THIS IS A CAPITAL CASE

No. 23-6703

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER COLLINGS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER A DISTRICT COURT'S DENIAL OF *RHINES* STAY IS AN APPEALABLE ORDER NOT SUBJECT TO A COA.

The warden wrongly contends there is no circuit split regarding whether a COA is required to appeal a district court's denial of a *Rhines* stay. The plain findings of decisions of the courts of appeals cited in the petitioner show that, unlike the Eighth Circuit's decision in this case and the Tenth Circuit, other courts of appeals have concluded that a COA is not a prerequisite for an appeal of a denial of a *Rhines* stay. *See*, *e.g.*, *Lave v. Dretke*, 416 F.3d 372, 382 (5th Cir. 2005) (a "COA is not a prerequisite to review the denial of a motion to stay proceedings . . .."); *Smith v. Chappell*, 584 F. App'x 790, 790-91 (9th Cir. 2014) ("District court orders denying motions to stay federal habeas proceedings to allow the exhaustion of state remedies are reviewable on appeal after the district court enters a final judgment."). These cases show that the warden is simply wrong about a circuit split.

The warden attempts to misdirect the Court on this point by suggesting that, even if there is a circuit split, Collings is not "challenging a collateral issue of federal procedure." BIO at 19. But a *Rhines* stay is a collateral issue of federal procedure. *Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003) (per curiam) ("We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas petition in abeyance pending exhaustion of state court remedies."). As such, it is reviewable under the abuse of discretion standard and does not require a COA. *See Rhines v. Weber*, 544 U.S. 269, 279 (2005) (remanding to the

Eighth Circuit to determine "whether the District Court's grant of a stay . . . constituted an abuse of discretion"); *Rachal v. Quarterman*, 265 F. App'x 371, 376 n.5 (5th Cir. 2008) (acknowledging "that a *Rhines* decision of the district court, being a procedural ruling, should be reviewable for abuse of discretion only and does not require a COA.").

The warden acknowledges that in the Fifth and Ninth Circuit cases on which Collings relies, the appellants were challenging denials of *Rhines* stays. BIO at 18-19. The warden further acknowledges that the Fifth Circuit applied the abuse of discretion standard in this appellate review. *Id.* at 18 (explaining that "the Fifth Circuit found that there was no abuse of discretion in denying a stay[.]"). Collings's notice of appeal shows he unquestionably appealed the district court's determination of this same collateral issue of federal procedure. A128. Thus, the warden's contention that Collings is not appealing a collateral issue of federal procedure is wrong.

Finally, *Slack v. McDaniel,* 529 U.S. 473 (2000), does not foreclose Collings's argument, as the warden suggests. *Slack* does not hold that a COA is a prerequisite for an appeal of a denial of a *Rhines* stay. The warden recognizes that other appeals of collateral issues of federal procedure do not require a certificate of appealability. BIO at 17-18. Thus, the warden's reliance on *Slack* is misplaced. *See Rhines*, 544 U.S. at 279. This Court should give no credence to the warden's argument.

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER § 2253(C) AND *SLACK*, PARTICULARLY IN CAPITAL CASES, REQUIRE AN INDIVIDUALIZED COA DETERMINATION OF EACH CLAIM PRESENTED BY A PETITIONER.

A. A CIRCUIT SPLIT EXISTS.

The warden wrongly contends that Collings has manufactured a circuit split. BIO at 22-23. The warden agrees that *Murphy v. Ohio,* 263 F.3d 466 (6th Cir. 2001), held that it is unacceptable "to uniformly deny certificates on all claims without analysis." BIO at 22 (citing *Murphy*, 263 F.3d 466, 467 (6th Cir. 2001)). The basis for this holding is that § 2253(c) and *Slack* require an "individualized determination of each claim presented by [a] petitioner[.]" *Murphy*, 263 F.3d at 467. In direct contrast with this determination, the Eighth Circuit has concluded that neither "§ 2253(c) [n]or the Supreme Court's decisions regarding certificates of appealability dictate that a court of appeals must or must not publish a statement of reasons when it denies an application for a certificate." *Dansby v. Hobbs*, 691 F.3d 934, 936 (8th Cir. 2012). The Eighth Circuit provided no individualized determination of the claims before it nor its reasons for their denial. Thus, a court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter. Rule 10(a).

The warden suggests that this is not a conflict because the Sixth Circuit "did not hold that its sister circuit courts of appeals are legally required to follow" it. BIO at 22. But opinions of the Sixth Circuit are not binding on other circuits. *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Perry*, 115 F.3d 386, 393 (6th Cir. 1997) (explaining that "cases from sister circuits are not, of course, binding

precedent."). It is thus no surprise that the Sixth Circuit did not make an unlawful ruling that its decision would bind other courts of appeals. The absence of such a ruling is not a legitimate reason to conclude that a circuit split does not exist.

The warden unpersuasively argues that the reasoned decisions of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh circuits do not support the existence of a circuit split. First, the warden incorrectly asserts that Collings did not allege that these courts of appeals "were compelled to issue a detailed written opinion." BIO at 23. On the contrary, Collings asserted that because § 2253(c) and *Slack* require an individualized determination of each claim, heightened due process applies to capital cases, meaningful review of first habeas petitions is essential, and a blanket-denial practice unfairly insulates a conviction and death sentence from federal habeas review, these courts *were* compelled to issue detailed written opinions. Pet. at 20-27.[1] Second, the warden does not disagree that the practice of the courts in each circuit contradicts the Eighth Circuit's decision. BIO at 23. There is no merit to the warden's contention that no circuit split exists.

Similarly, the warden unpersuasively suggests that, even if there is a circuit split, this Court's practice of issuing summary denials shows that the Eighth Circuit's practice is permissible. BIO at 23-24. This Court does issue summary

[1] Even the Eighth Circuit has recognized that in capital cases where a petitioner has filed a lengthy explanation of why a COA is warranted and a petition for writ of certiorari is sure to ensue," the court should "explain [] to some degree its decision to deny the application." *Dansby*, 691 F.3d at 936.

denials, even in capital cases. *Id.* But this Court is not subject to the same statutory requirements as the circuit courts. The plain language of § 2253(c) reflects this distinction. Because the statutory language lists "circuit justices or judges" but omits Supreme Court justices, Congress recognized a distinction between appellate review in the lower courts (and this Court's potential subsequent review) versus original appellate review in this Court. This is consistent with the purpose of the statute as this Court's decisions are not subject to further judicial review and an explanation of the Court's rationale is unnecessary.

The Eighth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. This Court should settle this conflict.

B. COLLINGS HAS PRESERVED THIS ISSUE FOR REVIEW IN THIS COURT.

The warden incorrectly contends that Collings did not preserve this issue because Collings did not argue, prior to the opinion of the Eighth Circuit, that the Eighth Circuit was required to write a reasoned opinion. BIO at 24-25. But the warden does not cite to any authority—because none exists—requiring an appellant, to preserve an issue for review in this Court, to raise an allegation of error *before* the error was committed. Likewise, the warden does not cite to any authority requiring an appellant, as a perquisite for review in this Court, to have presented the issue in a motion for rehearing.

Collings included the COA standards in his application for a COA and his motion for hearing. A4-8; A62-64. Collings specifically argues that "[t]he panel's blanket COA denial and dismissal of the rest of the appeal is contrary to the

decisions of [the Eighth Circuit] and the Supreme Court[.]" A62. Thus, the warden's argument lacks merit; Collings properly preserved this issue for review in this Court.

C. THE LOWER COURT'S MISAPPLICATION OF THE COA STANDARDS IS A BASIS FOR REVIEW IN THIS COURT.

The warden wrongly contends that the lower court's misapplication of the COA standards is not a basis for review in this Court. Rule 10(c) prescribes that this Court may grant review when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." On multiple occasions, this Court has granted review when a lower court has misapplied 28 U.S.C. § 2253(c). *See*, *e.g.*, *Buck v. Davis*, 580 U.S. 100, 128 (2017) (reversing court of appeals for applying an incorrect COA standard); *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (reversing court of appeals for side-stepping the proper COA procedure); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (reversing due to the court of appeals misapplication of the COA standard, although the court paid "lipservice to the principle guiding issuance of a COA."). It was not improper for this Court to grant review in these cases, and it likewise would not be improper for this Court to grant review here.

Other than its general argument that this Court should not grant review, the warden does not contest Collings's arguments that the Eighth Circuit misapplied the COA standards. This Court should treat this as an implicit concession that the district court's decision is "debatable among jurists of reason" or "the issues

presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

Instead of challenging the misapplication of the COA standards, the warden purportedly identifies mistakes of fact in Collings's brief. BIO at 13-14. However, none of the warden's examples are "mistakes."

First, the warden incorrectly contends that law enforcement did not question Collings expressly to extract a confession. BIO at 13. But Chief Clark affirmatively contacted law enforcement handling the investigation seeking to be investigating and to pursue a confession from Collings. R. Doc. 10-8, p. 1219. The Missouri Supreme Court found that after speaking with Collings, "Chief Clark contacted the FBI and told them about his talk with Collings. The FBI believed if Collings were going to confess or reveal any information, it would be to Chief Clark. Hence, the FBI encouraged Chief Clark to help in the investigation, to which Chief Clark agreed." *State v. Collings*, 450 S.W.3d 741, 749 (Mo. banc 2014). Afterward, Clark actively pursued questioning of Collings expressly to extract a confession. R. Doc. 10-6, at 586, 604, 662-63.

After Collings was charged, even though Clark knew—from attending Collings's arraignment and from Collings himself—that Collings was represented by counsel who had advised Collings not to talk about his case, Clark continued "to pose questions and interject personal comments about their relationship in an effort to get Collings to speak." *Collings*, 450 S.W.3d at 757. This questioning, which Clark knew was being recorded, went on for approximately 40 minutes, even though

"Collings stated unequivocally, at least nine times, that he could not answer any questions regarding the case on the advice of counsel." *Id.* The Missouri Supreme Court found Clark's conduct was an "egregious and blatant violation of Collings' constitutional rights[.]" Thus, Clark did in fact question Collings with the express purpose of extracting a confession and other incriminating details about the offense.

Second, the warden contends that instead of being convicted for desertion, Clark instead was convicted of being "AWOL" four times. BIO at 13. While Chief Clark was allowed to plead plead to the lesser offense of AWOL, he still had **four convictions** that the prosecutor never disclosed to defense counsel all while allowing Chief Clark to testify under oath on three occasions without the ability to impeach his credibility before the court and the jury.

The warden also incorrectly contends this information was not suppressed because "the prosecutor appears to have disclosed that the witness had military charges of which the prosecutor did not know the disposition, except that a desertion charge had been reduced to an AWOL charge." BIO at 13. However, prosecutors cannot turn a blind eye to impeaching information and then claim no error occurred because they were "unaware" of it. *See Kyles v. Whitley,* 514 U.S. 419, 438 (1995) (Prosecutors have an obligation to implement "procedures and regulations" necessary to insure that "all relevant information on each case to every lawyer who deals with it.") (quoting *Giglio v. United States.*, 405 U.S. 150, 154 (1972)). Thus, even assuming the local prosecutor did not know about the four convictions at the time of the limited disclosure of information about Clark, he

nonetheless had a duty to find the convictions and disclose them to the defense. *United States v. Bagley*, 473 U.S. 667, 677-77 (1985); *Brady v. Maryland*, 373 U.S. 83, 86-89 (1963). The failure to do so was a suppression of the impeaching information.

Even if the local prosecutor did not know about the four convictions, the Missouri Attorney General's Office—who also prosecuted Collings at trial—was aware of Clark's convictions or at least had access to information that could verify the disposition of the charges. R. Doc. 10-43 (evidence of Clark's convictions produced by the Office of the Attorney General during the federal habeas proceeding); R. Doc. 10-30 at 13 (docket sheet showing May 19, 2008 entry of appearance of Assistant Attorney General in the trial court); R. Doc. 10-1 – 10-2 (pretrial transcripts showing appearance of Assistant Attorney General); R. Doc. 10-3 – 10-9 (motion to suppress transcripts showing appearance of Assistant Attorney General when Clark testified under oath); R. Doc. 10-10 – 10-29 (trial transcripts showing appearance of Assistant Attorney General when Clark again testified under oath). Despite being involved in the prosecution from the outset of the case the Missouri Attorney General's Office allowed Clark to testify under oath on at least three occasions (his pretrial deposition, at the suppression hearing, and at trial) without disclosing that Clark had a single criminal conviction, let alone Clark's four convictions and his stint in military prison.

Third, the warden erroneously contends that trial counsel did not challenge the unconstitutionality of Missouri's voluntary intoxication statute prohibiting the

jury from considering the effect of his intoxication on his mental state. BIO at 14. Counsel did challenge the statute and its accompanying instruction. R. Doc. 10-26 at 5557-60. Collings again challenged in post-conviction proceedings the constitutionality of the statute and instruction, and the Missouri Supreme Court ruled that the statute was constitutional. *Collings v. State*, 543 S.W.3d 1, 8-11 (Mo. banc 2018); R. Doc. 58, at 23; R. Doc. 10 at 38-39.

Though the warden asserts that "this Court has held that state laws like Missouri's are constitutional," BIO at 14 (citing *Montana v. Egelhoff*, 518 U.S. 37, 41-42, 56 (1996)), the warden does not contest that under *Egelhoff*, a law that excludes a certain category of evidence, but still considers that evidence relevant to the requisite mental state, is an unconstitutional evidentiary bar. *Egelhoff*, 518 U.S. at 57 (Ginsburg, J., concurring); *see also Egelhoff*, 518 U.S. at 71-72 (O'Connor, J., dissenting). Similarly, the warden does not contest that reasonable jurists could conclude under *State v. Walkup*, 220 S.W.3d 748, 758 (Mo. banc. 2007), that Missouri excludes evidence of voluntary intoxication but still considers it relevant to a defendant's mental state.

Collings's petition does not include mistakes of fact. The lower court's misapplication of the COA standards is a basis for review in this Court, and the warden has offered no persuasive argument to the contrary. The Eighth Circuit's blanket denial of the COA diverges from that of other courts of appeals and conflicts with relevant decisions of this Court. This Could should grant review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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