*** CAPITAL CASE ***

No. 24-___

In the Supreme Court of the United States

LANCE SHOCKLEY,

Petitioner,

v.

DAVID VANDERGRIFF,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTION PRESENTED

The federal courts of appeals are deeply divided 5 to 4 over whether a state prisoner has the right to appeal the denial of his federal habeas petition if at least one circuit judge votes to grant appellate review. This capital case petition seeks plenary review of the following question to resolve that entrenched circuit split or, alternatively, an order granting a certificate of appealability so petitioner may appeal the denial of his substantial *Strickland v. Washington* claims to the Eighth Circuit:

Did the Court of Appeals err in denying petitioner's application, over dissent, to appeal the denial of his Sixth Amendment ineffective assistance of counsel claims?

RELATED PROCEEDINGS

Direct:

State v. Shockley, No. 05C2-CR00080-01, Circuit Court of Missouri, Division I, Carter County. Jury verdict March 27, 2009; sentence May 22, 2009.

State v. Shockley, No. SC 90286, Supreme Court of Missouri. Judgment affirmed August 13, 2013; rehearing denied October 29, 2013.

Shockley v. Missouri, 571 U.S. 1206 (2014) (Table). Petition for writ of certiorari to the Supreme Court of Missouri denied February 24, 2014.

State Post-Conviction:

Shockley v. State, No. 14AK-CC00001, Circuit Court of Missouri, Division I, Carter County. Motion for post-conviction relief denied July 10, 2017.

Shockley v. State, No. SC 96633, Supreme Court of Missouri. Motion court's judgment affirmed April 16, 2019; rehearing denied September 3, 2019.

Federal habeas:

Shockley v. Crews, No. 4:19-cv-02520-SRC, U.S. District Court for the Eastern District of Missouri, Eastern Division. 28 U.S.C. § 2254 petition and Certificate of Appealability denied September 29, 2023; Rule 59(e) motion denied December 5, 2023.

Shockley v. Crews, No. 24-1024, U.S. Court of Appeals for the Eighth Circuit. Panel order denying Certificate of Appealability entered April 2, 2024; order denying panel rehearing and rehearing en banc entered June 7, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lance Shockley respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit or, alternatively, for an order granting a certificate of appealability.

OPINIONS BELOW

The Court of Appeals' order denying a certificate of appealability (Pet. App. 1a-2a) is unpublished but available at 2024 WL 3262022. The opinion of the District Court (Pet. App. 3a-216a) is published at 696 F. Supp. 3d 589. The Supreme Court of Missouri opinion affirming the denial of state post-conviction relief (Pet. App. 217a-295a) is published at 579 S.W.3d 881. The Supreme Court of Missouri opinion affirming petitioner's conviction and sentence on direct appeal (Pet. App. 296a-349a) is published at 410 S.W.3d 179. The Court of Appeals' order denying panel rehearing and rehearing en banc (Pet. App. 350a) is unpublished.

JURISDICTION

The Eighth Circuit issued its order on April 2, 2024, and denied panel rehearing and rehearing en banc on June 7, 2024. On August 29, 2024, Justice Kavanaugh extended the time to file this petition to November 4, 2024. No. 24A216. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

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28 U.S.C. § 2253 provides, in relevant part:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the

court of appeals for the circuit in which the proceeding is held.

***

(c)

(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 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).

INTRODUCTION

This case, in which petitioner Lance Shockley faces execution based on a guilty verdict tainted by a juror's bias, starkly presents an important question dividing the circuits regarding when a state prisoner may appeal the denial of his federal habeas claim.

A state prisoner whose federal habeas petition is denied can appeal only if a judge issues a certificate of appealability. 28 U.S.C. § 2253(c). "At the COA stage, the only question is whether the applicant has shown 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.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003)). The courts of appeals are deeply divided 5 to 4 on whether a COA must issue under that standard if at least one circuit judge votes to grant the application to appeal—as happened here.

Months before petitioner's trial, the foreman of petitioner's jury self-published a "fictionalized autobiography" featuring the revenge murder of a criminal defendant who killed the protagonist's wife in a drunk driving accident but got off on probation. Petitioner's case also involved allegations that he'd fled the scene of a motor vehicle accident resulting in his passenger's death, and he stood accused of later killing the investigating officer. The foremen's fictionalized autobiography, titled *Indian Giver*, was complete with blood-spattered cover art that glorified a protagonist who "sought vengeance" and "fought the system" after the courts failed to deliver justice. Yet

petitioner's attorneys never uncovered this shocking bias—even after the juror approached the bench on his own to mention his authorship because he thought it might be relevant to the jury selection proceedings. He was seated on the jury and chosen as the foreman. After the guilty verdict, when petitioner's counsel first became aware of the contents of the jury foreman's fictionalized autobiography, the trial court invited counsel to develop the record of the juror's conduct, but the defense team inexcusably declined.

Due to defense counsel's failures, the truth emerged too late. With no record, the Supreme Court of Missouri was forced to affirm the trial court's denial of counsel's unsupported motions for mistrial and new trial. Post-conviction proceedings revealed the jury foreman had in fact distributed several copies of his vigilante manifesto to fellow jurors during *and even before the start of* trial, poisoning the jury pool. The foreman had shared copies with court security and administrative personnel as well. And he openly and repeatedly talked about his new book with multiple other jurors and court personnel during sequestration. Given defense counsel's failure to question the foreman about his fictionalized autobiography during voir dire or develop the record of juror bias and misconduct despite being invited to do so, the same judge who had penned the state court opinion affirming petitioner's conviction and sentence on direct appeal dissented from the denial of state post-conviction relief—concluding that petitioner was denied his Sixth Amendment right to counsel.

Now, a profound circuit split bars petitioner from appealing the denial of his federal petition bringing the same claims. The Eighth Circuit denied

petitioner's application to appeal over the dissent of Judge Jane L. Kelly; it then denied panel rehearing over Judge Kelly's dissent and en banc review over the dissents of Judge Kelly and Judge Ralph R. Erickson. Four other circuits would hear his case in this circumstance; another four would also deny his application to appeal over dissent. Petitioner should not be put to death without the opportunity to appeal Sixth Amendment claims that multiple judges believe merit further review, merely because he is imprisoned in Missouri rather than neighboring state Illinois. When a person's life hangs in the balance, justice requires more than a lottery between circuits to determine whether he may appeal the denial of substantial constitutional claims.

STATEMENT OF THE CASE

I. State Capital Trial Proceedings

On Thanksgiving in 2004, Petitioner Lance Shockley "was involved in a motor vehicle accident resulting in the death of his passenger." Pet. App. 218a. Over the next several months, Missouri Highway Patrol Sergeant Carl DeWayne Graham, Jr. investigated the accident. *Ibid.* On March 20, 2005, Sergeant Graham was murdered in his driveway. *Id.* 219a.

Police arrested petitioner three days later "for leaving the scene of the car accident that resulted in his passenger's death." Pet. App. 220a. The State "subsequently charged [petitioner] with leaving the scene of a motor vehicle accident, first-degree murder for [Sergeant Graham]'s death, and armed criminal action." *Ibid.*

1. The prosecution "proceeded to trial only on the first-degree murder charge and sought the death penalty." Pet. App. 220a.

During death qualification voir dire, Juror 58 said he could meaningfully consider returning any appropriate sentence if the jury reached that point in deliberations. Pet. App. 226a. Defense counsel's questioning of Juror 58 was notably sparse. *Ibid.* In fact, the most relevant sources of Juror 58's potential bias were brought to the trial court's attention during a break thereafter, when he approached the bench on his own initiative to inform the court he had failed to mention two potentially significant pieces of information: (1) he was a published author and (2) he was the father of a police officer. *Ibid.*

Defense counsel only asked follow-up questions related to the second point. Pet. App. 226a. Counsel chose not to ask a single question about Juror 58's writing, subject matter, or themes. During a post-conviction hearing, one of petitioner's trial counsel was directly asked if there had been "any strategy reason for not asking Juror 58 any follow-up questions during the voir dire" about his book, and he responded: "No there would have been no strategy reason." D. Ct. Doc. 20-24, at 639. Lead trial counsel did not dispute his colleague's testimony that the failure to question Juror 58 about his self-described fictionalized autobiography was not based on any considered strategy; lead counsel merely testified that in his view "self-publishing just sort of meant that ... it was a vanity project," and the book was not distributed widely. Pet. App. 230a (omission in original).

2. The prosecution's theory of the case was that petitioner killed Sergeant Graham "to stop the fatal car accident investigation." Pet. App. 221a. Petitioner argued that the prosecution's case was doubtful because it would have been "ridiculous for him to believe, simply by killing [Sergeant Graham], law enforcement would halt its investigation into the accident." *Ibid.*

According to the prosecution's evidence presented at trial, petitioner borrowed his grandmother's car on the afternoon of Sergeant Graham's death, and the car matched the description of one seen parked near Sergeant Graham's home the day he was killed. Pet. App. 218a-219a. When Sergeant Graham returned home and radioed that he was ending his shift at about 4:03 PM that day, he was shot and killed in his driveway. *Id.* 219a. Although the murder weapon was never recovered, petitioner was known to have possessed a .243 caliber rifle, and his wife testified that on the night of the murder she gave petitioner's "uncle a box of .243 caliber bullets and stated, '[petitioner] said you'd know what to do with them." *Ibid.* The prosecution's two ballistics experts could not agree whether the rifle bullet recovered at the scene was consistent with a .234 caliber rifle or "inconclusive" instead. *Id.* 188a.

The guilt phase proceeding lasted five days, after which the jury found petitioner guilty of first-degree murder. Pet. App. 221a.

3. The evening after the guilt-phase verdict was returned, petitioner's trial counsel received a copy of the book *Indian Giver*—the book Juror 58 had self-published just months before. Pet. App. 226a-227a.

The self-described "fictionalized autobiography" contained violent themes of vigilante justice, including one particularly gratuitous section "chronicling the protagonist's brutal and graphic revenge murder of a defendant who killed the protagonist's wife in a drunken-driving accident." *Id.* 224a. "The protagonist viewed the defendant as escaping justice in the court system because the defendant received only probation following his conviction." *Ibid.*

When petitioner's counsel learned of the fictionalized autobiography's anti-defendant, violent-vigilante plot, counsel "asked the [trial] court to question Juror 58 on the record about the book's contents and his personal beliefs" and "all of the jurors about any effect Juror 58's personal beliefs and opinions had on jury deliberations." Pet. App. 227a. Like the car accident motivating the protagonist's revenge plot in Juror 58's book, petitioner's case stemmed from a car accident that resulted in his passenger's death. *See id.* 218a. The trial court denied the request to question any juror at that time, because it might "improperly taint the whole jury" in the middle of the trial even if Juror 58 had not in fact been untruthful during voir dire or engaged in misconduct. *Id.* 227a. Petitioner's counsel then "moved for a mistrial, arguing he would have to concede ineffectiveness for failing to inquire about the book during voir dire." *Ibid.* The trial court denied the motion, advising that counsel "could question the jurors, if necessary, after the trial." *Ibid.* Trial counsel then moved for a new trial, arguing that the court "erred in failing to declare a mistrial after the book's contents were revealed." *Ibid.*

Juror 58 "was removed from the jury by the consent of the parties and did not participate in the penalty phase." Pet. App. 227a. Thus, while Juror 58 was one of the jurors who found petitioner guilty, he did not participate in the penalty-phase deliberations. Still, the jurors with whom Juror 58 admitted to sharing copies of and speaking about his book continued to serve during the penalty phase. *See id.* 244a-247a. And although the jury found three of four statutory aggravating factors proved beyond a reasonable doubt, the jury was ultimately unable to agree on whether to impose a sentence of death or life imprisonment. *Id.* 218a.

Before sentencing, the trial judge invited petitioner's defense team to develop the record to support their motion for new trial. *See* Pet. App. 342a. "Not only did neither counsel take the judge up on this offered opportunity to question Juror 58 about whether he had discussed his novel with other jurors, defense counsel specifically waived any right to such a hearing." *Ibid.* The trial court then denied petitioner's motion for new trial and imposed a death sentence. *Id.* 221a-222a.

II. State Direct Review

On direct appeal, the Supreme Court of Missouri affirmed petitioner's conviction and death sentence in an opinion written by Judge Laura Denvir Stith.

Petitioner argued that the trial court should have granted his motion for mistrial or subsequent motion for new trial because the content of Juror 58's fictionalized autobiography was so close to the facts of petitioner's case and revealed such inherent bias that it was likely Juror 58 was untruthful about his ability

to be fair and impartial during voir dire. Petitioner also argued that Juror 58's conduct likely biased other jurors. *See* Pet. App. 338a.

The court rejected the arguments. Juror 58 could not have lied about his book during voir dire, the court reasoned, because defense counsel didn't ask him about it—even after he volunteered that he was a published author and believed this to be relevant to the jury selection proceedings. Pet. App. 338a-339a. Nor, the court reasoned, was there anything in the record supporting petitioner's allegation that Juror 58 shared his fictionalized autobiography with other jurors; the only evidence in the record on direct appeal was that Juror 58 had shown his book to a bailiff. *Id.* 340a. And while his book's subject matter caused concern, nothing in the record developed up to that point demonstrated that Juror 58 had been untruthful about his ability to be fair and impartial. *See id.* 340a-341a.

The court acknowledged that before sentencing, the judge sent counsel a letter offering the opportunity to subpoena and question jurors about Juror 58's potential prejudices and conduct. Defense counsel not only declined this opportunity but "specifically waived any right to such a hearing." Pet. App. 342a. Petitioner could not claim error, the court concluded, in the trial court's supposed failure to hold such a hearing *sua sponte*, when his own counsel affirmatively declined to call jurors to testify despite being invited to do so. *Id.* 342-343a.

III. State Post-Conviction Review

1. Petitioner's post-conviction counsel developed the record that was lacking on direct appeal.

Juror 58 confirmed under oath that he had distributed several copies of *Indian Giver* to Juror 3, the sheriff, the jury coordinator, and "possibly one other female juror." Pet. App. 247a. He handed out the copies at night after the jury was empaneled and returned to the hotel for sequestration. And when he was shown the trial court's directive that jurors should not bring books about trials and crimes with them to the trial, Juror 58 testified that he felt he had complied because he viewed his fictionalized autobiography as "'a love story,'" not as about the justice system. *Ibid. But see id.* 224a (state court's description that the "book's front and back covers contain illustrations of blood splatter"; the "back cover states the protagonist's life changed forever when his wife was killed and her murderer set free"; and the front "cover states the protagonist 'sought vengeance' and 'seeks justice' and 'knows he will die fighting the system'").

Other jurors were not confused. Juror 50 testified that Juror 58 gave her a copy of his book, but after reading just a few pages concluded "'there was something that made her think maybe she shouldn't be reading this stuff.'" Pet. App. 245a (cleaned up). Juror 58 also gave his business card and book to Juror 3, who "looked at the book" and "read the back cover" before returning it to Juror 58. *Id.* 244a. And for her part, Juror 117 had prior knowledge of the book because, weeks *before* the trial, Juror 58 went into Juror 117's gift shop and asked if she would carry *Indian Giver* in her store. *Id.* 245a. Juror 117 brought a copy to trial, where she read the introduction, skimmed through it, then put it away during sequestration. *Ibid.* She testified that if she had read

the back cover before putting the book in her backpack to take with her, she would not have packed it because she believed the book fell under the court's directive not to bring books about trials or crimes to have with them during sequestration. *Ibid.*

The Howell County Sheriff, in charge of supervising court security, testified that Juror 58 approached him as well, talked about writing a book, and asked if the sheriff wanted to read it. The sheriff testified he either read or glanced at the forward and became concerned, so he brought the book to the trial judge's administrative assistant. Pet. App. 245a. The administrative assistant described the book as "'fairly graphic in some of its content.'" *Id.* 246a. The jury coordinator also testified that shortly after being chosen for the jury, Juror 58 approached her, told her he wrote a book, asked if she would like to read it, and handed her a copy. *Ibid.*

2. Based on the post-conviction record, petitioner raised two Sixth Amendment ineffective assistance of counsel claims. Applying clear error review, a majority of the Supreme Court of Missouri affirmed the post-conviction court's denial of petitioner's claims over the dissent of Judge Stith—the very judge who had authored the court's opinion affirming petitioner's conviction and sentence on direct appeal.

First, petitioner argued that trial counsel was ineffective for failing to question Juror 58 when he volunteered that his authorship might be relevant to the proceedings. Pet. App. 227a. Again, lead counsel testified that he thought the book was just a "vanity project" because it was self-published and hadn't been widely distributed. *Id.* 230a. According to the

majority, the post-conviction court did not clearly err in concluding that choosing not to question Juror 58 about the book on this basis was a reasonable strategic choice. *Id.* 231a-232a.

Judge Stith dissented. Unlike choosing whether to pursue one kind of defensive theory to present to a jury over another, "[a] similar strategic choice is not required when a potential juror reveals multiple sources of bias." Pet. App. 291a (Stith, J., dissenting). "It is not reasonable to pick only one disqualifying or biasing issue to examine further." *Ibid.* "Yet, that is what counsel admitted they did here." *Ibid.* "Because they wanted to follow up on Juror 58's son's own employment as a police officer, they chose not to question him about his novel." *Ibid.* "This choice was unreasonable," Judge Stith concluded. *Ibid.*

Judge Stith also explained why the majority was wrong to suggest that her analysis "would be equivalent to adopting a rule that 'a potential juror's employment as an author, standing alone, establishes the juror has "multiple sources of bias."'" Pet. App. 291a (quoting Pet. App. 230a n.4). The important point was not that Juror 58 was an author, but that "Juror 58, on his own initiative, approached the bench during a break to inform the court he had not revealed as yet during voir dire that he was a published author and he thought 'maybe I should be coming out with fact [sic] as well." *Id.* 291a-292a (Stith, J., dissenting) (sic in original). "When a venireperson feels strongly enough that a piece of information may be relevant for consideration in voir dire that he himself suggests it to the court on his own initiative, defense counsel is ineffective in failing to investigate what made the venireperson believe the information needed to be

disclosed." *Id.* 292a. Entirely failing "to conduct a basic investigation of the juror's bias was ineffective." *Ibid.*

Second, petitioner argued his trial team was ineffective for failing to call witnesses to develop the record of whether Juror 58 had engaged in misconduct or otherwise prejudiced his fellow jurors by sharing his fictionalized autobiography or discussing its anti-defendant storyline. *Id.* 233a-242a. The evidence later developed post-conviction showed that Juror 58 had in fact given several copies of his book to at least three other jurors during sequestration, as well as court staff and security, and openly discussed the book with everyone who would listen. *Id.* 243a-247a.

Based on trial counsel's testimony, the majority held that the post-conviction court did not clearly err in finding this choice to be a reasonable strategy as well. Counsel belatedly testified, without justification, that "the trial judge had 'been good' to them during the trial" and they did not want to upset him by "'opening the can of worms'" to develop the record as the trial judge had invited them to do; they considered it a victory the jury could not agree on punishment; and lead trial counsel had not previously had a trial judge impose death after a jury deadlocked on punishment. *See* Pet. App. 236a-237a. "Even though trial counsel's strategy failed in hindsight," the majority held that "trial counsel evaluated their options, drew upon their experience, and chose to forego 'opening the can of worms' regarding Juror 58's alleged misconduct in exchange for attempting to persuade the circuit court to impose a life sentence to save [petitioner]'s life." *Id.* 237a.

Judge Stith dissented on this point too. Defense "counsel's rejection of the circuit court's offer to allow counsel to call Juror 58 and other jurors during the hearing on the motion for new trial .... meant the record before the circuit court and this Court on appeal did not support grant of a new trial, resulting in the conviction being affirmed on appeal." Pet. App. 292a (Stith, J., dissenting); *compare id.* 340a-341a (direct appeal holding that "[t]here is nothing in the record to support [petitioner]'s assumption that Juror 58 shared his novel and its story with other jurors" and "nothing in the record demonstrated that Juror 58 lied when he said he could be fair and impartial or that he was willing but reluctant to impose the death penalty"). "If counsel believed errors in the trial merited a new trial, they had a duty to file a proper and supported motion for new trial. They failed to meet their duty by filing a motion they admittedly chose not to fully support with facts." *Id.* at 293a.

Moreover, defense counsel could have had its cake and eaten it too but didn't even try, making the ostensible "strategy" even more unreasonable. "[I]f what counsel wanted was to have the judge decide punishment while knowing the jury deadlocked, they could have requested the judge and State consent to doing just that even if a new trial were granted." Pet. App. 293a (Stith, J., dissenting). "Failing to investigate juror misconduct, however, was not an option." *Ibid.* "While counsel may have believed the better chance of avoiding a death sentence lay in their hope the judge would continue to 'be good' to them rather than in raising prejudicial juror misconduct from Juror 58's deliberate exposure of the other jurors to his novel, this belief was not reasonable as counsel

had no idea of the seriousness of the exposure to other jurors to the virulently anti-defendant violent rhetoric of the book." *Id.* 293-294a. "Counsel does not have to choose between hoping for mercy from a judge or presenting valid claims in the client's defense, and this Court should not excuse counsel's failure to follow up here as trial strategy." *Id.* 294a.

Since trial counsel's "ineffectiveness may well have affected the decision to leave Juror 58 on the jury for the guilt phase and could well have affected the jury's inability to decide on punishment," Judge Stith concluded that petitioner's motion for post-conviction relief should have been granted and his conviction and sentence set aside. Pet. App. 295a.

IV. Federal Habeas Review

1. Petitioner sought habeas relief in federal court under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *See* 28 U.S.C. § 2254.

The District Court denied the petition, finding that no reasonable jurist could conclude the state court majority's denial of post-conviction relief was contrary to or an unreasonable application of Supreme Court precedent, or based on an unreasonable determination of the facts. *See* Pet. App. 3a-216a. The court also denied the certificate of appealability required to appeal under 28 U.S.C. § 2253(c). The court concluded that petitioner's claims "lack debatable merit," and "the issues do not deserve further proceedings." Pet. App. 216a.

2. Petitioner filed a timely application for a certificate of appealability in the Court of Appeals.

A panel of the Eighth Circuit denied the application in a 2 to 1 order over Judge Jane L. Kelly's vote to "grant a certificate of appealability on Claim 1, which alleges ineffective assistance of trial counsel." Pet. App. 1a-2a.

3. Petitioner timely sought panel rehearing and rehearing en banc.

The Eighth Circuit denied panel rehearing in a 2 to 1 vote, again over Judge Kelly's voted to "grant the petition for panel rehearing." Pet. App. 350a. The court denied en banc review over the dissent of both Judge Kelly and Judge Ralph R. Erickson. *Ibid.*

This petition follows.

REASONS TO GRANT THE PETITION

This capital case starkly presents a dispute dividing the circuit courts as to when a state prisoner has the right to appeal the denial of federal habeas claims. This Court has long and repeatedly held that a state prisoner is entitled to appeal the denial of his federal habeas petition if he can show "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.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003)). Yet the circuits are deeply divided 5 to 4 on whether that threshold is met when judges in fact dispute whether the issues warrant appellate review. The Third, Fourth, Seventh, and Ninth Circuits recognize that a certificate of appealability is warranted when any circuit judge votes to grant one; a jurist reasonably could conclude, because

a jurist has concluded, that the case merits an appeal. But the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits deny COAs over the dissent of a colleague who votes that the issues warrant further review—just as the Eighth Circuit did in this case.

This question dividing the circuits is important, as shown by the fact that members of this Court have taken the extraordinary step of dissenting from the denial of certiorari to the Eighth Circuit when it has denied an application for COA in a split decision. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553-54 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of application for stay and denial of certiorari); *see also Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari). Courts that deny applications to appeal over the dissent of a colleague are "too demanding in assessing whether reasonable jurists could debate the merits" or believe "'the issues presented were adequate to deserve encouragement to proceed further.'" *See Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

This case is an especially good vehicle to decide the question. Judge Kelly lodged her dissent from the denial of COA. She then voted to grant panel rehearing. Judge Erickson then joined Judge Kelly in dissenting from the denial of en banc review. And the same judge who had authored the state court opinion affirming petitioner's conviction and death sentence on direct appeal dissented from the denial of petitioner's motion for post-conviction relief—explaining that petitioner was denied his Sixth Amendment right to counsel in part *because*

his defense team expressly waived the trial judge's invitation to develop the record of juror bias and misconduct such that his conviction had to be affirmed on direct. Petitioner is entitled to appeal the District Court's denial of habeas relief because "'reasonable minds could differ—*had differed*—on the resolution'" of his claim. *See Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting) (quoting *Jordan*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting)). Given Juror 58's conduct before trial and during sequestration, and defense counsel's utter failure to uncover his obvious anti-defendant bias and distrust of the court system, this Court should require the Eighth Circuit to hear petitioner's appeal in this extraordinary case before he may be put to death.

I. The Courts Of Appeals Are Divided 5 to 4 Over The Question Presented By This Case.

There is a deep and entrenched circuit split on an issue that has already drawn scrutiny from several members of this Court. The Third, Fourth, Ninth, and Seventh Circuits require a certificate of appealability to issue so long as any circuit judge votes to grant one. But the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits will deny the right to appeal over even a reasoned dissent.

That split is untenable and unjust. Petitioner should not be put to death without appellate review of Sixth Amendment claims that several judges find substantial just because he is imprisoned in Missouri rather than bordering state Illinois.

1. In the Third, Fourth, Ninth, and Seventh Circuits, an application to appeal must be granted when at least one judge votes to grant.

In the Third Circuit, the local rules provide that "[a]n application for a certificate of appealability will be referred to a panel of three judges," and "if any judge on the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. L.A.R. 22.3 (2011).

The Fourth Circuit similarly provides by rule that a "request to grant or expand a certificate … shall be referred to a panel of three judges," and if "any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue." 4th Cir. Loc. R. 22(a)(3) (2023).

The Seventh Circuit, too, has interpreted its rules to require that a COA must issue so long as any one judge "concludes ... that the statutory criteria for a certificate have been met." *See Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003) (interpreting Operating Procedure 1(a)(1)).

The same goes in the Ninth Circuit, where the rules provide that the court can only deny an application to appeal if unanimous. 9th Cir. G. O. 6.2(b), 6.3(b), 6.3(g); *see also McGill v. Shinn*, 16 F.4th 666, 706 & n.14 (9th Cir. 2021) (granting certificate of appealability despite majority disagreeing that COA threshold had been met because majority was "fully satisfied of the fairmindedness of our dissenting colleague").

2. In contrast, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits will all deny an application to

appeal even when one or more colleagues conclude that the issues warrant appellate review.

The Eighth Circuit's particularly egregious practice is to deny an application for COA even over the dissents of multiple colleagues. In fact, the Eighth Circuit recently went en banc to vacate a panel order granting a COA and then denied the application over the dissent of *three* circuit judges. *Johnson v. Vandergriff*, 2023 WL 4851623, at *1 (8th Cir. July 29, 2023), *cert. denied*, 143 S. Ct. 2551 (2023). Thus, despite a panel majority having already granted the application to appeal, and three judges of the en banc court dissenting in separate writings, a majority of the en banc court concluded that "no reasonable jurist" could find that the issues warranted an appeal. *Compare ibid.* (Gruender, J., joined by Colloton, Benton, Shepherd, Grasz, Stras, and Kobes, JJ., concurring), *with id.* at *3-7 (Kelly, J., joined by Smith, C.J., and Erickson, J., dissenting), *and id.* at *7-8 (Erickson, J., joined by Kelly, J., dissenting).

Members of this Court criticized the Eighth Circuit's en banc decision in *Johnson* for having "too demanding" a standard "in assessing whether reasonable jurists could debate the merits of" the habeas petition, given that "three judges dissented when the en banc court vacated the panel's order" granting a COA. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of application for stay and denial of certiorari). In this case, the Eighth Circuit has denied another death row petitioner an appeal and en banc review over the dissents of multiple active judges. And these remarkable results follow from other published

authority of the Eighth Circuit, denying a COA over the reasoned dissent of a circuit judge who would vote to grant one. *See, e.g.*, *Williams v. Kelley*, 858 F.3d 464, 475-80 (8th Cir. 2017) (denying COA over reasoned dissent of Judge Kelly); *see also, e.g.*, *Wade v. United States*, 2022 WL 839397, at *1 (8th Cir. Mar. 4, 2022) (denying COA over Judge Kelly's vote to grant the request); *Johnson v. Blair*, 2022 WL 2032929, at *1 (8th Cir. Jan. 21, 2022) (same), *cert. denied*, 143 S. Ct. 430 (2022); *Rhines v. Young*, 2018 U.S. App. LEXIS 37756, at *1 (8th Cir. Sept. 7, 2018) (same); *Taylor v. Bowersox*, 2014 U.S. App. LEXIS 3522, at *1-9 (8th Cir. Feb. 24, 2014) ("I would grant the petition for rehearing en banc in this case in order to grant a certificate of appealability to petitioner … and stay his execution until this issue could be decided on the merits.") (Bye, J., joined by Kelly, J., dissenting from the denial of rehearing en banc); *Lotter v. Houston*, 2011 U.S. App. LEXIS 26993, at *1 (8th Cir. Aug. 23, 2011) (denying COA over Judge Bye's vote to grant one).

The Fifth Circuit's practice is also to deny a COA even over the reasoned dissent of a colleague. *See Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014), *cert. denied sub nom. Jordan v. Fisher*, 576 U.S. 1071 (2015); *see, e.g.*, *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (published decision denying COA and motion for stay of execution over reasoned dissent of Judge James E. Graves (citing *Crutsinger v. Davis*, 929 F.3d 259, 266 (5th Cir. 2019) (Graves, J., dissenting); *Crutsinger v. Davis*, 930 F.3d 705, 709 (5th Cir. 2019) (Graves, J., dissenting))). In *Jordan*, the panel majority acknowledged that "[a] petitioner satisfies" the COA 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." 756 F.3d at 405 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003)). Yet it held that no reasonable jurist could so conclude despite the reasoned dissent of Judge James L. Dennis, who believed one of the petitioner's claims "deserve[d] encouragement to proceed further." *Compare id.* at 405-11 (panel majority rejecting dissent's reasoning) *with id.* at 413-22 (Dennis, J., dissenting from the denial of COA).

Judge Dennis's dissent pointed out that the panel was "not called upon to make a decision on the ultimate merits of Jordan's claim of prosecutorial vindictiveness." *Jordan*, 756 F.3d at 416. "Rather," he noted, Jordan only needed to show that "'jurists of reason could disagree.'" *Ibid.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). And "any doubt as to whether a certificate should issue in a death-penalty case," he pressed, should "be resolved in favor of the petitioner." *Ibid.* (quoting *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005)). The *Jordan* majority expressly rejected Judge Dennis's reasoning, addressing his dissent at length. 756 F.3d at 407 ("because the dissenting opinion addresses a presumption of vindictiveness claim," the majority "addess[ed] why … any such argument is foreclosed by [the circuit's] binding precedent"). The majority then spent several pages of the federal reporter addressing the merits of the claim under prior Fifth Circuit precedent. *Id.* at 407-11. As in *Johnson*, the Fifth Circuit's reasoning prompted members of this

Court to dissent from the denial of certiorari. "[T]he Fifth Circuit was too demanding in assessing whether reasonable jurists could debate the District Court's denial of [the] habeas petition," given that two judges had "found [his] ... claim highly debatable." *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari).

As with the Eighth and Fifth Circuits, the Sixth, Tenth, and Eleventh Circuits will also deny applications to appeal over even a colleague's reasoned dissent. *Wellborn v. Berghuis*, 2018 U.S. App. LEXIS 22931, at *1-2 (6th Cir. Aug. 16, 2018) (denying COA over reasoned dissent of Judge Bernice Donald); *Rafidi v. United States*, 2018 U.S. App. LEXIS 21327, at *1 (6th Cir. July 31, 2018) (denying COA over dissent of Judge Helene White); *United States v. Ellis*, 779 F. App'x 570, 572 (10th Cir. 2019) (denying COA over reasoned dissent of Judge Robert E. Bacharach); *United States v. Miller*, 789 F. App'x 678, 680 (10th Cir. 2019) (same); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015) (denying COA over reasoned dissent of Judge Beverly B. Martin); *Mann v. Palmer*, 713 F.3d 1306, 1317 (11th Cir. 2013) (Martin, J., concurring in part and dissenting in part) ("in another case" prisoner had "pending in this court," the judge "dissented from the denial of a certificate of appealability in that case" (citing *Mann v. Moore*, No. 13-11322-P, slip op. at 16-21 (11th Cir. April 9, 2013)); *see also Hutchinson v. Secretary, Fla. Dep't of Corr.*, No. 21-10508-P, slip op. at 4-6 (11th Cir. Apr. 29, 2021) (denying COA over Judge Adalberto Jordan's dissent).

II. The Question Presented Is Important.

The Question Presented is important, as reflected by the fact that members of the Court have taken the extraordinary step of dissenting from the denial of certiorari to criticize the Eighth Circuit and its side of the split. And this Court has granted review when the circuits are applying differing standards in reviewing such applications to appeal.

1. This is a particularly good case to resolve the split implicated by the Question Presented because the Eighth Circuit's practice is particularly egregious. As just describe, the Eighth Circuit in *Johnson v. Vandergriff* went en banc to vacate a panel decision that had granted a COA, and then denied the COA over the dissent of three circuit judges. 2023 WL 4851623, at *1 (8th Cir. 2023). That decision drew a scathing dissent chastising the Court of Appeals for denying a COA even though numerous judges debated the merits of the claim. *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of application for stay and denial of certiorari). When judges actually "debate the merits of [a] habeas petition," that "'alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution'" of the claim. *Ibid.* (quoting *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari)) (emphasis in original). While the "COA requirement erects an important … barrier to an appeal," that barrier is "not insurmountable." *Id.* at 2554.

In this case, the Eighth Circuit again has denied a capital prisoner's application to appeal over dissent, and then denied en banc review over the dissent of multiple active judges. But "[t]he only question before the Eighth Circuit was whether reasonable jurists could debate the District Court's disposition of Johnson's habeas petition." *See Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). "That question, in turn, depends on whether reasonable jurists could debate whether the Missouri Supreme Court contravened or unreasonably applied clearly established federal law." *See ibid.* (citing 28 U.S.C. § 2254(d)).

In *Johnson*, three of this Court's members would have granted certiorari to give "Johnson a meaningful opportunity to be heard," because "reasonable jurists can and do have that debate." *See* 143 S. Ct. at 2556. "Put simply, it [wa]s beyond question that Johnson's habeas claim [wa]s 'reasonably debatable,'" because "[m]embers of this Court, the Eighth Circuit, and the Supreme Court of Missouri ha[d] already done so." *Id.* at 2255-56. "To nevertheless maintain that Johnson should be denied a COA because no reasonable jurist could debate the District Court's denial of his habeas petition defies common sense." *Id.* at 2556.

Members of this Court also dissented from the denial of certiorari to review the Fifth Circuit's decision in *Jordan v. Epps*, 756 F.3d 395 (5th Cir. 2014), described above. *See Jordan v. Fisher*, 576 U.S. at 1071-78 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting). "Although the Fifth Circuit accurately recited the standard for issuing a COA, its application of that standard in th[e] case contravened" this Court's precedents. *Id.* at 1076. "To start, the

Fifth Circuit was too demanding in assessing whether reasonable jurists could debate the District Court's denial of Jordan's habeas petition." *Ibid.* In addition to "Judge Dennis" of the Fifth Circuit, "Justice Banks" of the Mississippi Supreme Court had also "found Jordan's vindictiveness claim highly debatable." *Ibid.* "Those facts alone," according to several of this Court's members, "might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution of Jordan's claim." *Ibid.*

2. This Court has granted certiorari when a petitioner has asserted a circuit's "'troubling' pattern of failing to apply the threshold COA standard required by this Court's precedent." *See* Petition for Writ of Certiorari at 26, *Buck v. Stephens sub nom. Buck v. Davis* (No. 15-8049) 2016 WL 3162257 (quoting *Jordan*, 576 U.S. at 1078 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari)).

In *Buck v. Davis*, the petitioner presented this Court with evidence of a "troubling pattern" that had "resulted in a demonstrable circuit split with respect to the application of the COA standard." Petition for Writ of Certiorari, *supra*, at 26. Appendix F to the *Buck* petition set forth "a review of electronically available capital § 2254 cases in the Fifth Circuit and two other nearby circuits (the Fourth and Eleventh) in the last five years, demonstrat[ing] a dramatic difference among the three circuits." *Ibid.* "In the Fifth Circuit," the petition noted, "a COA was denied on all claims by both the district court and the court of appeals 59% of the time." *Ibid.* "By contrast, during that same period, a COA was denied on all claims by both the district court and court of appeals in only

6.25% of capital § 2254 cases in the Eleventh Circuit and 0% of such cases in the Fourth Circuit." *Ibid.* This disparate treatment is further reason to grant the petition here.

Of course, this Court granted the petition in *Buck*. The Court then held in a lopsided opinion that although the "court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief," the court applied too stringent a standard in resolving that question. *Buck v. Davis*, 580 U.S. 100, 115-16 (2017) (Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ.). "At the COA stage, the only question is whether the applicant has shown 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.* at 115 (quoting *Miller–El v. Cockrell*, 537 U.S. 332, 327 (2003)). So "when a reviewing court (like the Fifth Circuit [t]here)" instead "inverts the statutory order of operations and 'first decides the merits of an appeal, then justifies its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner *at the COA stage*." *Id.* at 116-17 (quoting *Miller–El*, 537 U.S. at 336-37) (cleaned up).

Despite this Court's repeated pronouncements, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits are placing too heavy a burden on state prisoners by denying applications to appeal the denial of federal habeas claims despite judges' votes that the claims merit appellate review. This Court's intervention is required once more.

III. Petitioner's Substantial *Strickland* Claims Warrant Further Review.

Petitioner's application to appeal would have been granted had he been imprisoned in any state within the Third, Fourth, Seventh, or Ninth Circuits, given Judge Kelly's vote. And two active judges of the Eighth Circuit voted to grant en banc review. The Supreme Court of Missouri itself was split on the merits of petitioner's Sixth Amendment claims. "When 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, 1040 (7th Cir. 2011); *see also, e.g.*, *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari) ("Two judges—first Justice Banks [of the Missouri Supreme Court], and later Judge Dennis [of the Fifth Circuit]—found Jordan's vindictiveness claim highly debatable.").

Petitioner has made a "substantial showing of the denial of a constitutional right," such that he is entitled to appeal. *See* 28 U.S.C. § 2253(c)(2). Petitioner was denied his Sixth Amendment right to effective assistance of counsel in two critical ways. As Judge Stith reasoned in her dissent from the state court's denial of post-conviction relief, petitioner's trial counsel was deficient both (1) in failing to question Juror 58 about his novel and (2) in failing to investigate and present evidence of juror misconduct, and those failures were prejudicial. Pet. App. 290a-295a.

1. When a potential juror "feels strongly enough that a piece of information may be relevant for consideration in voir dire that he himself suggests it to the court on his own initiative, defense counsel is ineffective in failing to investigate what made the venireperson believe the information needed to be disclosed." Pet. App. 292a (Stith, J., dissenting). In other words, it is unreasonable to characterize counsel's failure to probe Juror 58 for potential bias as a valid strategic choice between different lines of questioning. Unlike choosing among different, perhaps contradictory defense theories to present to a jury, a "similar strategic choice is not required when a potential juror reveals multiple sources of bias." *Id.* 291a. "Counsel could, and should, examine the potential juror about all of the revealed biases. It is not reasonable to pick only one disqualifying or biasing issue to examine further." *Ibid.*

The state court majority's contrary conclusion violates even AEDPA's deferential standards. The record is damning. Juror 58's fictionalized autobiography contained events strikingly parallel to petitioner's case. Both involved a death due to drunk driving and the death of a law enforcement officer. D. Ct. Doc. 20-5, at 124. The fictionalized autobiography promoted vigilante justice against criminal defendants who "got off easy" in the system, with the protagonist torturing and killing a drunk-driver defendant who received only probation for killing the protagonist's wife. *See ibid.* As one of petitioner's defense counsel admitted, the trial team did not contemplate this as a thoughtfully chosen strategy; there wasn't *any* "strategy reason" for not asking Juror 58 any follow-up questions about authorship

during voir dire. D. Ct. Doc. 20-24, at 639. Instead, lead trial counsel only suggested that he didn't think it important because, in his view, "self-publishing" a self-described fictionalized autobiography like *Indian Giver* was a "vanity project." *See* Pet. App. 230a-231a (quoting testimony of trial counsel who contemporaneously "conced[ed] ineffectiveness for failing to inquire about the book during voir dire," Pet. App. 227a).

The majority opinion rejected the defense team's admission that they had "no strategic reason" for failing to follow up on Juror 58's authorship. *See* Pet. App. 61a, 231a. According to the majority, lead "[t]rial counsel articulated strategic reasons why they chose not to question Juror 58" about his book. *See* Pet. App. 231a. But again, lead trial counsel's testimony was not an explanation of *any* strategy, so it was unreasonable for the state court to conclude that the explanation described a *reasonable* strategy. In effect, the majority held that even though trial counsel admitted they did not subjectively have any strategic reason to forgo asking Juror 58 about his fictionalized autobiography, and even though trial counsel conceded ineffectiveness for this failure, this unconsidered decision was still a valid and reasonable strategy "made after thorough investigation of law and facts relevant to plausible options." *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). But merely intoning the word "strategy" cannot excuse deficient performance when the claimed strategic decision was not based on a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). The reasonableness of a decision must be evaluated based on whether counsel made a strategic

choice after a reasonable investigation. *Ibid.* And when trial counsel conducts no investigation at all to inform a critical decision, it is unreasonable. *Ibid.* In all events, it should have been plainly obvious in this case that a potential juror who was so motivated by his "vanity project" that he would take the time and effort to self-publish such violent, anti-defendant fictionalized autobiography should be questioned about it. Such fictionalized autobiography is much more probative of the author's biases than one that has gone through the standard publishing industry selection, editing, revision, and distribution process.

2. Petitioner's trial counsel also performed deficiently in failing to investigate and present evidence to support their motion for new trial once the content of Juror 58's fictionalized autobiography came to their attention. The evidence of Juror 58's bias and conduct was developed in post-conviction proceedings precisely *because* the trial team expressly declined the judge's invitation to develop the record to support their new trial motion. "If counsel believed errors in the trial merited a new trial, they had a duty to file a proper and supported motion for new trial." Pet. App. 293a (Stith, J., dissenting). "They failed to meet their duty by filing a motion they admittedly chose not to fully support with facts." *Ibid.*

The prejudice from these failures is clear. Indeed, the prosecution agreed to remove Juror 58 from the penalty phase once the contents of his fictionalized autobiography were revealed. Pet. App. 227a. "The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury." *Skilling v. United States*, 561 U.S. 358, 377 (2010). For that reason, "[t]rying a defendant before a biased jury is akin to

providing him no trial at all," and "constitutes a fundamental defect in the trial mechanism itself." *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992); *see also Remmer v. United States*, 347 U.S. 227, 229 (1954) (even the perception that a juror's impartiality is compromised is, "for obvious reasons, deemed presumptively prejudicial"). Had petitioner's counsel properly questioned Juror 58 about his fictionalized autobiography during voir dire, he would likely have been struck for cause given his violent anti-defendant views.

The state court majority's contrary conclusion is "contrary to" and "an unreasonable application of" clearly established federal law, as well as an "unreasonable determination of the facts," 28 U.S.C. § 2254(d), contradicted by "clear and convincing evidence," *id.* § 2254(e)(1). *Cf. Burt v. Titlow*, 571 U.S. 12, 18, (2013) (this Court has "not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)"). No reasonable jurist could dispute that the defense team's "ineffectiveness may well have affected the decision to leave Juror 58 on the jury for the guilt phase and could well have affected the jury's inability to decide on punishment." Pet. App. 295a (Stith, J., dissenting). And the only consequence of granting this capital petition and answering "yes" to the Question Presented or, alternatively, issuing petitioner a certificate of appealability is that a prisoner on death row may appeal the district court's denial of Sixth Amendment claims that several federal and state judges find debatable and worthy of further review.

CONCLUSION

This Court should grant the petition or enter an order granting petitioner a certificate of appealability.

Respectfully submitted,

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November 4, 2024