No. 14-8035

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD GERALD JORDAN, ***Petitioner*****,**

v.

MARSHALL L. FISHER, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS AND JIM HOOD, ATTORNEY GENERAL, ***Respondent.***

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

REPLY BRIEF OF PETITIONER
CAPITAL CASE

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REPLY BRIEF OF PETITIONER

Respondent's statement of the case does not contest any of the following facts, which give rise to petitioner's claim of vindictiveness: after the lower courts repeatedly rejected petitioner's death sentence, petitioner and special prosecutor Joe Sam Owen (a private attorney) reached a plea agreement whereby petitioner would serve a sentence of life without parole. As part of that agreement, Owen acknowledged that petitioner had expressed remorse for his crime, and that petitioner had been a model inmate, assisting other prisoners as well as citizens and businesses outside the prison walls while maintaining a spotless disciplinary record. The Mississippi courts ruled that state law did not permit life-without-parole sentences. Petitioner therefore sought to have his sentence adjusted to life with parole, but the Mississippi Supreme Court instead voided the plea bargain altogether. When the legislature subsequently voted to permit life without parole—returning the parties to the position at which they entered the plea—petitioner sought to reinstate the bargain that Owen previously had accepted. But Owen refused—even though in the intervening period, petitioner's good behavior in prison only made the case for leniency stronger, and even though other death row inmates had obtained similar bargains. Owen indicated that he had refused to negotiate because of petitioner's previous attempt to adjust his sentence to conform to the law. Moreover, Owen admitted that seeking petitioner's death "had become a personal thing for me." PCR Ex. 41.

These facts give rise to a presumption of prosecutorial vindictiveness, and thus a due process violation, because this Court's cases clearly establish that a prosecutor may not seek greater penalties against a defendant because the defendant pursues his legal rights. *See Blackledge v. Perry*, 417 U.S. 21, 25-26 (1974); *United States v. Goodwin*, 457 U.S. 368, 372 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Yet both the state and federal postconviction courts denied petitioner an evidentiary hearing on his claims, and in both court systems, the appellate courts affirmed over strong dissents. Critically, a divided panel of the Fifth Circuit refused even to grant a certificate of appealability (and thus to receive briefing on the merits of petitioner's claim) only because it adopted a new rule—unique to that court and without any analogue in this Court's precedents—that when the punishment ultimately sought does not exceed the punishment initially sought, a claim of presumptive vindictiveness can never lie, whatever else happens during the course of the litigation.

Respondent does not dispute that in the Third, Fourth, and Seventh Circuits, petitioner would have received a certificate of appealability and thus the right to present his appeal, after full briefing, to a merits panel. Respondent also does not dispute that the rule the Fifth Circuit adopted in this case creates a per se bar to vindictiveness claims in capital cases. That rule creates an acknowledged conflict with courts that permit such claims to move forward—and contravenes this Court's precedents as well. For the reasons set forth below, respondent's efforts to minimize these conflicts fail, and this Court should grant certiorari to resolve them.

I. The Fifth Circuit Panel Majority's Refusal To Grant A Certificate of Appealability Conflicts With This Court's Precedents And The Procedures Of Other Circuits.

Under this Court's established precedent, a certificate of appealability should issue if "jurists of reason could disagree with the district court's resolution of his constitutional claims or . . . conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Petitioner pointed to a dissent from the Mississippi Supreme Court on direct appeal, a dissent from the Fifth Circuit panel opinion, and the acknowledgement by the panel majority of a conflict with an en banc decision from the Ninth Circuit, *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), as all demonstrating that his prosecutorial vindictiveness claim was at least debatable and that he was therefore entitled to a certificate of appealability.

Respondent's first argument in opposition is that the Fifth Circuit was not obligated to follow *Adamson*, and that relief under AEDPA is only available when a state court decision conflicts with Supreme Court precedent. BIO 14. This reflects a fundamental misunderstanding of petitioner's position. Petitioner did not, as respondent asserts, argue that the Fifth Circuit was bound to follow the Ninth Circuit's ruling in *Adamson*; obviously not. Instead, petitioner pointed out that *Adamson*'s application of *Blackledge v. Perry*, 417 U.S. 21 (1974), demonstrates the reasonable jurists can (and do) disagree about how *Blackledge* applies to the circumstances in this case. Respondent does not argue that the facts of *Adamson* are materially different from the facts here; nor does respondent dispute that

Adamson applied this Court's precedents, emphasizing *Blackledge*, to find a presumption of vindictiveness on those facts. *See* 865 F.2d at 1018. As this Court and other circuits recognize, a difference of opinion between courts of appeals is a compelling indicator that an issue is debatable. *See Wilson v. Sec'y, PA Dep't of Corrs.*, ___ F.3d ___, 2015 WL 1137437 at *5 (3rd Cir. Mar. 16, 2015) (granting certificate of appealability and citing *Lozada v. Deeds*, 498 U.S. 430, 432 (1991), where this Court granted a certificate because the district court's ruling was at odds with decision from another circuit); *Rashad v. Walsh*, 300 F.3d 27, 35 (1st Cir. 2002) ("[F]actually similar cases from the lower federal courts may inform such a determination, providing a valuable reference point when the relevant Supreme Court rule is broad and applies to a kaleidoscopic array of fact patterns."); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3rd Cir. 1999) ("[W]e do not believe federal courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was unreasonable . . . . [I]n certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent.").

Respondent argues next that the panel majority was not bound to issue a certificate of appealability because this Court has not expressly stated that the presence of a dissenting opinion requires a certificate of appealability. BIO 17-19. But this sidesteps the question that petitioner raised, which is whether the Fifth Circuit erred by refusing to grant a certificate of appealability despite the acknowledged debate among jurists about the merits of petitioner's vindictiveness

claim. That includes not only the dissenting panel opinion, but also the prior dissent in the state supreme court, and the acknowledged conflict with the Ninth Circuit in a factually indistinguishable case.

Under the case law and procedures applicable in other circuits, a certificate of appealability would have issued. For example, petitioner cited *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011), which held that "[w]hen a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." In this case, the merits of petitioner's constitutional claim divided the Mississippi Supreme Court, and so the Seventh Circuit would have issued a certificate of appealability. Respondent's only answer is to say that *Jones* cited this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Slack* never expressly stated that "dissenting opinions require[e] the issuance of a COA." BIO 18. Even if respondent is correct, that does not refute the existence of a clear circuit split. The most that respondent could hope to prove is that *Jones* is an improper extension of this Court's precedents—in which case certiorari would be warranted to correct the Seventh Circuit's error. Moreover, respondent's reading of *Slack* is extraordinarily wooden. There, the Court held that a certificate should issue if "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner." 529 U.S. at 484. When the dismissal of a petition results in a dissent, and the dissenting judge would permit the claim to proceed, then reasonable jurists *are debating* that very question. Respondent has not offered an alternate definition of "debate" or "debatable" that

would reconcile the Fifth Circuit's rule with this Court's precedents, and petitioner's research has not uncovered one.

Petitioner also cited the Third Circuit's rule requiring issuance of a certificate of appealability if one judge on a panel deems it appropriate, *see* Third Cir. R. 22.3; respondent's answer is merely to point out that those procedures are not "present in this case." BIO 19. That is precisely petitioner's point. It is the Fifth Circuit's extreme variance from this Court's precedents and the procedures followed in other circuits that call for this Court's intervention.[1]

Respondent argues next that the state court dissent "was not on the merits of the issue, but on what [the dissenting justice] thought was a need for further factual development of the claim." BIO 19-20. Respondent contends that the dissent was therefore too weak to render the state court decision "debatable." *Id*. 20. This argument misstates the law. The question is not whether a judge would have ruled outright for petitioner on the merits of his claim—without even holding a hearing—but instead whether a reasonable jurist would have resolved the petition "in a different manner" than the district court. *Slack*, 529 U.S. at 484. Thus, the fact that some reasonable jurists would have ordered a hearing instead of dismissing the claim is sufficient. Respondent's characterization of the dissent is also disingenuous. The dissenting justice quoted at length from this Court's decision in *Blackledge*, and

[1] In making this argument, respondent appears to conflate the standard for obtaining ultimate relief under AEDPA (showing a conflict with clearly established law under this Court's precedents) with the criteria for obtaining certiorari (showing that a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter).

found that a presumption of vindictiveness was appropriate; he then went on to state that:

> While there may be an explanation for the [prosecutor's] change in heart which meets the test necessary to avoid a conclusion that the prosecution was unconstitutional as vindictive, we are not favored with it because the trial court refused to conduct a hearing or otherwise require the prosecutor to explain his change of heart. In my view, this is error.

Pet. App. 223a-24a. That decision goes to the merits of petitioner's claim because it establishes that in the dissent's view, respondent has failed to rebut the presumption of vindictiveness.

Respondent argues that the court of appeals did not adjudicate the merits of petitioner's claim, but instead merely conducted the review necessary to determine whether a certificate of appealability should issue. Again, not so. In this case, the majority announced that under *Deloney v Estelle*, 713 F.2d 1080 (5th Cir. 1983), because "the original charges and the later charges were . . . the same," there could be no vindictiveness claim. Pet. App. 17a. The majority therefore established new law, holding for the first time that there can never be a presumption of vindictiveness in a capital case. To do so without first issuing a certificate of appealability and receiving the benefit of full merits briefing was error.

Finally, respondent points out that the Fifth Circuit denied rehearing. BIO 20. That only proves that the Fifth Circuit's rule is entrenched, and certiorari is necessary to bring uniformity to this area of the law.

II. Certiorari Should Be Granted to Resolve a Conflict As To Whether Prosecutorial Vindictiveness Claims Can Arise With Respect to a Sentence That Was Originally Authorized.

Respondent does not dispute the point just made—that the Fifth Circuit here established a new, uniquely harsh rule against presumptive vindictiveness claims in capital cases. That rule conflicts with the Ninth Circuit's holding in *Adamson*, which permitted a vindictiveness claim to go forward on essentially identical facts. That alone warrants certiorari. In advancing the contrary view, the brief in opposition ignores key aspects of the panel majority's opinion, mischaracterizes petitioner's arguments, and rests on a flawed legal basis.

First, respondent insists that "there is no conflict with a reasoned opinion of the Ninth Circuit to resolve." BIO at 21. The Fifth Circuit, however, expressly acknowledged a conflict, explaining that "[w]hile the Ninth Circuit may have taken a different approach to this question, we are bound by our own prior precedent on this issue." Pet. App. 19a n.5.

Respondent then repeats his argument that *Adamson* "does not represent precedent from this Court and therefore is not controlling precedent in this case." *Id.* As explained in Part I, *supra*, petitioner never claimed that *Adamson* was "controlling"—rather, he argued that the circuit conflict warrants review, and that *Adamson*'s application of this Court's vindictiveness precedents was correct, while the panel majority's was not. Moreover, the Petition included five pages of argument explaining why this Court's precedents, *Blackledge*, *Bordenkircher*, and *Goodwin*, foreclose the Fifth Circuit's rule. Pet. 20-25. The brief in opposition does

not bother responding to any of that. Indeed, it is telling that the brief in opposition never once attempts to defend the Fifth Circuit's rule as correct, or even reasonable.

Respondent also makes the unfounded assertion that the Ninth Circuit's *Adamson* opinion "was not a decision on the merits of the claim." BIO 24. But the court there found "merit . . . in [Adamson's] claim that the circumstances surrounding the State's decision to seek the death penalty raise a presumption of prosecutorial vindictiveness sufficient to require an evidentiary hearing on the matter." 865 F.2d at 1017. It further held that "[o]nce the presumption of vindictiveness is raised, the burden shifts to the prosecution to rebut it by presenting evidence of independent reasons or intervening circumstances which demonstrate that the prosecutor's decision was motivated by a legitimate purpose." *Id*. at 1019. And it noted that "[n]one of the arguments the State presents are sufficient to rebut the presumption of vindictiveness." *Id*. If that is not a ruling on the merits, then nothing is. Respondent's contrary argument appears to be rooted in the assumption that because *Adamson* remanded for an evidentiary hearing—and thus left open the possibility that, after the hearing, Adamson might still lose—it was not a decision in Adamson's favor. *See* BIO 22. But that does not matter for purposes of evaluating the circuit conflict created by the irreconcilable legal rules, or the merits of petitioner's own claim.[2]

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[2] Respondent asserts that because "[p]etitioner's claim was reviewed on the merits by the state court . . . an evidentiary hearing is not available to petitioner." BIO 23. That is incorrect. For a claim adjudicated on the merits in state court, AEDPA requires a habeas petitioner to show that the state court adjudication was contrary to or involved an unreasonable application of clearly established law.

Finally, respondent insinuates that that *Alabama v. Smith*, 490 U.S. 794 (1989), supports the decision in this case. BIO 23. Respondent greatly exaggerates the importance of *Smith*—which neither the majority nor the dissent below even cited.

In *Smith*, a judge imposed a greater sentence following a trial after a guilty plea had been vacated. This Court found that the circumstances of the case did not warrant a presumption of vindictiveness for two reasons, neither of which exists in petitioner's case. First, "[e]ven when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than after a trial . . . . [I]n addition, [t]he defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation." *Id*. at 801. Second, the Court cited its previous holdings that "[a] guilty plea may justify leniency," and that a prosecutor is permitted to offer a more lenient sentence in exchange for a guilty plea. *Id*. at 802-03.

In contrast to *Smith*, this case involves retaliation by special prosecutor Joe Sam Owen against petitioner for the exercise of a legal right. As the Mississippi Supreme Court found, there is no question about Owen's motive: he refused to deal

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Cullen v. Pinholster, 131 S. Ct. 1388, 1401 (2011) (discussing 28 U.S.C. § 2254(d)). If a petitioner satisfies § 2254(d), he may receive a hearing to prove his claims, provided that he did not fail[] to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). *See also Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring). In *Williams v. Taylor*, 529 U.S. 420, 436-37 (2000), this Court held that a prisoner fails to develop his claim when he does not exercise reasonable diligence, *i.e.*, when he does not "seek an evidentiary hearing in state court in the manner prescribed by state law." Here, petitioner has diligently sought to develop the evidence to support his vindictiveness claim, but was denied an evidentiary hearing by the state courts. Respondent has not argued otherwise.

with petitioner following the exercise of a legal right. Pet. App. 192a. Indeed, there was no new information available to Owen to justify a rejection of petitioner's offer to accept the life without parole sentence. Instead, the mitigating factors in petitioner's case were even stronger in 1998 than in 1991, when Owen stipulated to a number of such circumstances. Moreover, in contrast to Smith, who wanted to go to trial to gamble on a more favorable result, Jordan sought to enter the same deal that the Special Prosecutor found acceptable in 1991. Although the state court cited *Smith* to support its decision rejecting petitioner's claim, that was plainly unreasonable—which no doubt explains why the panel majority failed to mention it and instead turned to older circuit precedent.

Because the Fifth Circuit's application of prosecutorial vindictiveness claims is undeniably at odds with the Ninth Circuit's approach, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the Petition should be granted.

Respectfully submitted,

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