No. 24-695

IN THE SUPREME COURT OF THE UNITED STATES

BILL COOL, Warden,

Petitioner

vs.

NATHANIEL JACKSON,

Respondent

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

RESPONDENT'S BRIEF IN OPPOSITION

Joseph Medici
Federal Public Defender

* Paul R. Bottei
Adam M. Rusnak
Assistant Federal Public Defenders

Office of the Federal Public Defender
Southern District of Ohio
10 West Broad Street, Suite 1020
Columbus, Ohio 43215
(614) 469-2999

* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

In granting Nathaniel Jackson habeas corpus relief, the court of appeals held that his trial judge's unconstitutional bias made this case "the epitome of . . . an extreme judicial malfunction." App. 2a, 10a-18a. In this Court, however, Petitioner does not challenge the court of appeals' judicial bias ruling. *See* Pet. i (question presented) *and* Sup. Ct. R. 14.1(a). Instead, Petitioner challenges only a second ground upon which the court of appeals granted relief, *viz*., the biased judge's exclusion of mitigating evidence at resentencing. *See* Pet. i (question presented) *and compare* App. 18a-27a (granting habeas corpus relief on this additional ground).

The questions presented are:

1. Under Article III, can this Court grant certiorari on the secondary issue raised in the question presented, when, given Petitioner's failure to challenge the grant of relief on judicial bias, the question presented is moot, and/or any decision of the question presented would be advisory?

2. Should this Court grant certiorari to review the issue raised in the question presented, where, *inter alia*: the existence of the biased judge and Petitioner's waiver of all challenges to the court of appeals' judicial bias ruling make this a poor vehicle for addressing the question presented; Petitioner's asserted conflict is illusory on the facts of this case and not worthy of certiorari; and the court of appeals correctly concluded that Jackson is entitled to habeas corpus relief on his Eighth Amendment mitigating evidence claim?

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INTRODUCTION

Nathaniel Jackson was sentenced to death by a biased judge who secretly collaborated with the prosecution to decide Jackson's capital sentence. When this misconduct was uncovered, and the judge was commanded to sentence Jackson again, he insisted he had done nothing wrong, flouted the decision of the state supreme court, and re-issued a nearly identical, equally tainted judgment. The federal court of appeals correctly granted Jackson habeas corpus relief on this basis, finding the judge's conduct to be "the epitome of [] an extreme judicial malfunction." App. 2a.

Before this Court, Petitioner raises no challenge to this conclusion by the court of appeals. Instead, the Warden attacks only a *second* basis for the court's grant of relief, premised on the biased judge's refusal to consider all available mitigating evidence when he was ordered to sentence Jackson again in compliance with the constitution.

The Warden's failure to challenge the unconstitutional bias that affected Jackson's case ultimately dooms his Petition. Because that un-appealed grant of the writ already entitles Jackson to full sentencing relief – that is, the presentation of mitigating evidence to a jury, overseen by an unbiased judge, and the fair imposition of sentence by a neutral arbiter – this Court cannot grant Petitioner the redress sought by the question presented. And even if it could, this case presents an exceptionally poor vehicle for review: it gives rise to no actual conflict given its unique facts; the court of appeals correctly granted relief on the ground raised by Petitioner; and Jackson is otherwise entitled to relief on other grounds.

The Petition should be denied.

STATEMENT OF THE CASE

I. The Court Of Appeals Granted Habeas Relief On Jackson's Judicial Bias Claim, And Petitioner Does Not Challenge Jackson's Entitlement To Relief On This Ground.

Nathaniel Jackson's state-court proceedings were tainted by the bias of Judge John Mason Stuard, who imposed the death sentence upon Jackson in 2002 and again in 2012.[1] Judge Stuard's "most egregious conduct was his facilitation of and participation in multiple ex parte communications – and in turn, ethical violations – relating to Jackson's sentencing opinion." App. 13a. "[I]t is hard to imagine a more 'extreme' case of bias from ex parte contact than this one." *Id.* at 14a. The court of appeals explained:

> Without informing Jackson, Judge Stuard approached the prosecutor to ghost write Jackson's sentencing opinion. After consulting Judge Stuard's incomplete notes, the prosecutor used his discretion to create a draft opinion. Judge Stuard reviewed the prosecutor's draft, edited it, and told the prosecutor 'to make corrections.' [*Disciplinary Couns. v. Stuard*, 941 N.E.2d 788] at 790. The prosecutor did so – but he also incorporated another prosecutor's 'editorial suggestions.' *Id.* That version eventually became Judge Stuard's first opinion ordering Jackson's execution.

App. 13a. "Judge Stuard secretly recruited the prosecutor to draft the entirety of an opinion sentencing Jackson *to death*: he left the prosecutor to turn his two pages of incomplete, handwritten notes into a twelve-page opinion outlining the facts and

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[1] Jackson discusses Judge Stuard's judicial bias and the court of appeals' decision granting relief on that ground solely to inform this Court of the proceedings below, as they are relevant to this Court's review of the question presented by the Petition. Because Petitioner does not challenge Jackson's entitlement to relief on the grounds of judicial bias, no issues related to that grant of habeas relief are before the Court. Sup. Ct. R. 14.1(a). Jackson's entitlement to habeas corpus relief because of judicial bias remains intact, unaffected by the Petition.

procedural history, weighing the aggravating and mitigating factors (while characterizing Jackson's mitigating evidence as 'self-serving,' 'not convincing,' and lack[ing] sincerity'), and ultimately imposing the death penalty." *Id*. 14a (emphasis in original).

After his misconduct came to light, Judge Stuard was formally sanctioned by the Ohio Supreme Court, which found his conduct "wholly inconsistent" with the canons of judicial conduct. *Disciplinary Couns. v. Stuard*, 901 N.E.2d 788, 791 (Ohio 2009) (internal quotation omitted). Jackson requested a new sentencing, which Judge Stuard denied. He relented only after the Ohio Court of Appeals ordered him to "personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry as required by [Ohio law], and conduct whatever other proceedings are required by law and consistent with this opinion." *State v. Jackson*, 941 N.E.2d 1221, 1224, 1226 (Ohio Ct. App. 2010).

Even so, when resentencing Jackson in 2012, Judge Stuard first professed that he had done nothing wrong. Resent. Tr. at 6, R.47-17, PageID #13530. He then sentenced Jackson again to death, issuing an opinion almost identical to the original secretly crafted and prosecution-written opinion – an opinion that the judge finalized before the new sentencing proceeding commenced, the essence of prejudgment.[2]

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[2] Ohio Supreme Court Justice Lanzinger saw Judge Stuard's prejudgment of Jackson's death sentence clearly, aptly recognizing that "the new sentencing opinion had already been prepared prior to the resentencing hearing, and it was filed the same afternoon that the court heard Jackson's allocution and pronounced sentence. In other words, the Court did not take Jackson's words into account before reimposing a sentence of death." *State v. Jackson*, 73 N.E.3d 414, 447, ¶ 174 (Ohio 2016) (Lanzinger, J., dissenting).

The federal court of appeals held that Judge Stuard's improprieties establish an unconstitutionally high risk of judicial bias, the "epitome of . . . an extreme judicial malfunction." App. 2a. Judge Stuard's bias was constitutionally intolerable, and he essentially allowed the prosecution to act as both accuser and judge in Jackson's case. *Id.* 16a. Because the Ohio Supreme Court adjudicated Jackson's judicial bias claims by applying a subjective standard for assessing bias, as opposed to the objective standard required by clearly established federal law, *id.* 12a-13a, the court of appeals concluded that Jackson is entitled to habeas corpus relief on his judicial bias claim. "In sum, Judge Stuard failed to act as a fair tribunal, denying Jackson his Fourteenth Amendment right to an unbiased, neutral arbiter. As such, Jackson is entitled to a writ of habeas corpus on his judicial bias claim." *Id.* 17a-18a.

In this Court, Petitioner has not challenged the court of appeals' conclusions and holding on Jackson's judicial bias claims, nor has he argued that Jackson is not entitled to habeas corpus relief on this basis. As Jackson elaborates below, this fact ultimately requires this Court to dismiss or deny the Petition.

II. Judge Stuard Excluded, Or Refused To Consider, Mitigating Evidence At Jackson's 2012 Resentencing.

A. Judge Stuard Excluded Significant Mitigating Evidence At Resentencing.

In light of his egregious misconduct in the first sentencing proceeding, Judge Stuard was "directed by the Ohio Court of Appeals to afford Jackson a new hearing," App. 15a, and was "instructed to 'evaluate the appropriateness of the death penalty' on remand," App. 26(a) (quoting *Jackson*, 941 N.E.2d at 1226). Yet, at the resentencing hearing in 2012 – where the question was whether Jackson should be

sentenced to life or to death – Judge Stuard excluded significant mitigating evidence. Specifically, Jackson proffered several volumes of materials in support of a life sentence. *See* Proffer, Vols. 1-3, R.47-14, PageID #12619-819; R.47-15, PageID #12820-13005; R.47-16, PageID #13006-274; R.47-17, PageID #13275-472. The judge refused to allow consideration of any of this mitigating evidence. Resent. Tr. at 5, R.47-17, PageID #13529.

Contained in Jackson's proffer was a wealth of mitigating evidence that has never been considered by any Ohio decisionmaker determining whether Jackson should live or die. Such evidence includes that Jackson suffered severe cognitive, intellectual, adaptive, and perceptual deficits, as demonstrated by school records documenting an IQ of 70, significant adaptive deficits, a history of special education placement, and numerous skills well-below age and grade level. *See, e.g.*, R.47-15, PageID #12820, 12828, 12829, 12917, 12918, 12922. Jackson also proffered mitigating evidence that he had endured social, familial, and physical problems, including proof of significant childhood adversity, emotional abandonment by his mother, and serious health problems. *See, e.g.*, *id.*, PageID #12820-21, 12823-25, 12896, 12919. Jackson's proffer also included evidence of substance dependence and brain damage, while demonstrating that he had successfully completed personal development programs while incarcerated. *See, e.g.*, *id.*, PageID #12851-53, 12856, 12870, 12882-84.

B. The Court Of Appeals Granted Nathaniel Jackson Habeas Corpus Relief On This Ground.

Because Judge Stuard prohibited consideration of this mitigating evidence, Jackson maintained that he was entitled to habeas corpus relief, and the district court agreed. App. 47a-53a. The court of appeals affirmed. *Id*. 18a-27a.

The court of appeals held that, as to the mitigating evidence excluded at resentencing, *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), "require capital sentencing courts to consider any and all relevant mitigating evidence presented at the time of sentencing, with no exception for cases where prior sentencing proceedings had been held." App. 18a. Explaining the holdings in *Lockett*, *Eddings*, and *Skipper*, the court emphasized, for example, that upon ordering resentencing in *Eddings* and *Skipper*, this Court mandated that the sentencer at the resentencing proceeding consider "*any and all relevant mitigating evidence that is available*." App. 21a (emphasis supplied) (quoting *Skipper*); *id*. ("all relevant mitigating evidence") (quoting *Eddings*). *See also* App. 21a-22a (quoting *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Kansas v. Marsh*, 548 U.S. 163 (2006), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007)); App. 23a (quoting *Skipper*, 476 U.S. at 8).

But the Ohio Supreme Court denied relief by failing to apply *Eddings* and *Skipper*, instead crafting its own "resentencing exception" to *Lockett*, *Eddings*, and *Skipper*. The court of appeals thus concluded that "the Ohio Supreme Court unreasonably applied clearly established Supreme Court precedent by prohibiting Jackson from presenting all available, relevant mitigating evidence at his

resentencing proceedings." App. 24a. Jackson's mitigating evidence could not be excluded precisely because "the trial court was considering whether to impose the death penalty at Jackson's resentencing," and this Court has held "that capital defendants may present 'any and all relevant mitigating evidence that is available' at the time the court is considering whether to impose the death penalty, *see Skipper*, 476 U.S. at 5, 8." App. 24a.

The court of appeals found the Ohio Supreme Court's conclusion was also "contrary to" the *Lockett-Eddings-Skipper* rule. "Here, the relevant question of law – whether the trial court must consider all relevant mitigating evidence when determining a sentence in capital proceedings – is one that the Supreme Court has squarely answered. Yet the Ohio Supreme Court refused to follow the Supreme Court's answer to that question." App. 25a. Consequently, "[t]he Ohio Supreme Court unreasonably narrowed the *Lockett-Eddings-Skipper* rule so much that it reached a conclusion opposite to that of the Supreme Court," and thereby "applied a standard contrary to that of the Supreme Court by categorically excluding Jackson's proffered mitigating evidence at his second capital sentencing proceedings." App. 25a. When a sentencer is actually "choosing a capital defendant's sentence" and making the choice between life and death (as Judge Stuard was), "'the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' *Skipper*, 476 U.S. at 4 (quoting *Eddings*, 455 U.S. at 114)." App. 26a.

Having found Jackson satisfied 28 U.S.C. § 2254(d)(1), the court held on *de novo* review that at the new sentencing proceedings, "Jackson was not subject to any

sentence," and thus "*Lockett, Eddings*, and *Skipper* entitled Jackson to present 'any and all' relevant mitigating evidence he had compiled at the time of his resentencing proceedings, yet the trial court prevented him from doing so." App. 27a. Thus, "Jackson is entitled to a writ of habeas corpus on his mitigating-evidence claim." *Id.*

III. The Court Of Appeals Pretermitted Consideration Of Two Other Claims: That Judge Stuard Also Refused To Consider Mitigating Evidence Of Jackson's Lack Of Future Dangerousness, And That Jackson's Trial Counsel Were Ineffective for Failing to Develop Mitigating Evidence.

Jackson further argued that Judge Stuard violated the Eighth Amendment at resentencing in yet another way, by refusing to consider mitigating evidence – which Jackson personally presented – of his ten years of peaceful behavior, personal improvement, and lack of dangerousness in prison, after he was first sentenced to death. *See* Br. of Petitioner-Appellee/Cross-Appellant at 21-23, 83-87, 89, 97, *Jackson v. Shoop*, Nos. 21-3207/3280 (6th Cir. June 5, 2023) (Doc. No. 42).

As Jackson has argued, the Eighth Amendment requires full consideration of this evidence which came into existence after his first sentencing: It was highly mitigating (more so than the 7 months of positive behavior at issue in *Skipper*); and it also rebutted the prosecution's argument that Jackson should be executed because he would kill again. *Id.* at 83-87. Thus, as Jackson has maintained, he is entitled to relief under the direct authority of *Skipper*.

Having granted Jackson relief on his *Lockett-Eddings-Skipper* claim, however, the court of appeals pretermitted determination of this claim. App. 25a n.4. Furthermore, having granted habeas relief on the judicial bias claim and the *Lockett-Eddings-Skipper* claim, the court of appeals has likewise pretermitted consideration

of Jackson's ineffective-assistance-of-counsel at sentencing claim, as set forth in his appellate briefing. *See* Br. of Petitioner-Appellee/Cross-Appellant at 32-37, 98-113, *Jackson v. Shoop*, Nos. 21-3207/3280 (6th Cir. June 5, 2023) (Doc. No. 42).

REASONS FOR DENYING THE WRIT

Throughout his Petition, Petitioner has "elided [the] very important fact[s]," *BG Group plc v. Republic of Arg.*, 572 U.S. 25, 49 (2014) (Roberts, C.J., dissenting), that the court of appeals granted Jackson habeas corpus relief on two grounds, one of which – judicial bias – Petitioner does not challenge. The Warden's failure to do so poses both jurisdictional and vehicle problems for the Petition, which instead raises a separate issue that, on its own, is also unworthy of review. The Petition should be dismissed or denied.

I. Given Petitioner's Waiver Of All Challenges To Jackson's Judicial Bias Claim, Article III Prohibits Petitioner's Request For Review Of His Question Presented

The Warden's petition for writ of certiorari suffers a fatal Article III defect that requires this Court to reject it. Whether described as mootness, or this Court being unable to provide any effectual relief on certiorari, or Petitioner requesting this Court to issue an advisory opinion, the fundamental problem with the Petition is that this Court lacks Article III jurisdiction to decide the question presented.

Petitioner has not challenged the court of appeals' ruling that Jackson is entitled to habeas corpus relief because he was tried and sentenced by a judge who was unconstitutionally biased, a due-process violation which constitutes structural error not subject to harmless-error analysis. *See* Pet. i *and compare* App. 2a, 10a-18a; *id.* 17a-18a ("In sum, Judge Stuard failed to act as a fair tribunal, denying Jackson

his Fourteenth Amendment right to an unbiased, neutral arbiter."); *id*. 11a ("judicial bias is a structural defect that affects the entire proceeding").

Jackson was subjected to this biased judge during the entirety of sentencing, which includes both the jury-sentencing portion (involving the presentation of mitigating evidence and ending with the jury's sentence recommendation) as well as the judge-only hearings (where the judge decides whether to accept the jury's recommendation and imposes sentence). Jackson has never had a proceeding untainted by constitutional error as the jury considered mitigating evidence, and his grant of relief on his judicial-bias claim entitles him to one now. Because this error is structural and not harmless, and not challenged by Petitioner, this grant of habeas relief entitles Jackson to an entirely new sentencing proceeding – a two-part proceeding in which an unbiased judge presides at *both* a jury-sentencing proceeding, and at a subsequent judge-only hearing for imposition of sentence.

Yet rather than challenge the grant of habeas corpus relief on this Fourteenth Amendment due process claim, Petitioner instead requests that this Court decide a separate issue (an Eighth Amendment claim) on which the court of appeals *also* granted habeas corpus relief. *See* App. 18a-27a.

Petitioner states the issue as such: The court of appeals "agreed that Jackson was entitled to new mitigation evidence on remand. Pet. App. 18a-27a," Pet. 3; the court of appeals concluded that this Court's case law "require[d] a reopening of mitigation evidence any time a death-penalty case is remanded, even if there was no

error in the first mitigation evidentiary hearing," *id.* 3-4; and, in Petitioner's view, this Court should now review that issue. *Id.* 4-17.

This case doesn't even present the issue posed by Petitioner, because *there was error* in Jackson's sentencing hearing, including most notably the participation of a constitutionally biased judge. For this reason, Jackson's first sentencing was anything but "flawless," as Petitioner asserts. Pet. 15. But even so, were this Court to review or decide this Eighth Amendment issue, this Court would not change the court of appeals' judgment on the Fourteenth Amendment judicial bias claim – for which Jackson has been granted habeas corpus relief, and which requires that Jackson be afforded, at a minimum, a new sentencing hearing before an unbiased judge at which a jury considers his mitigating evidence. The Petition thus presents an Article III mootness problem, since this Court cannot, by answering Petitioner's posed question, provide Petitioner "any effectual relief whatever." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

And indeed, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Given Petitioner's failure to seek review of the judicial bias claims, Article III now prohibits this Court from deciding Petitioner's question presented. Petitioner merely asks this Court "to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (2012).

Article III judicial power does not "extend[] to every *question* under the Constitution." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 295 (2021) (Roberts, C.J., dissenting), quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984) (emphasis in original). It does not extend to Petitioner's question presented. Because Petitioner fails to challenge the court of appeals' judicial bias ruling, this Court is not "able to provide meaningful redress to" Petitioner by answering his separate question. *Id.* Petitioner asks the Justices of this Court to act instead as "advice columnists," as he seeks "a judicial determination that [his] interpretation of [Eighth Amendment] law is correct—nothing more." *Id.* at 296. Article III prohibits that.

Petitioner nevertheless contends that the court of appeals' grant of habeas corpus relief on the grounds of judicial bias somehow does not require that a state court jury consider Jackson's mitigating evidence at a new sentencing proceeding. According to Petitioner, that requirement only attaches in this case because of the court of appeals' Eighth Amendment ruling, which, Petitioner contends, is "dispositive on the scope of the writ." *See* Pet. 14. Petitioner's assertions about the scope of Jackson's entitlement to relief for judicial bias, however, are not properly before this Court and, in any event, are simply not correct.

Indeed, the same biased judge presided at the jury-sentencing proceeding and the judge-only proceedings, and this judicial bias was not "harmless." App. 11a. Judge Stuard's failure to be an "unbiased, neutral arbiter" was, as the court of appeals has held, a structural defect that "affect[ed] the entire proceeding," *id.*, – meaning both "presentation of mitigating and aggravating evidence" to a jury and where a "judge

decides whether to impose the death penalty," *id.* at 4a n.1 – rendering it unconstitutional "at its core," *id.* at 2a. As such, this separate grant of habeas relief requires that Jackson be provided a complete sentencing hearing before an unbiased judge who presides over both the jury's consideration of mitigating evidence and a later judge-only proceeding for imposition of sentence.

And while Petitioner's question presented suffers mootness and advisory opinion problems, Petitioner imports additional Article III standing and ripeness problems that prevent review, by basing his question on assertions about how he thinks hypothetical future state court proceedings would occur. Pet. 14. Jackson disagrees with Petitioner's characterizations of those future proceedings, especially where Jackson has already noted the relief to which he is entitled, given judicial bias. Even so, the Warden's contentions about the course of future state proceedings are hypothetical, posing an Article III ripeness impediment, because his request for review is "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 592 U.S. 125, 131 (2020) (per curiam), quoting *Texas* v. *United States*, 523 U. S. 296, 300 (1998). This "significant degree of guesswork" subsumed by Petitioner's question poses an additional barrier to review. *Trump*, 592 U.S. at 132.

At bottom, given Petitioner's failure to challenge the court of appeals' ruling granting habeas relief because of judicial bias, Article III requires this Court to deny the Petition. Jackson is already receiving the very same relief on that claim as he was provided on the separate mitigating evidence claim. Given the very limited question

presented, there is no longer a live controversy about Jackson's entitlement to habeas relief and a new sentencing hearing.

II. Even If There Were Article III Jurisdiction To Consider The Question Presented, This A Poor Vehicle For Attempting To Decide That Question.

Even if this Court had jurisdiction to provide Petitioner the advisory opinion he seeks, the Article III problems with the Petition make it a decidedly poor vehicle for resolving the issue posed by the question presented. As a practical matter, to get to the question presented, this Court would first have to address and resolve the threshold jurisdictional issues unique to Jackson's case. These procedural barriers are serious obstacles that make the petition an extremely poor vehicle for addressing the question presented.

III. Review Of The Question Presented Is Not Warranted Where The Court Of Appeals Identified And Properly Applied The Correct Legal Rules To Grant Jackson Relief On This Issue.

Certiorari is not warranted when a petitioner asserts a "misapplication of a properly stated rule of law," Sup. Ct. R. 10. Yet that is precisely the situation here, and therefore certiorari should be denied on the question raised by Petitioner.

Indeed, the court of appeals correctly identified the legal standard governing habeas relief contained in 28 U.S.C. § 2254(d)(1), which permits relief when a state court adjudication is "contrary to" or involves "an unreasonable application of" this Court's clearly established law. App. 9a-10a; *id.* 23a-25a. When applying this standard, the court of appeals correctly identified and discussed the "clearly established law" that governs Jackson's Eighth Amendment claim. App. 18a-23a, citing, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104

(1982), *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Kansas v. Marsh*, 548 U.S. 163 (2006), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007).

The court of appeals proceeded to apply the correctly stated standard of 28 U.S.C. § 2254(d), concluding first that the Ohio Supreme Court unreasonably applied such clearly established law. App. 23a-24a, 26a. Further, the court found that the Ohio Supreme Court's decision was also contrary to clearly established law. *Id*. 24a-25a, 26a. The court explained why Petitioner's counterarguments concerning the application of § 2254(d) were errant. *Id*. 25a-26a. Finally, on *de novo* review, the court concluded that Jackson is entitled to relief under the Eighth Amendment. *Id.* 27a.

Because the court of appeals properly identified and applied the governing rules of law applicable to Jackson's Eighth Amendment mitigating evidence claim, Petitioner's request that this Court decide the question presented does not meet the exacting standards for granting certiorari identified in this Court's Rule 10.[3]

IV. The Question Presented Is Not The Subject Of An Actual Conflict, And Any Alleged Conflict Is Otherwise Not Worthy Of Certiorari

Petitioner claims that the question presented is the subject of a conflict in the lower courts, but that assertion fails for numerous reasons.

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[3] It is also worth noting that the court of appeals quickly denied a petition for rehearing and rehearing *en banc*, within 16 days after that petition was filed, and without requesting a response or a vote. *See* App. 85a. Such decisive action here contrasts with other recent cases in which the court of appeals has granted rehearing upon identifying error in a panel's grant of habeas corpus relief. *See, e.g.*, *Fields v. Jordan*, 86 F.4th 218 (6th Cir. 2023) (en banc) (on *en banc* review, denying habeas relief); *In re Hill*, 81 F.4th 560 (6th Cir. 2023) (en banc) (same); *Rogers v. Mays*, 69 F.4th 381 (6th Cir. 2023) (en banc) (same).

First, in trying to gin up a conflict, Petitioner does not fairly state the facts and the record, and Jackson vigorously disputes Petitioner's characterizations. For instance, Petitioner claims the court of appeals held that Jackson and other petitioners would be entitled to relief in the form of a new, sentencing hearing "even if their prior mitigation hearings were flawless." Pet. 1; *id.* 15. That is simply not true. Jackson's sentencing hearing was anything but "flawless." He is already separately entitled to relief, given the structural error that his jury sentencing proceeding was flawed by the presence of a biased judge. And he has argued his sentencing hearing was further flawed by the denial of his right to the effective assistance of counsel. *See* Section VI, *infra.* The very premise of Petitioner's argument does not exist in this case, making his alleged conflict non-existent as well.

Further, Petitioner misleads this Court when he asserts that Jackson had a "flawless" mitigation hearing in his first sentencing, and that his case was remanded for mere "opinion-drafting error." Pet. 1, 13. Jackson did not have a flawless mitigation hearing before a jury that was constitutional, given the judicial bias that affected his case. And it is also wholly disingenuous for Petitioner to characterize the judge's actions as involving mere "opinion-drafting error," in the face of the Ohio Court of Appeals' recognition that his behavior was "wholly inconsistent" with the canons of judicial conduct, and its order that Judge Stuard "personally review and evaluate the appropriateness of the death penalty." *State v. Jackson*, 941 N.E.2d at 1226. It was these numerous improprieties by Judge Stuard, ongoing during Jackson's first sentencing and repeated at his second, that led the federal court of

appeals to conclude that this case presents "epitome of . . . an extreme judicial malfunction." App. 2a.

Second, Jackson's case is distinguishable from any purported conflict among the lower courts. Petitioner contends: there is a conflict in the lower courts with Ohio and South Dakota on one side (and three courts on another); "whether the original mitigation evidentiary hearing suffered from an error determines whether a defendant should be permitted to reopen the hearing," Pet. 5; and courts in some states have concluded that "the Constitution does not require a new mitigation evidentiary hearing when no error infected the first hearing." Pet. 8. However, Jackson's case *is not* embraced by any purported "conflict" because Jackson's "original mitigation evidentiary hearing suffered from an error" of a biased judge and that error did "infect[] the first hearing," *id.* 5, 8, especially where the court of appeals has reached an uncontested conclusion that the presence of the biased judge was not harmless because it "affects the entire proceeding." App. 11a. In addition, Jackson's resentencing also suffered additional constitutional errors. *See* Section VI, *infra*.

Thus, even under Petitioner's statement of what constitutes purported conflict in this case, Jackson's case falls outside the scope of that asserted conflict. This "Court may deny certiorari for many reasons, including that the facts presented by a petition do not clearly or cleanly implicate a division of authority among the lower courts." *Price v. Montgomery Cnty.*, 603 U.S. ___, 144 S. Ct. 2499, 2500 n.1 (2024) (Sotomayor, J., respecting denial of certiorari). Simply put, Petitioner fails to come to grips with the fact that Jackson's sentencing hearing was presided over by a biased judge, which

distinguishes this case from the others cited, and otherwise entitles Jackson to habeas relief.

Third, Petitioner's alleged, but illusory, conflict is simply not a conflict worthy of review. In fact, this Court recently denied certiorari when asked to resolve a similar question presented, where a petitioner asserted a conflict in the lower courts. *See Leavell-Keaton v. Alabama*, 598 U.S. ___, 143 S. Ct. 2585 (2023); Pet. for Cert. in *Leavell-Keaton v. Alabama*, O.T. 2022, No. 22-6895. Petitioner unconvincingly tries to distinguish *Leavell-Keaton*, noting that the Brief in Opposition in *Leavell-Keaton* emphasized that this issue is "unlikely to recur," with Petitioner stating that this is "proven untrue." Pet. 14-15. Petitioner's argument, however, falls under its own weight: Petitioner identifies a mere handful of cases dating back forty years involving the issue he poses here. Pet. 5-10. As an empirical matter, the conflict asserted by Petitioner is "unlikely to recur." In fact, it didn't even "recur" here, given the unique facts of this case. A rare issue about an asserted conflict that does not exist in this case – one asserted to have affected a few cases over four decades – is not worthy of this Court's review.

V. The Court Of Appeals Correctly Granted Jackson Relief On The Separate Ground That He Was Denied His Eighth Amendment Right To Full Consideration Of Mitigating Evidence

Not only did the court of appeals cite and apply the correct legal standards governing Jackson's Eighth Amendment claim, *see* Section III, *supra*, the court of appeals also reached the correct conclusion in granting habeas relief on this secondary ground. Nathaniel Jackson's constitutional entitlement to full consideration of his mitigating evidence before imposition of sentence has a well-

established pedigree, starting nearly fifty years ago with *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Lockett*, and running through *Eddings*, *Skipper*, *Hitchcock*, *Abdul-Kabir*, and *Kansas v. Marsh*. Individually and cumulatively, these cases lead ineluctably to the same conclusion, the exact one reached by the court of appeals: In a proceeding in which a sentencer is choosing between life and death, the Eighth Amendment demands that the sentencer hear all mitigating evidence, lest the death penalty be imposed in spite of factors that warrant life. *See* App. 19a-27a.

Jackson need not restate the careful analysis conducted by the court of appeals, which systematically analyzed and explained this Court's Eighth Amendment jurisprudence, in which this Court has repeatedly emphasized three essential points: (1) when any sentencer (at any sentencing); (2) is choosing between life and death; (3) the sentencer must consider "any and all relevant mitigating evidence that is available." *Hitchcock v. Dugger*, 481 U.S. at 399. To be sure, this Court may have used slightly different language in laying out the Eighth Amendment requirements in its cases, but in each, this Court has made plain that *all* mitigating evidence must be considered in any proceeding when life and death are at stake.[4]

Woodson explained that the Eighth Amendment requires "the particularized consideration of relevant aspects of the character and record of each convicted

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[4] In his petition, Petitioner seemingly attempts to question "the *Skipper* line of cases," Pet. 16, but Petitioner never pressed any such argument below, and has waived and forfeited any such argument in this Court. Below, Petitioner acknowledged the applicability of *Lockett*, *Eddings*, and *Skipper*, and his sole contention was that the district court erred in granting relief under 28 U.S.C. § 2254(d). *See* Br. of Appellant-Cross-Appellee, *Jackson v. Shoop*, Nos. 21-3207/3280 (Feb. 1, 2023).

defendant *before the imposition* upon him of a sentence of death." 428 U.S. at 303 (emphasis supplied). Accordingly, "in fixing the ultimate punishment of death," a sentencer may not fail to consider the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id*. at 303-04.

Lockett made clear that "[w]hen the choice is between life and death," a sentencer must be allowed to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." 438 U.S. at 605. In *Eddings*, after restating *Lockett*'s requirement, and upon finding that the sentencer had not considered all of Eddings' mitigating evidence, this Court required a new sentencing hearing, with the proviso that "[o]n remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." 455 U.S. at 117. The phrase this Court used was "all relevant mitigating evidence," without restriction.

In *Skipper*, after mitigating evidence was excluded from consideration, this Court granted relief, specifically ordering that Skipper be provided a new, individualized sentencing consideration at which the sentencer must consider "any and all relevant mitigating evidence that is available." *Skipper*, 476 U.S. at 8, citing *Eddings*, 455 U.S. at 117. The words this Court used were "any and all mitigating evidence," with the Court again placing no restriction on the source or nature of that evidence. This Court reiterated that such evidence included all mitigating evidence "that is available" before sentence is imposed. Shortly after *Skipper*, in *Hitchcock*, this Court yet again made clear that before Hitchcock's sentence could comport with

the Eighth Amendment, the resentencing proceeding had to allow Hitchcock "to present any and all relevant mitigating evidence that is available." *Hitchcock*, 481 U.S. at 399.

Kansas v. Marsh, 548 U.S. 163 (2006), then restated that the Eighth Amendment requires that a capital defendant "must have the opportunity to consider *all evidence relevant to mitigation*." *Id.* at 171 (emphasis supplied). And in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), this Court re-emphasized that this Court's Eighth Amendment jurisprudence had now "firmly established that sentencing juries must be able to give meaningful consideration and effect" to "*all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual*." *Abdul-Kabir*, 550 U.S. at 246 (emphasis supplied). When stating this "firmly established" or "clearly established" law, this Court explicated its rulings in, *inter alia*, *Woodson*, *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*. *See Abdul-Kabir*, 550 U.S. at 247-50.

From this unbroken line of cases dating back nearly fifty years, the court of appeals has come to the unexceptional conclusion that "*Lockett*, *Eddings*, *Skipper*, and their progeny clearly established that capital defendants have a right to present during their sentencing proceedings 'any and all relevant mitigating evidence that is available.'" App. 23a, quoting *Skipper*, 476 U.S. at 8. That is exactly what the holdings and language of all these cases provide, exactly as the court of appeals explained in its careful analysis of this Court's Eighth Amendment precedent. App. 19a-23a.

What's more, there is no "resentencing" exception under this Court's Eighth Amendment cases, as Petitioner contends. App. 25a, 26a. Petitioner rails against this Court's "firmly established" Eighth Amendment law, contending that there is such an "exception" hiding in this Court's cases – applicable to a new sentencing hearing, and dependent upon the reason that a court may have invoked to order a sentencer to now choose between life and death. But this Court's cases simply provide no such exception that Petitioner wants, with all the nuance that Petitioner attaches. This Court has always held that all mitigating evidence must be heard whenever a sentencer is choosing between life and death.

Critically, Petitioner's proposed exception flouts the Eighth Amendment. Designed by the Framers to uphold and ensure the dignity of the human being, the Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons." *Hall v. Florida*, 572 U.S. 701, 708 (2014). That is precisely why this Court has made clear that the Eighth Amendment requires that no death sentence be imposed unless and until the sentencer considers "all mitigating evidence" and "any and all mitigating evidence *that is available*" that might lead to the sparing of the defendant's life, thereby upholding human dignity. To do otherwise would prevent a sentencer from making the "reasoned moral response" required when sentencing a capital defendant, *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007), and would deny the defendant his or her human dignity.

That is exactly what Judge Stuard did to Nathaniel Jackson: Judge Stuard denied Jackson his essential human dignity guaranteed by the Eighth Amendment.

Not only did Judge Stuard demonstrate egregious judicial bias, but Judge Stuard manifestly refused to listen to the mitigating details of Jackson's troubled and tortured life that make him fully worthy of life. Judge Stuard also didn't care one whit about Jackson's renewal: Jackson had changed his life, and had reformed his conduct over ten years of good behavior. All of that was irrelevant to Judge Stuard. Put plainly, Judge Stuard ordered Jackson's death by simultaneously closing his ears and mind to the powerful mitigating realities of Jackson's life. The Eighth Amendment prohibits such trampling of human dignity.

The court of appeals has thus correctly concluded that the state court decision violated this Court's clearly established law, and that Jackson is entitled to habeas relief on this claim. Petitioner instead requests that this Court issue a statement about this particular ground by adopting a theory that the state court could create a non-existent exception to this Court's settled Eighth Amendment jurisprudence, and thereby validate a death sentence imposed by a biased judge that flouted Jackson's human dignity. Because the court of appeals has properly upheld the law and granted relief on this secondary ground, Petitioner's request should be denied.

VI. Nathaniel Jackson Would Also Be Entitled To A New Sentencing Hearing On Two Additional Grounds For Relief That Were Pretermitted By The Court Of Appeals

Finally, there is an additional reason why the petition presents a poor vehicle for trying to decide the issue raised in the question presented: The court of appeals' grant of habeas relief is supported by additional grounds that warrant habeas corpus relief, but that were pretermitted by the court of appeals. Thus, any review of the question presented would ultimately be for naught, where Jackson would still obtain

a new sentencing hearing on remand on either or both of these additional as-yet-undecided grounds.

Nathaniel Jackson's Eighth Amendment challenge to the exclusion of mitigating evidence has two separate, independent bases: that the biased judge's exclusion of *all* mitigating evidence at resentencing contained in Jackson's proffer was both contrary to and unreasonable application of *Lockett*, *Eddings*, *Skipper*, *Hitchcock*, and their progeny, (*see* pp. 5-8, *supra*); and that the refusal to consider mitigating evidence showing Jackson's peaceful, positive behavior in prison for ten years after he was convicted but before resentencing was contrary to *Skipper* (*see* pp. 8-9, *supra*).

The court of appeals only decided the first challenge (App. 18a-27a), and it expressly pretermitted the second. *See* App. 25a, n. 4. Similarly, Jackson also alleged that trial counsel at the original sentencing proceeding were ineffective for failing to present significant mitigating evidence that was available at the time, and the court of appeals likewise pretermitted consideration of that claim. *See* App. 27a-28a. Jackson is ultimately entitled to habeas corpus relief on these pretermitted grounds, thus making this petition a poor vehicle for considering the question presented.

CONCLUSION

This Court should dismiss or deny the petition for writ of certiorari.

Respectfully Submitted,

Joseph Medici
Federal Public Defender

* Paul R. Bottei
Adam M. Rusnak
Assistant Federal Public Defenders

Office of the Federal Public Defender
Southern District of Ohio
10 West Broad Street, Suite 1020
Columbus, Ohio 43215
(614) 469-2999

* Counsel of Record

By: /s/ *Paul R. Bottei*

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