There is no explanation that a COA is required to be granted when there is a dissent on the panel considering the grant of a COA. Other cases cited by petitioner deal with court rules and internal operating procedures regarding the grant of COA. Neither of these procedures are present in this case. Further, respondents would note that in *Jackson v. Dretke*, 450 F.3d 614 (5th Cir. 2006), *cert. denied*, 549 U.S. 1119 (2007), and *Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998), *cert. denied*, 525 U.S. 1091 (1999), the Fifth Circuit denied COA and certiorari was denied by this Court. There was a dissent by one of the panel members in each of those cases. Therefore, it appears the fact there is a dissent by a panel member does not require the grant of a COA.

Respondents would also point out that there were two justices of the Mississippi Supreme Court who dissented. First, Justice McRae, concurred in part and dissented in part without any written opinion. *See* 786 So.2d at 1031. Therefore, we have no indication as to the reason for his dissent. There is no indication that it was on the vindictiveness issue. Justice Banks, however, did dissent on the vindictiveness issue. However, his dissent was based on his view that the court did not have sufficient information to rule on the matter and concluded "I would remand this matter to the trial court for a hearing on the issue of prosecutorial vindictiveness." *See* 786 So.2d at 1032. Therefore, that dissent was not on the merits of the issue, but on what thought was a need for further factual development of the

claim. Hardly the type of dissent that would create a scenario which would cause the resolution of the state court to be debatable.

The district court and the panel majority were correct in denying the COA. After the petition for rehearing en banc was filed the Fifth Circuit requested further briefing on the question that is before this Court. Respondent would note that no judge of the Fifth Circuit, including the dissenting panel judge, requested that the full court be polled on rehearing en banc. *See* Appendix G.

Petitioner also contends that the panel majority, instead of making a quick assessment of the claim, actually proceeded to address the merits of the claim. Petitioner based this in part on his perception that the panel ignored the decision of the district court in reaching its conclusion to deny COA. This is not borne out by a reading of both. The district court discussed the case fully in its opinion. *See* 740 F.Supp.2d at 817-19. He contended that the panel majority went into further detail regarding the import of *Blackledge v. Perry*, 417 U.S. 21 (1974), than the district court. However the panel majority was addressing the dissent's interpretation of *Blackledge*. This does not represent a decision on the merits of the clam.

For the above and foregoing reasons the respondents would assert there is no absolute requirement that a certificate of appealability must issue where there is a dissent in the state court proceedings or in the federal proceedings seeking a certificate of appealability. The petition for certiorari should be denied.

II. THE COURT BELOW DID NOT ERR IN APPLYING ITS OWN PRECEDENT TO THE PRESUMPTIVE VINDICTIVENESS QUESTION, AND DID NOT CREATE A CONFLICT OF THE CIRCUITS, THEREFORE, CERTIORARI SHOULD BE DENIED.

Petitioner next contends there is a conflict of the circuits as to the resolution of the issue of prosecutorial vindictiveness in this case. He contends that this conflict was created when the panel majority failed to follow the opinion of the Ninth Circuit in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). The respondents would assert that there is no conflict with a reasoned opinion of the Ninth Circuit to resolve.

First, respondents would point out that habeas relief can only be granted if the decision of the state court resulted in an opinion the is contrary to or an unreasonable application of clearly established federal law as announced by the United States Supreme Court. *See* 28 U.S.C. 2254(d)(1); *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003); *Summers v. Dretke*, 431 F.3d 861, 868-69 (5th Cir. 2005). The state court resolution of a claim must "not only be erroneous, but objectively unreasonable" in order for habeas relief to be granted. *See Yarborough v. Alvarado*, 541 U.S.652 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Mitchell v. Esparza*, 540 U.S.12 (2003); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003); *Williams v. Taylor*, 529 U.S. 362, 409 (2000). *Adamson v. Ricketts* does not represent precedent from this Court and therefore is not controlling precedent in this case.

The respondents would point out that while the Ninth Circuit addressed the

prosecutorial vindictiveness claim at some length, it did not render a decision on the merits of the issue. The court remanded the issue for an evidentiary hearing before the district court. The court of appeals stated:

> Because we find that Adamson has made an initial showing to raise a presumption of vindictiveness that the State has not thus far rebutted, we hold that the district court erred in denying Adamson's request for an evidentiary hearing on the matter. We therefore reverse the district court and remand for such a hearing.[14]
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> 14. While the dissent fears that an evidentiary hearing would somehow allow Adamson to "escape" the reinstatement provisions and thus "render the agreement meaningless," such a hearing in no way compromises the integrity of Adamson's plea agreement, or plea agreements generally. *States remain free to enforce plea agreements via enforcement provisions authorizing the filing of increased charges, including death-eligible charges, following a defendant's breach.* What states may not do, and what appearances indicate was done in Adamson's case, however, is to pursue a sentence under the guise of plea enforcement when animated by improper motives.
>
> 865 F.2d at 1020. [Emphasis added.]

See 865 F.2d at 1044.

Adamson does not stand as a decision that must be reconciled with the precedent of the Fifth Circuit.[2] Further, *Adamson* was decided in a pre-AEDPA context and hardly falls into a decision that must be followed by the Fifth Circuit.

Respondent would assert that an evidentiary hearing is not available to a petitioner if his claims were reviewed on the merits, unless he meets the standards set forth in § 2254(d). *See Cullen v. Pinholster*, ——U.S. ——, 131 S.Ct. 1388, 1399, 179 L.Ed.2d 557 (2011). In

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[2]The major import of *Adamson* was that it declared the Arizona death penalty unconstitutional, a decision which was later reversed in *Walton v. Arizona*, 497 U.S. 639 (1990).

order to be entitled to an evidentiary hearing in federal court, a petitioner must demonstrate that he was denied a "full and fair hearing" in State court and persuade the Court that his allegations, if true, would warrant relief. *Id.* Petitioner's claim was reviewed on the merits by the state court therefore an evidentiary hearing is not available to petitioner.[3]

The Fifth Circuit's decision in *Deloney v Estelle*, 713 F.2d 1080 (5th Cir. 1983), is not in conflict with the procedural decision in *Adamson*. Petitioner contends that the dissent's reliance on the precedent of *Blackledge v. Perry*, 417 U.S. 21 (1974), requires en banc consideration. However, the dissent never mentions the decision in *Alabama v. Smith*, 490 U.S. 794 (1989), a case relied on by the state court in resolving this claim. *Smith* holds that a presumption of prosecutorial vindictiveness does not apply when a sentence imposed after trial is greater than that previously imposed after a guilty plea. Jordan's sentence was the same has it had been before the plea agreement, death. The fact that a death sentence was imposed again after he obtained the vacation of the plea agreement does not demonstrate

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[3]Respondent would also point out that the prosecutorial vindictiveness question was presented to this Court in the petition for writ of certiorari filed after the Mississippi Supreme Court affirmed this latest death sentence as Question 1 in that petition. That question read:

> I. Did the Mississippi Supreme Court improperly extend the rule of *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989), to a case in which the defendant offered to forgo a new sentencing hearing and accept a negotiated sentence after securing the reversal of the same sentence which had been illegally imposed upon an earlier, negotiated guilty plea but his offer was rejected by the prosecutor, who vindictively sought a great sentence at resentencing despite the circumstances that (1) the resentencing hearing was necessitated by the prosecutor's intransigence, not by the defendant's election, and (2) no evidence was presented, nor any reason urged, for the greater sentence that had not been available to the same prosecutor at the time he agreed to the initial, lower sentence, except that the defendant had appealed and invalidated the initial, lower sentence?

See Petition for Writ of Certiorari in *Jordan v. Mississippi*, No. 01-6421, *cert. denied*, 534 U.S. 1085, Jan. 7, 2002.

vindictiveness. Further, petitioner makes the unsupported assertion that the prosecutor's only motive in this case was one of vindictiveness. That assertion is not borne out by the record in this case.

There is no conflict to resolve with the decision of the Ninth Circuit, it was not a decision on the merits of the claim. The decision of the panel majority on this question is not contrary to the precedent of this Court. That being said respondent would assert that certiorari should be denied.

CONCLUSION

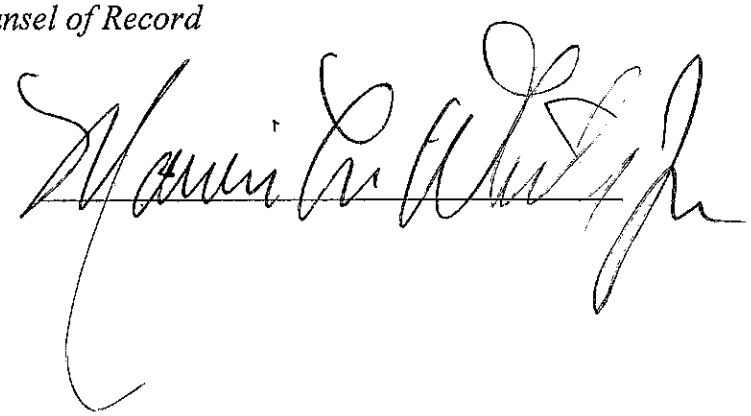
For the above and foregoing reasons respondent would assert that the decision of the court of appeals denying a certificate of appealability and thereby affirming the district court's finding that the decision of the Mississippi Supreme Court is neither contrary to or an unreasonable application of the clear precedent of this Court is not erroneous and therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL
Miss. Bar No. 7149
Counsel of Record

BY: 

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
swhit@ago.state.ms.us

CERTIFICATE

I, Marvin L. White, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above BRIEF IN OPPOSITION to the following:

Thomas C. Goldstein, Esquire
Tejinder Singh, Esquire
Goldstein & Russell, P.C.
7475 Wisconsin Ave., Suite 850
Bethesda, Maryland 29814

David P. Voisin, Esquire
P.O. Box 13984
Jackson, Mississippi 39236-3984

This the 18th day of March, 2015

MARVIN L. WHITE, JR.