No. 24A___

*** CAPITAL CASE ***

In the Supreme Court of the United States

LANCE SHOCKLEY,

Petitioner,

v.

DAVID VANDERGRIFF,

Respondent.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM SEPTEMBER 5, 2024, TO NOVEMBER 4, 2024

To the Honorable Brett M. Kavanaugh, as Circuit Justice for the Eighth Circuit:

Under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner Lance Shockley respectfully requests that the time to file a petition for a writ of certiorari be extended 60 days from September 5, 2024, to and including November 4, 2024. On April 2, 2024, the Eighth Circuit denied Shockley's motion for a certificate of appealability (COA) in a split opinion in which Judge Jane Kelly dissented. App. A. Shockley timely petitioned for panel rehearing and rehearing en banc. On June 7, 2024, the panel denied Shockley's petition for panel rehearing over Judge Kelly's dissent, and the active judges of the Eighth Circuit denied Shockley's petition for rehearing en banc over the dissents of Judge Kelly and Judge Ralph Erickson. App. B. Without an extension, the petition for a writ of certiorari would be due on September 5, 2024. This application is being filed at least 10 days before that date.

See Sup. Ct. R. 13.5. This Court will have jurisdiction to review the petition under 28 U.S.C. § 1254.

1. This case presents an important question dividing the circuits regarding when a certificate of appealability must issue, so that a state prisoner denied habeas relief by a federal district court may appeal. *See* 28 U.S.C. § 2253. This Court has established that to obtain a COA, a prisoner need only demonstrate that "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). In this case, the panel denied Shockley's petition for a COA in a 2-1 decision, in which one of the panel judges would have granted a COA on the ineffective assistance of trial counsel claim raised by Shockley, and the Eighth Circuit denied rehearing en banc over the dissents of *two* judges.

Respondent is the warden of the Missouri state prison where petitioner is on death row.[1]

Petitioner Lance Shockley was convicted of first-degree murder and sentenced to death by a Missouri trial judge after "the jury was unable to agree which punishment to recommend." *See Shockley v. State*, 579 S.W.3d 881, 892 (Mo. 2019). The central issue involves juror bias and misconduct by the foreperson of Shockley's jury ("Juror 58") and Shockley's trial counsel's ineffective assistance in failing (a) to

[1] The Deputy Warden was named as the respondent below. *See* App. A. At the time of this filing, David Vandergriff is the Warden of Potosi Correctional Center in Missouri—the correctional facility where petitioner is incarcerated, and thus the proper respondent. *See* Rule 2(a) of the Rules Governing Section 2254 Cases.

question Juror 58 about his potential bias during voir dire and (b) to question any witness regarding Juror 58's bias and misconduct to support Shockley's motion for new trial. *See id.* at 890–97, 897–98; *see also id.* at 898–903.

During voir dire, Juror 58 "volunteered he was a published author," but trial counsel "fail[ed] to question Juror 58" about the contents of his recently published book. *See Shockley*, 579 S.W.3d at 893. Juror 58 was empaneled and selected to be the foreperson of Shockley's jury, which returned a guilty verdict after a five-day trial. *See id.* at 891, 894. The evening after the guilt-phase verdict was returned, Shockley's trial counsel received a copy of the book *Indian Giver*—the book Juror 58 had published just months before the trial. *See id.* at 894. The 184-page fiction contained violent themes of vigilante justice—including one particularly relevant 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.* at 893. "The protagonist viewed the defendant as escaping justice in the court system because the defendant received only probation following his conviction." *Ibid.* It later came to light that Juror 58 had shared several copies of his book with court security and staff, and even fellow jurors during the proceedings. *See id.* at 902–03.

When Shockley's counsel learned of the book's violent, vigilante plot the evening after the jury returned the guilty verdict, 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." *Shockley*, 579 S.W.3d at 894. Like the car accident motivating the

protagonist's revenge plot in Juror 58's book, Shockley's case stemmed from a November 2004 car accident involving Shockley that resulted in his passenger's death. *See id.* at 890, 893–94. Missouri highway patrolman Sergeant Carl DeWayne Graham Jr., who was tasked with investigating the accident, was killed several months later. *Id.* at 890–91. The prosecution argued that Graham was killed to stop the accident investigation; Shockley contended that this motive was implausible and police had improperly focused on him as the perpetrator. *Ibid.* But the trial court denied the request to question any Juror, even Juror 58, believing it might "improperly taint the whole jury" to do so. *Id.* at 894.

Shockley's counsel then "moved for a mistrial, arguing he would have to concede ineffectiveness for failing to inquire about the book during voir dire." *Shockley*, 579 S.W.3d at 894. The trial court overruled Shockley's motion, advising that jurors could be questioned, "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.* The trial court denied the new trial motion and imposed a death sentence after "the jury was unable to agree which punishment to recommend." *Id.* at 892.[2] The Missouri Supreme Court affirmed. *Ibid.*

Shockley filed a timely motion for state post-conviction relief. The relevant claim argued that Shockley's trial counsel was "ineffective for failing to question Juror 58

[2] After Shockley was found guilty, Juror 58 "was removed from the jury by the consent of the parties and did not participate in the penalty phase." *Shockley*, 579 S.W.3d at 894. Thus, while Juror 58 was one of the jurors who found Shockley guilty, he had been removed from the penalty-phase deliberations by the time the jury ultimately deadlocked. But the jurors with whom Juror 58 admitted to sharing copies of his book continued to serve on the jury during the penalty phase. *See id.* at 901–03.

when he volunteered he was a published author," because "questioning Juror 58 about the book's contents would have uncovered grounds to strike him for cause," and Shockley "was prejudiced because the book's contents demonstrated Juror 58 could not serve fairly and should have been struck for cause." *Shockley*, 579 S.W.3d at 893. Shockley further argued that trial counsel's failure to call Juror 58 or other jurors to testify during the hearing on his new trial motion was also constitutionally deficient and prejudicial, especially given that trial counsel had been "invited to do so by the [trial] court to prove this allegation." *Id.* at 897. The Missouri Supreme Court rejected the claim in a split opinion. The majority found that trial counsel's decision not to question Juror 58 about his book was a reasonable trial strategy. *Id.* at 896-97. The majority also approved trial counsel's decision not to call anyone to testify about the book's impact during the proceedings on Shockley's motion for a new trial. *Id.* at 897–98.

Missouri Supreme Court Judge Laura Denvir Stith dissented, reasoning that defense counsel was ineffective both in failing to question Juror 58 about his novel during voir dire and in failing to call anyone to testify during the hearing on the motion for new trial. *Shockley*, 579 S.W.3d at 921 (Stith, J., dissenting). These failures were not reasonable trial strategies, she explained, because counsel had no valid reason to forgo investigating the potential bias of Juror 58 or the impact of his novel on other jurors. *Id.* at 921–23. Judge Stith emphasized that defense counsel's decision to decline questioning about the novel in the purported hopes of receiving a favorable sentencing from the judge was unreasonable and potentially prejudicial.

Ibid. Based on these concerns, Judge Stith concluded that Shockley's conviction and death sentence should be set aside due to ineffective assistance of counsel. *Ibid.*

Shockley filed a timely habeas petition in federal court arguing again, among other claims, that he was denied effective assistance of trial counsel when trial counsel failed (a) to voir dire Juror 58 about his book and Juror 58's resultant lack of impartiality, and perhaps worse (b) to fully investigate and present all available evidence in his motion for new trial that the circumstances surrounding Juror 58's book and jury service denied him a fair trial. The federal district court denied the petition on all counts and denied Shockley a COA. *See* D. Ct. Doc. 74, at 44-51, 164.

Shockley then moved for a COA in the Eighth Circuit so that he could appeal. As further described below, the Eighth Circuit denied a COA and then denied Shockley's petition for panel rehearing and denied rehearing en banc—all three denials in split opinions.

2. A state prisoner whose habeas petition is denied by a federal district court can appeal only if a judge issues a COA. Issuing a COA requires that the prisoner make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court has held that, to make such showing, the prisoner need only demonstrate that "reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quotation marks omitted). Put another way, "[a]t 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 (2018) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

The courts of appeals are deeply divided 5 to 4 on whether, under that standard, a COA must issue so long as at least one judge would vote to grant a COA, satisfying the requirement that "jurists of reason could disagree." *See Buck*, 580 U.S. at 115.

The Eighth Circuit aligns with the Fifth, Sixth, Tenth, and Eleventh Circuits, all of which will deny a COA even when one or more judges would vote to grant one. The Eighth Circuit's practice is to deny a COA over the dissent even of multiple colleagues. Indeed, not long ago the Eighth Circuit went en banc to vacate a panel decision that granted a COA and then denied the COA 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). Members of this Court criticized that decision for having "too demanding" a standard "in assessing whether reasonable jurists could debate the merits of" a 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, J., and Jackson, J., dissenting from the denial of application for stay and denial of certiorari). The Fifth Circuit's practice is also to deny a COA even over the reasoned dissent of a colleague. *See, e.g.*, *Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014). The Fifth Circuit's decision in *Jordan v. Epps* similarly drew criticism from members of this Court, who believed "the 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—one of the Mississippi Supreme Court justices in the prisoner's direct appeal and one of the Fifth Circuit judges on the panel considering the prisoner's motion for a COA—had "found [his] … claim highly debatable." *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg, J., and Kagan, J., dissenting from the denial of certiorari). As with the Eighth and Fifth Circuits, the Tenth and Eleventh Circuits also deny COAs over the reasoned dissent of a colleague. *See, e.g.*, *United States v. Ellis*, 779 F. App'x 570, 572 (10th Cir. 2019); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015).

On the other hand, in the Third, Fourth, Seventh, and Ninth Circuits, a certificate of appealability will issue when at least one judge believes a COA is warranted for the claims to proceed on appeal. 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. Loc. App. 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 has also interpreted its rules to require that a COA cannot be denied unless a reviewing panel unanimously agrees that a COA is not justified. *Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003). So too, the Ninth Circuit will issue

a COA when one member of a three-judge panel dissents from denying one, despite the panel majority finding no merit to the claim, explaining: "We are fully satisfied of the fairmindedness of our dissenting colleague, and so we have granted the COA." *See, e.g.*, *McGill v. Shinn*, 16 F.4th 666, 706 & n.14 (9th Cir. 2021).

3. After the federal district court denied Shockley a COA on his denial-of-counsel claim, Shockley filed a motion for a COA in the Eighth Circuit. *See* App. A. The panel denied a COA in a 2-1 split opinion, from which Judge Kelly lodged her dissent, noting that she "would grant a certificate of appealability on Claim 1, which alleges ineffective assistance of trial counsel." *Ibid.*

Shockley timely petitioned for panel rehearing and rehearing en banc. *See* App. B. The panel denied rehearing over Judge Kelly's dissent. *Ibid.* The active judges of the Eighth Circuit denied the petition for rehearing en banc over the dissents of Judges Kelly and Erickson. *Ibid.*

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for 60 days for three reasons:

1. The forthcoming petition is likely to be granted. The Eighth Circuit has already drawn scrutiny from several members of this Court for its COA practice. And there is a deep and entrenched circuit split dividing the courts of appeals on the issue. The Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits will deny certificates of appealability even when one or more judges vote to grant a COA. But the Third, Fourth, Seventh, and Ninth Circuits would issue a COA to the same applicant under

those circumstances. That 5 to 4 circuit split is untenable and severely unjust to an inmate like Shockley, a death row prisoner who is deprived of the right to appeal the denial of a habeas claim over which judges disagree, simply because he is imprisoned in Missouri rather than bordering state Illinois.

And for the reasons already noted by members of this Court, the Eighth Circuit is misapplying this Court's precedents. *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan, J., and Jackson, J.). When judges in fact "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*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg, J., and Kagan, J.)). While the "COA requirement erects an important … barrier to an appeal," that barrier is "not insurmountable." *Ibid.*

"The only question before the Eighth Circuit was whether reasonable jurists could debate the District Court's disposition of [Shockley's] habeas petition." *See Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan, J., and Jackson, J.). "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)). "Here, reasonable jurists can and do have that debate." *See ibid.*

Missouri Supreme Court Judge Stith, considering the post-conviction motion for relief, concluded that Shockley had been denied his constitutional right to effective assistance of counsel and deserved a new trial. *See Shockley*, 579 S.W.3d at 921-23;

see also Jordan, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg, J., and Kagan, J.) (considering state justice's dissent on direct appeal in reasoning that "[t]wo judges … found Jordan's vindictiveness claim highly debatable"). Notably, Judge Stith was the author of the Missouri Supreme Court's opinion affirming Shockely's conviction and death sentence on direct review. *See State v. Shockley*, 410 S.W.3d 179, 182 (Mo. 2013).

In addition, an active judge of the Eighth Circuit voted to grant a COA, App. A, and two active Eighth Circuit judges voted to grant en banc review to resolve the issue, App. B. When three judges from two courts find merit to a prisoner's claim—one representing the view of a judge on the State's highest court and two representing the views of federal court of appeals judges on habeas—there should be no doubt that "jurists of reason could disagree," at the very least, on whether further proceedings are warranted, such that the prisoner has a right to appeal the denial of his habeas petition. *See Buck*, 580 U.S. at 115.

2. The press of other matters before this and other courts makes the existing deadline on September 5, 2024, exceedingly difficult to meet. Shockley only recently retained undersigned counsel to prepare the petition. Further time is needed to allow counsel to study the issues and prepare a concise petition for this Court's review. Besides this case, counsel has a reply brief due before the Federal Circuit on September 4, 2024, for which the deadline cannot be moved; an intervenor brief due in the Sixth Circuit on September 11, 2024, for which the deadline cannot be moved; an oral argument to prepare for and present on September 19, 2024, in the U.S.

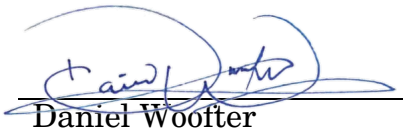
District Court for the District of Oregon; and an opening merits brief before this Court in *Facebook v. Amalgamated Bank* on September 24, 2024, for which the deadline cannot be moved; all among other personal and professional obligations that make the current deadline very difficult for undersigned counsel to meet.

3. Whether or not the extension is granted, the petition will be considered—and, if the petition is granted, the case will be considered on the merits—this coming Term. Thus, the extension will not substantially delay the resolution of this case or prejudice any party.

Conclusion

For the preceding reasons, the time to file a Petition for a Writ of Certiorari should be extended for 60 days to and including November 4, 2024.

Respectfully submitted,



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August 26, 2024