No. 14-_____

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

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

Petitioner entered into a plea agreement under which he would receive a sentence of life without possibility of parole. After the Mississippi Supreme Court held such agreements void because they were not authorized by state law, petitioner unsuccessfully requested that the plea be modified to life in prison with the possibility of parole.

The Mississippi legislature subsequently authorized sentences of life without possibility of parole. The prosecutor refused to enter into the prior plea, however. The basis for his refusal was that, when the original plea was deemed unlawful, petitioner had sought to modify the plea. Petitioner was sentenced to death.

A divided Mississippi Supreme Court rejected petitioner's claim of prosecutorial vindictiveness. On federal habeas, the Fifth Circuit acknowledged that the en banc Ninth Circuit had recognized such a claim in similar circumstances. But by a divided vote, a motions panel of the court refused to grant petitioner even a certificate of appealability. The majority reasoned that petitioner's sentence of death was always an available sentence in his case, not one later added by the prosecutor. In the Fifth Circuit's view, claims alleging a presumption of prosecutorial vindictiveness in sentencing are therefore never available in a capital case.

The Questions Presented are:

I. Is it error to deny a habeas petitioner a certificate of appealability in a case in which the state supreme court was divided and another federal court of appeals would recognize his claim?

II. Does the fact that the prosecutor did not expand the sentence to which the defendant was exposed prohibit a finding of prosecutorial vindictiveness?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Gerald Jordan respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion dismissing the habeas petition and denying a certificate of appealability is reported at 756 F.3d 395 and is attached as Appendix A. The District Court's opinion denying habeas corpus relief is reported at 740 F. Supp. 2d 802 and is attached as Appendix B. The Fifth Circuit's order denying rehearing is unpublished and is attached as Appendix C. The district court's order denying a motion for discovery and funding is unreported and is attached as Appendix D; its order denying a certificate of appealability is unreported and is attached as Appendix E. The opinion of the Mississippi Supreme Court denying postconviction relief is reported at 912 So.2d 800 and is attached as Appendix F; its opinion on petitioner's direct appeal is reported at 786 So.2d 987 and is attached as Appendix G; its order vacating petitioner's sentence of life without parole is unpublished and attached as Appendix H.

JURISDICTION

The Fifth Circuit issued its decision on June 25, 2014. Petitioner's timely Motion for Rehearing was denied on October 20, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

After being convicted and sentenced to death in 1976 in a unitary proceeding, petitioner was retried in 1977. The Fifth Circuit granted habeas corpus relief because the jury was given improper sentencing instructions. *Jordan v. Watkins*, 681 F.2d 1067, 1082, *rehearing denied sub. nom. Jordan v. Thigpen*, 688 F.2d 395 (5th Cir. 1982). After petitioner was resentenced to death in 1983, the Mississippi Supreme Court vacated his sentence because of the trial court's failure to allow evidence of his adaptability to prison. *Jordan v. State*, 518 So. 2d 1186 (Miss. 1987).

A. The Prosecutor Agrees To A Sentence Of Life Without Parole.

Petitioner was then prosecuted by Joe Sam Owen, serving as a Special Prosecutor. Owen had served as an Assistant District Attorney for petitioner's 1976

and 1977 trials. Although Owen had entered private practice, he was appointed as a Special Prosecutor at the request of the victim's family. T. 26; State Trial Exhibit 1.

Owen agreed to a plea bargain under which petitioner would receive a sentence of life imprisonment without the possibility of parole. Although no such sentence existed under Mississippi law, prosecutors had entered similar agreements with at least three other capital defendants. *See Lanier v. State*, 635 So. 2d 813 (Miss. 1994); *Stevenson v. State*, 674 So. 2d 501 (Miss. 1996); *Patterson v. State*, 660 So. 2d 966 (Miss. 1995).

Owen stipulated to a number of mitigating circumstances supporting the agreed-upon sentence, including:

> 1. That Richard Gerald Jordan has expressed sorrow for this crime in previous court testimony.
>
> * * *
>
> 5. That Richard Gerald Jordan has not had a discipline record problem in the jail/prison system for the past 15 years, 11 months.
>
> 6. That while in prison Richard Gerald Jordan has been creative and attempted to make significant contributions to society through his ideas for inventions to benefit businesses and society.
>
> 7. That while in prison Richard Gerald Jordan has assisted bank and bank security personnel in devising methods and approaches to prevent crimes against banking personnel and their families.
>
> 8. That members of the religious community have previously testified and are prepared to again testify to the remorse of Richard Gerald Jordan for his crime and to his commitment to personal improvement.
>
> 9. That while in prison Richard Gerald Jordan has been a positive force and assisted other prisoners.

PCR Ex. 34; R. 1094-95.

Owen also recognized petitioner's record of "eight (8) years of honorable service in the United States Army, from which he was honorably discharged and discharged partially disabled from injuries received in combat in Vietnam." *Id.* ¶ 2.

Pursuant to the plea agreement, petitioner was sentenced to life without parole.

B. The Mississippi Supreme Court Holds That Life Without Parole Sentences Are Unavailable, And Therefore Voids Petitioner's Sentence, But The Legislature Amends The Sentencing Statute To Permit It.

Not long after petitioner was sentenced, the Mississippi Supreme Court held that such pleas were "void and unenforceable on public policy grounds." *Lanier v. State*, 635 So. 2d 813, 815 (Miss. 1994); *see also Patterson v. State*, 660 So. 2d 966 (Miss. 1995). Petitioner accordingly requested that the Harrison County Circuit Court strike the prohibition against seeking parole. The Circuit Court denied relief. The Mississippi Supreme Court found the 1991 agreement "void as against public policy" and restored the parties to their pre-bargain positions. Appendix H, Pet. App. 235a-36a. Consequently, petitioner was again to be sentenced by a jury.

Before petitioner's resentencing, the Mississippi legislature amended the applicable sentencing statute to allow for a punishment of life without possibility of parole. *See* Miss. Code Ann. § 97-3-21. In addition, the Mississippi Supreme Court held that a defendant whose crime occurred prior to the effective date of the amendment to the statute could validly waive his ex post facto rights and receive a life without parole sentence. *See, e.g.*, *West v. State*, 725 So. 2d 872 (Miss. 1998).

C. The Prosecutor Refuses To Reinstate The Agreement After The Law Changes, And Petitioner Is Sentenced To Death.

Petitioner informed Owen that he was willing to waive his ex post facto rights concerning the application of the recent amendments to Miss. Code Ann. §§ 97-3-21 and 99-19-101 and again be sentenced to life imprisonment without the possibility of parole. Other prosecutors had entered into such agreements with other prisoners in the same situation. These other inmates committed crimes at least as serious as the crime for which petitioner was convicted, including assaulting, kidnapping, and murdering a police officer, *Lanier v. State*, 635 So. 2d 813, 815 (Miss. 1994); attacking and stabbing to death a deputy at a jail and escaping, *Stevenson v. State*, 674 So. 2d 501, 502 (Miss. 1996); and kidnapping and capital murder, *Patterson v. State*, 660 So. 2d 966, 967 (Miss. 1995).

If anything, petitioner's model record as an inmate made him a much stronger candidate for a life sentence than any of the other inmates. Even in 1991, Owen recognized petitioner's excellent record in prison. From 1991 until the 1998 resentencing, petitioner' prison record only improved. He was made a "trusty"—*i.e.*, an inmate who due to good behavior and trustworthy conduct receives special privileges—and was highly regarded by corrections officers for his work ethic and good conduct. T. 722-736.

But Owen now refused to enter into the agreement that he previously had accepted. He did so because petitioner had responded to the Mississippi Supreme Court's order invalidating his prior agreement by seeking to modify his sentence to make it lawful. As later recounted by the Mississippi Supreme Court:

> Owen declined Jordan's offer and indicated that he would not make a plea agreement with Jordan since Jordan had previously violated his agreement with the State that he would not appeal his plea and sentence of life imprisonment without the possibility of parole.

Jordan v. State, 786 So. 2d 987, 1000 (¶ 19) (Miss. 2001) (Appendix G, Pet. App. 192a). Owen also admitted that he refused to negotiate, in part, because he felt a personal desire to obtain a death sentence. As he explained, "I knew this lady . . . . It became a personal thing for me." PCR Ex. 41.

Petitioner then asserted to the court that Owen's refusal to enter into the plea amounted to prosecutorial vindictiveness. Petitioner asked the trial judge to impose a sentence of life without possibility of parole or at least hold an evidentiary hearing on the question. He argued that the Due Process Clause prohibits a prosecutor from punishing a defendant for successfully pursuing a statutory right of appeal or collateral remedy. *See Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969). Petitioner also relied on this Court's statement that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). Petitioner did nothing more than follow the Mississippi Supreme Court's ruling that his 1991 agreement was void, and when such agreements later became legal, he offered to enter into the same deal.

The trial court denied the motion, however, and petitioner was sentenced to death in 1998.

D. Over A Dissent, The Mississippi Supreme Court Affirms.

Petitioner pursued that claim on direct appeal, relying largely on this Court's holdings in *Blackledge* and *Pearce*. The Mississippi Supreme Court rejected the claim. The court reasoned that its prior ruling had held open the possibility that the prosecutor would seek the death penalty. Pet. App. 193a. Further, in the court's view, "the presumption of prosecutorial vindictiveness does not apply when a sentence imposed after trial is greater than that previously imposed after a guilty plea." *Id.* Finally, the state court noted that "any possible prosecutorial vindictiveness . . . was rendered impotent because it was the jury which decided that Jordan should be sentenced to death rather than life without parole." *Id.* at 193a-94a.

Justice Banks dissented, explaining that the prosecutor's *power* to impose the death penalty was irrelevant: "[p]rosecutorial power to seek the greater punishment is a prerequisite to rather than a negation of vindictiveness. . . . Acting vindictively is an abuse of prosecutorial power, not the want of that power." Pet. App. 223a (citing *Blackledge*, *supra*). Justice Banks was particularly concerned because the case was "prosecuted by a private actor rather than an elected prosecutor charged with the responsibility to the public as opposed to individual clients retaining him, with or without fee, for that purpose." *Id.* 224a.

E. Petitioner Raises His Claim Of Vindictiveness In State Post-Conviction Proceedings.

Petitioner raised the prosecutorial vindictiveness claim again in post-conviction proceedings. The Mississippi Supreme Court, however, found that

petitioner failed "to demonstrate the 'prosecutorial vindictiveness' about which he complains." *Jordan v. State*, 912 So. 2d 800, 822 (Miss. 2005) (Appendix F, Pet. App. 175a).

F. The District Court Denies Petitioner's Vindictiveness Claim.

Petitioner timely presented the vindictiveness claim to the district court in federal habeas corpus proceedings. Besides referring to the record evidence to support his claim, petitioner asked leave to seek discovery to propound interrogatories, requests for production of documents, and requests for admission regarding the vindictiveness claim. The district court denied the motion. *Jordan v. Epps*, No. 1:05CV260KS, at 2-3 (S.D. Miss. Sept. 26, 2007) (Appendix D, Pet. App. 140a-41a). The district court entered a final judgment and opinion denying relief on August 30, 2010. *Jordan v. Epps*, 740 F. Supp. 2d 802, 818 (S.D. Miss. 2010) (Appendix B, Pet. App. 49a).

After quoting the reasons offered by the Mississippi Supreme Court for rejecting the claim, the district court opined that this Court had "significantly narrowed" its decisions recognizing claims of prosecutorial misconduct in *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), and *Alabama v. Smith*, 490 U.S. 794 (1989). Pet. App. 49a.

The district court determined that petitioner had "failed to perform his end of the [original plea] bargain" when he sought to have a lawful sentence imposed, such that "he returned to the Circuit Court in the same position that he originally found himself." *Id.* 50a. At that point, there could be no vindictiveness because "[t]he

prosecutor did not substitute a different charge for the charge that was originally imposed, nor did he seek a different penalty than that originally sought." *Id.* Furthermore, the district court emphasized that petitioner was sentenced by a jury and not the judge who took his plea. *Id.*

The district court also denied a certificate of appealability (COA). Pet. App. 149a (Appendix E). After the district court denied a timely motion to alter or amend the judgment on September 30, 2010, R. 1498, petitioner filed a notice of appeal. R. 1499.

G. Over A Dissent, The Fifth Circuit Affirms.

A motion's panel of the Fifth Circuit denied petitioner's application for a COA. *Jordan v. Epps*, 756 F.3d 395 (5th Cir. 2014) (Appendix A). The panel majority opined that "it is not vindictive for a prosecutor to follow through on a threat made during plea negotiations." Pet. App. 14a (citing *Bordenkircher v. Hayes*, 434 U.S. at 363-64). The majority also found that circuit precedent foreclosed it from applying a presumption of vindictiveness. *Id.* 15a (citing *Deloney v. Estelle*, 713 F.2d 1080 (5th Cir. 1983)). According to the majority:

> [T]here is no prosecutorial vindictiveness when "the asserted increased seriousness of the charges stems from the reduction of the charges pursuant to the plea bargain. The charges were not enhanced beyond the original indictments." 713 F.2d at 1085. In Jordan's case, the original charges and the later charges were likewise the same.

Pet. App. 17a. Because the special prosecutor did not seek a sentence greater than the one initially sought before the plea bargain, his actions "do not give rise to a presumption of prosecutorial vindictiveness." *Id.* 16a. The majority reasoned that

the central issue in a vindictiveness claim is whether there is "an increase in the charge between the initial indictment and the indictment following the exercise of a right." *Id.* 19a. Thus, according to the majority, because the special prosecutor sought the death penalty as he had previously, there can be no vindictiveness.

The majority acknowledged that its decision conflicted with an en banc decision of the Ninth Circuit granting habeas relief in indistinguishable circumstances. *See id.* 19a n.5 (citing *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc)). The court of appeals brushed the conflict aside, however, 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." *Id.*

Judge Dennis dissented, finding that a certificate of appealability was warranted. *Id.* 21a-30a. In the dissent's view, circumstances suggesting vindictiveness arise when two elements are present. First, a prosecutor must have a "'considerable stake' in maintaining the status quo and discouraging action that could upset such status quo." *Id.* 26a. The second element is present if a defendant takes action upsetting the status quo, and the prosecutor responds by "upping the ante." *Id.* (*citing Blackledge*, 417 U.S. at 27-28). The facts of this case presented "a compelling case that both elements of vindictiveness are present here." *Id.*

The prosecutor had thus acknowledged petitioner's expressions of remorse, good behavior, and efforts to contribute to society—which the prosecutor had previously deemed sufficient to justify a sentence of life without parole. *Id.* 26a-27a. The prosecutor had a "considerable stake" in deterring petitioner from upsetting

that result, but petitioner did, in fact, upset it when he "exercised his right to petition the state court" to modify his sentence. *Id.* 27a. The prosecutor then "upped the ante" by determining that a death penalty was the only adequate sentence—even though petitioner had offered to plead to life without parole. *Id.* "These circumstances present a strong likelihood of vindictiveness." *Id.*

The dissent also stressed the disparate treatment of petitioner and others who reached the same illegal agreement but who were later permitted to obtain life-without-parole sentences. This discrepancy:

> adds to the perception that the special prosecutor's pursuit of the death penalty against Jordan was not motivated by only legitimate interests but was rather influenced in substantial part by the personal motives of a prosecutor who had spent decades working on the case, had received a result he sought, and who then faced the possibility of that result being upended.

Id. 29a. "It was the prosecutor, not Jordan, who abandoned the government's previous benefits of the bargain and insisted upon a trial on the merits. *Id.* 30a.

The dissent also noted that the Ninth Circuit had granted habeas relief on a vindictiveness claim under similar circumstances. *Id.* 27a (citing *Adamson*, *supra*). Reviewing the similarities, the dissent observed:

> In both cases, the prosecutors asked the courts to impose sentences other than death, and the courts obliged. Then, the defendants petitioned their state courts to give them some advantage, but the courts ruled against them. And then, the defendants offered to return to the prior status quo, but the prosecutors rebuffed the plea offers and insisted on proceeding to trial to seek death.

Id. 28a. Given the holding of the en banc Ninth Circuit, the dissent concluded that "it is apparent that the merits are indeed debatable" and therefore Jordan should receive a certificate of appealability. *Id.*

Petitioner sought rehearing, which was denied. *See* Appendix C.

This petition followed.

REASONS FOR GRANTING THE PETITION

Both questions presented by this capital case warrant this Court's review. First, this Court's precedents—and the consistent practice of the other courts of appeals—dictate that a certificate of appealability should issue in the recurring circumstances of this case. Two judges have argued forcefully that petitioner's vindictiveness claim actually has merit, and another court of appeals, sitting en banc, granted relief under similar circumstances. The Fifth Circuit's decision holding that petitioner's claim is nevertheless not "debatable" is manifestly incorrect, and wildly out of step with decisions in other courts of appeals.

Second, the Fifth Circuit held that a presumption of vindictiveness can only arise when prosecutors seek a penalty more severe than the one originally sought. Because the penalty initially sought in a capital case is always the most severe penalty available, such claims will always fail in the Fifth Circuit. That decision creates an acknowledged circuit conflict, and is flatly at odds with this Court's vindictiveness precedents.

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

Petitioner's prosecutorial vindictiveness claim is strong enough to have given rise to dissents from both a Mississippi Supreme Court Justice and a judge of the Fifth Circuit. The majority of the motions panel further acknowledged a contrary decision by the Ninth Circuit sitting en banc and took pains to respond to the

dissent. By denying a COA even though the merits of petitioner's claim are obviously at least debatable, the majority contravened this Court's precedents. It also created a conflict with other courts of appeals. The Court should at the least grant certiorari, hold that a certificate of appealability is warranted, and remand the case for a merits panel of the Fifth Circuit to receive full briefing and argument on the merits of petitioner's constitutional claim.

To receive a COA, a habeas 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.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (court of appeals must "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").

A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337. Furthermore, "[i]t is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. 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." *Id.* at 338.

This Court emphasized that determination about the issuance of a COA is merely a "threshold inquiry" that "does not require full consideration of the factual

or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. And this Court has not hesitated to reverse when a court of appeals merely "pay[s] lipservice to the principles guiding the issuance of a COA," and then relies on restrictive circuit precedent to reach ahead and resolve the merits of the case without considering whether the applicability or viability of that precedent is debatable. *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (reversing the Fifth Circuit). "Any doubt whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *Miller v. Johnson*, 200 F.3d 274, 280 (5th Cir. 2000).

A. The Panel Majority's Failure to Consider the Significance of Contrary Opinions.

Petitioner's vindictiveness claim generated dissents in both state and federal proceedings, by definition confirming that reasonable jurists can disagree about the matter. In fact, the panel majority and dissent clashed directly on the significance of certain facts, whether circuit precedent foreclosed relief, whether vindictiveness claims could be brought in death penalty cases, and the importance of a conflicting decision from another circuit. If, as this Court has held, the touchstone is whether the claim is debatable amongst jurists of reason, then a COA manifestly should have issued.

In contrast to the panel majority, other circuits find that a COA should issue if there has been a dissenting opinion in the course of the litigation. For instance, the Seventh Circuit has found 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." *Jones v. Basinger*, 635 F.3d 1030, 1039-40 (7th Cir. 2011).

Other circuits find that a lack of unanimity among panel members reviewing a COA application should lead to the issuance of a COA. For instance, in *Johnson v. Moore*, Nos. 97-33, 97-7801, 1998 U.S. App. LEXIS 23907 (4th Cir. Sept. 24, 1998), the Fourth Circuit noted that a COA had been granted because "at least one judge on the panel concluded" that Johnson was entitled to a COA. The Third and Seventh Circuits follow a similar procedure. *See, e.g.*, *Harper v. Vaughn*, 272 F. Supp. 2d 527, 529 n.4 (E.D. Pa. 2003) (Third Circuit Rule 22.3 provides that "if any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue."); *Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003) (a COA should be denied only if both judges on a motions panel reviewing the COA application unanimously agree that the certificate should not issue).

The majority's narrow focus on circuit precedent is similar to the deficiencies identified in *Tennard.* The issue there was whether certain instructions placed mitigating evidence, such as Tennard's low IQ, beyond the reach of the jurors who were deciding on punishment. This Court faulted the Fifth Circuit for "refus[ing] to consider the debatability" of an issue regarding those instructions due to its reliance on circuit precedent inconsistent with the Supreme Court's decisions. *Tennard*, 542 U.S. at 287.

The panel majority's misapplication of the COA standard is particularly glaring given its recognition of contrary precedent from the Ninth Circuit. Pet. App. 19a (citing *Adamson*, *supra*). The existence of contrary decisions under similar circumstances should weigh heavily in favor of granting a COA. *See Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (although district court and court of appeals denied COA, this Court granted certiorari, and implicitly certified appealability, because of conflicting decisions in other circuits); *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991) (reversing the denial of a certificate of probable cause in light of contrary decisions in other circuits); Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 35.4c, at 1780-83 (5th ed. 2005).

B. The Panel Attempted to Resolve the Merits Rather than Make a Threshold Inquiry into the Debatability of Petitioner's Vindictiveness Claim.

This Court has held that a federal court deciding whether to issue a COA should make only a general assessment of the merits of the claim to determine whether the petitioner has made a "substantial showing" of the denial of a federal right. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "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." *Id.*

Although paying "lip service" to this standard, the Fifth Circuit essentially reached the merits of petitioner's vindictiveness claim. Besides reviewing the facts and mentioning the cases cited by petitioner, the majority engaged in a debate with the dissent over the significance of certain facts, the interpretation of this Court's decisions, and the effect of circuit precedent.

This is hardly the first time that the Fifth Circuit made a de facto merits ruling rather than confining itself to the threshold inquiry required for determining whether to issue a COA. For instance, in *Ruiz v. Quarterman*, 460 F.3d 638, 644 (5th Cir. 2006), the Fifth Circuit denied a COA only after a lengthy analysis of the petitioner's ineffective assistance of counsel claim. *See also Scheanette v. Quarterman*, 482 F.3d 815, 820-22 (5th Cir. 2007) (denying COA after lengthy review of claim); *Foster v. Quarterman*, 466 F.3d 359 (5th Cir. 2006) (same).

In contrast, other circuits confine themselves to the limited analysis required under § 2253(c). *See, e.g.*, *Lambright v. Stewart*, 220 F.3d 1022, 1025, n.2 (9th Cir. 2000) (granting COA after "tak[ing] a 'quick look' at the face of the complaint to determine" if the petitioner alleged the denial of a constitutional right); *Yves v. Merrill*, 78 F. App'x. 136, 137 (1st Cir. 2003) (COA may be granted if petitioner's claim "does not appear utterly without merit after a 'quick look'"); *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000) (same).

Because petitioner has shown that his claim meets the standard for granting a COA, and because the panel majority's rejection of the COA is in conflict with procedures followed in other circuits and with Supreme Court decisions, this Court should grant certiorari. It should then remand the case for full merits briefing before a merits panel of the Fifth Circuit.

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.

The panel majority in this case held that a presumption of vindictiveness can *never* arise if "the original charges and later charges were . . . the same." Pet. App.

17a. According to the majority, that court's precedent "instructs us to make a simple and straightforward comparison between the original indictment and the later indictment that follows the exercise of a legal right. If there is no change in the charges filed or punishment sought, then there is no presumption of vindictiveness." *Id.* 16a-17a. Applying this test, the panel found that the special prosecutor's actions in this case did not give rise to a presumption of vindictiveness because he "never imposed a charge or sentence greater than the one that he originally—and repeatedly—charged Jordan with before the plea bargain." *Id.* 16a.

The startling implication of the majority's holding is that presumption-of-vindictiveness claims are unavailable in capital cases in the Fifth Circuit. When the state begins the case by seeking the death penalty (as it does in every capital case), a prosecutor can never seek a more severe penalty later on. This is true, the majority held, even when the prosecutor actually offered (and the defendant accepted) a lesser penalty during the course of the case. Certiorari is warranted because the Fifth Circuit's holding creates an acknowledged circuit conflict and is inconsistent with this Court's decisions.

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *Id.* at 372. Thus, the Due Process Clause prohibits a prosecutor from

punishing a defendant for successfully pursuing a statutory right of appeal or collateral remedy. *Blackledge v. Perry*, 417 U.S. 21, 25 (1974).

Here, the Special Prosecutor retaliated against petitioner for challenging the 1991 agreement. In fact, all that petitioner did was seek a modification of his sentence after the Mississippi Supreme Court deemed such an agreement to be *ultra vires* and the sentence it imposed to be unlawful. In other words, he did not unilaterally rescind any promise he had made, but instead exercised his legal rights in a limited and reasonable manner. After the state legislature removed the impediment to such an agreement, petitioner offered to re-enter into the agreement that Owen previously found acceptable. As the Mississippi Supreme Court found, Owen refused petitioner's offer only because petitioner exercised his legal right to challenge the agreement that was void *ab initio*. *See* Pet. App. 192a.

In an en banc decision, the Ninth Circuit found vindictiveness under similar circumstances. *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc). There, Adamson avoided a possible death sentence by agreeing to testify against other individuals charged in connection with the same crime. When his testimony was needed for a retrial, Adamson refused to testify, and the State successfully moved to abrogate its deal with him. Adamson then had a change of heart and offered to testify if the State did not seek the death penalty. The State, however, insisted on death. As the Ninth Circuit found, when the state "up[ped] the ante" by seeking the death penalty "for the very same conduct" for which it had previously sought "a sentence of 48-49 years," that conduct warranted a presumption of vindictiveness.

Adamson, 865 F.2d at 1018. The court rejected the argument that the prosecutor had acted within his discretion in pursuing the death penalty, explaining that "[v]indictive prosecution cases always involve circumstances where the prosecution is acting within its power," but "[t]he issue in such cases . . . is whether the exercise of that power was improperly motivated." *Id.* at 1019.

The panel majority acknowledged a circuit conflict with *Adamson*, explaining that "[w]hile the Ninth Circuit may have taken a different approach to this question," the Fifth Circuit was "bound by our own prior precedent [(*Deloney*)] on this issue." Pet. App. 19a n.5.

The highest courts of multiple states have likewise held—contrary to the decision below—that a presumption of vindictiveness can arise in a capital case. *See State v. Phipps*, 959 S.W.2d 538 (Tenn. 1997) (presumption of vindictiveness arose when State sought death after successful appeal following trial in which the State did not seek death); *State ex rel. Patterson v. Randall*, 637 S.W.2d 16 (Mo. 1982) (same).

The panel decision conflicts not only with the Ninth Circuit's precedents, but also with this Court's vindictiveness cases. As the dissent observed, "Jordan's right to petition the courts for redress is precisely the sort of legal right that should be protected against retaliation by the due process clause as interpreted in *Blackledge*." Pet. App. 30a (Dennis, J., dissenting). "The teaching of *Blackledge* is that, when the circumstances are such that there appears to be a realistic likelihood of prosecutorial vindictiveness—viz., a realistic likelihood that the prosecutor acted

with a retaliatory motive because of the defendant's exercise of a legal right—the presumption of vindictiveness arises." *Id.* 25a-26a.

The dissent's characterization of this Court's precedents is entirely correct. In *Blackledge*, the Court explained that a presumption of vindictiveness is appropriate when prosecutors "up[] the ante" in response to a defendant's exercise of his rights. *See* 417 U.S. at 28. In that case, the defendant had been charged with misdemeanor assault with a deadly weapon, had been convicted and sentenced to six months in prison, and had sought a de novo trial pursuant to a statute authorizing him to have one. *Id.* at 22-23. Before the de novo trial, the prosecution sought a felony indictment for assault with a deadly weapon with intent to kill and inflict serious bodily injury. *See id.* at 23. The defendant pleaded guilty and received a much harsher sentence. *Id.* He then sought post-conviction relief, alleging that the decision to charge him with a felony was vindictive.

This Court held that these facts gave rise to a presumption of vindictiveness even though there was no evidence of actual vindictiveness. The Court explained that prosecutors have an incentive to ensure that defendants do not appeal from convictions, and they can pursue that objective "by 'upping the ante' whenever a convicted misdemeanant pursues his statutory appellate remedy." *Id.* at 27. The Court held that such a course of conduct violates due process because prosecutors could use the threat of additional charges to deter defendants from pursuing their rights. *Id.* at 28.

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), this Court held that no presumption of vindictiveness arose when a prosecutor threatened to seek additional charges against a defendant if the defendant did not plead guilty, and then in fact sought those charges when the defendant refused to plead. The Court explained that in the process of plea bargaining, it is "inevitable" that the prosecution will offer some incentive for pleading—and therefore threaten greater penalties if the defendant exercises his trial rights. *See id.* at 364. Thus, "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Id.* The Court further noted that "a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." *Id.* at 365. And it stressed the narrowness of its holding:

> We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Id.

In *United States v. Goodwin*, 457 U.S. 368, 373 (1982), this Court further explained that a presumption of vindictiveness is appropriate "in cases in which a reasonable likelihood of vindictiveness exists." The Court noted that in *Bordenkircher*, as in *Goodwin* itself, the decision to bring additional charges was

brought before the trial, and that fact militated against a presumption of vindictiveness. The Court reasoned that:

> by the time a conviction has been obtained[,] . . . it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

Id. at 380. It further noted that in past vindictiveness cases, including *Blackledge*, a presumption of vindictiveness was appropriate, in part, because the right that the defendant had exercised would result in a retrial—a result that the prosecutor had a "personal stake" in preventing. *See id.* at 383. Changes in pretrial charging decisions, on the other hand, do not implicate a prosecutor's personal incentives.

From these cases, the Fifth Circuit's error is apparent. This Court's cases call for courts to carefully consider the circumstances and to determine whether "a reasonable likelihood of vindictiveness exists." *Goodwin*, 457 U.S. at 363. They show that a presumption is appropriate when, as here, a defendant exercises his rights in a manner that would undermine a result that the prosecutor has a personal stake in preserving. A presumption of vindictiveness is especially appropriate when, as here, the prosecutor has complete information about the defendant—including that the defendant has been a model inmate for decades; and especially so when the prosecutor previously found that information to be sufficient to justify a lesser penalty, and then changed his mind solely in response to the defendant's exercise of his rights.

The Fifth Circuit's approach, which relies on a simple comparison between the original indictment and the ultimate sentence, bears no resemblance to this Court's analysis. It asks courts to ignore all of the intervening developments in a case between the indictment and sentencing—even if one of those developments is an executed plea agreement that results in a lesser sentence. And critically, this Court has never held that presumption-of-vindictiveness claims are doomed in every capital case because of the severity of the initial charge, but that is precisely the result that the Fifth Circuit's rule compels.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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