No. 23-629

IN THE

Supreme Court of the United States

DEANDRE GORDON,

Petitioner,

v.

HAROLD MAY,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

There is no dispute that the circuits are deeply divided on the question presented, as explained in the petition. The State agrees that the circuits are divided on the question. In fact, the State goes even further than the petition—including other courts of appeals on *both* sides of the split. BIO 7-8. And the State acknowledges that the issue has caused several of this Court's members to signal their alarm that circuit courts like the Sixth Circuit here are applying too high a standard to deny COA applications over the vote of judges to grant one. *See* BIO 9-10. But review is not warranted, the State insists, because the circuits can have different administrative procedures governing review of COA applications. BIO 5-7.

That is a red herring. Gordon is not complaining that the circuits variously send COA applications to a single judge, two judges, or a full panel for review. *Contra* BIO 5-8. Indeed, the State does not suggest that *those* procedural differences account for the divergent court of appeals outcomes on the question presented. *See ibid.* Instead, Gordon argues that no matter how many judges review a COA application, the *substantive* "reasonable jurist" standard set forth by this Court requires that a COA must issue when at least one judge views the habeas claim as "'adequate to deserve encouragement to proceed further.'" Pet. i (quoting *Buck v. Davis*, 580 U.S. 100, 115 (2018)). Since there is no dispute that the circuits are intensely divided on *that* question, *see* BIO 7-8, review is warranted.

Nor does the State dispute that resolving the split in Gordon's favor is outcome determinative, given Judge White's vote to grant him leave to appeal the

denial of his federal habeas petition. *Cf.* BIO 3. Rather, the State argues that because there is no merit to Gordon's underlying federal claim, this is a bad vehicle to resolve the circuit split implicated by the question presented. BIO 13-15. That is wrong, or the state court of appeals panel majority and a Justice of the Supreme Court of Ohio would not have voted to grant Gordon a new trial. But more importantly for purposes of considering whether to grant the petition, the State asks this Court to apply "too heavy a burden on the prisoner *at the COA stage*" by suggesting the petition should be denied "based on [this Court's] adjudication of the actual merits.'" *See Buck*, 580 U.S. at 116-17 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 336-37 (2003)). There simply won't be a better vehicle to address the question dividing the circuits, because the issue won't arise when habeas relief is obviously warranted even under AEDPA's strict standards.

The courts of appeals that follow the Sixth Circuit's practice of denying COAs over the vote of a circuit judge continue to "place[] too heavy a burden on the prisoner *at the COA stage*." *Buck*, 580 U.S. a 117; *e.g.*, *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) ("[T]he Eighth Circuit was too demanding in assessing whether reasonable jurists could debate the merits of Johnson's habeas petition."); *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari) (same as to Fifth Circuit). This Court should grant the petition to resolve the acknowledged, deeply entrenched split on the question presented.

ARGUMENT

I. The Parties Agree That The Circuit Courts Are Deeply Divided Over The Question Presented.

1. The petition explained that there is a deep and entrenched circuit split dividing the courts of appeals on an issue that has already drawn scrutiny from several of this Court's members. The State *agrees* that there is a deeply entrenched split. And while the petition conservatively described the split as clear between the Third, Fourth, and Seventh Circuits on the one hand, and the Fifth, Sixth, Eighth, and Eleventh Circuits on the other, the State goes even further.

In the State's own words, "[t]he Third and Fourth refer [COA applications] to a panel but require unanimity on the decision to deny a certificate." BIO 7 (citing 3d Cir. Loc. App. R. 22.3; 4th Cir. Loc. R. 22(a)(3)). "The Seventh" Circuit, the State acknowledges, also requires judges "to unanimously deny" an application for COA. BIO 7-8 (citing 7th Cir. I.O.P.1(a)(1)). To that list, the State adds the Ninth Circuit—which, by rule, "can only deny" an application for COA "if unanimous." BIO 8 (citing 9th Cir. Gen. Ord. Ch. VI, 6.2(b), 6.3(b), 6.3(g)). *Cf.* Pet. 17.

The State also does not dispute that, as explained in the petition, the Fifth, Sixth, Eighth, and Eleventh Circuits deny COAs even over the *reasoned* dissent of a panel judge, so long as the panel majority votes against granting one. *See* BIO 7. But that list is also incomplete, according to the State. The State argues that the "First, Second, … and Tenth refer them to a panel and apply majority rule" as well. *See ibid.*

Thus, whereas the petition cautiously described a clear and untenable 3 to 4 split on the question presented, Pet. 15-21, the State argues that the circuits are divided *4 to 7*, BIO 7-8. That circuit conflict is severely unjust to a prisoner like Gordon, who is deprived of the right to appeal the denial of habeas claims that multiple federal judges have determined are "'adequate to deserve encouragement to proceed further,'" *cf.* BIO 4 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)), simply because he is imprisoned in Ohio rather than in its bordering States of Indiana, Pennsylvania, or West Virginia (or any of the other states in the Third, Fourth, Seventh, and Ninth Circuits).

2. Rather than denying a deeply entrenched split on the question presented, the State's principal response is to suggest that uniformity is unimportant. *See* BIO 8-11. "The circuits' various procedures," the State argues, "are the permissible result of each circuit's job to police its own procedures." BIO 11.

That conflates the variance in circuit *process* with different *substantive standards* for granting a COA. The procedural variations among the circuits are not what account for the split on the question presented. Again, Gordon is not disputing that each circuit can choose for itself whether to send COA applications to a single judge, two judges, or a full panel of judges for review. *Cf.* BIO 5-8. Instead, Gordon argues that no matter how many judges review a COA application, one must issue when a judge views the habeas claim as at least "'adequate to deserve encouragement to proceed further.'" Pet. i (quoting *Buck*, 580 U.S. at 115). The State does not dispute that the courts of

appeals are intensely divided on *that* question. *See* BIO 5-8.

Gordon also explained that this Court has granted certiorari several times to instruct the lower courts on the substantive COA standard. *E.g.*, Pet. 23-25. The State has no response. As Gordon described in the petition, the petitioner in *Buck v. Davis* sought certiorari based in part on a "'troubling' pattern" that had emerged in circuit decisions "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 (U.S. Feb. 4, 2016) (quoting *Jordan*, 576 U.S. at 1078 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari)). The *Buck* petition presented evidence of "a demonstrable circuit split with respect to the application of the COA standard." *Ibid.* This disparate treatment under the COA standard, Buck argued, warranted the Court's review. *Ibid.*

After granting Buck's petition, the Court (in a lopsided opinion) re-explained the substantive COA standard previously set forth by this Court several times—a good indication that the Court cares about a uniform legal standard for COA review. *Contra* BIO 5-6, 15. "At the COA stage," this Court reaffirmed, "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*, 580 U.S. at 115 (Roberts, C.J., joined by Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) (quoting *Miller–El*, 537 U.S. at 327). So,

"when a reviewing court" 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).

Most circuits continue to place too heavy a burden on prisoners at the COA stage. *See also infra* Part IV. This Court's intervention is required once more.

II. The Question Presented Is Important.

The petition explained why the question presented is important. On top of granting certiorari multiple times to instruct the courts of appeals on the COA standard, *see* Pet. 23-25; *contra* BIO 5-6, 15, members of the Court have repeatedly taken the extraordinary step of dissenting from the denial of certiorari to criticize the Sixth Circuit's side of the split.

As described in the petition, 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. *See* 2023 WL 4851623, at *1 (8th Cir. July 29, 2023), *cert. denied*, 143 S. Ct. 2551. That decision drew a scathing dissent from the denial of certiorari, chastising the court of appeals for denying a COA even though numerous judges debated the merits of the claim. *Vandergriff*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ.). 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), *cert. denied sub nom. Jordan v.*

Fisher, 576 U.S. at 1971-78 (Sotomayor, J., joined by Ginsburg and Kagan, JJ.).

The State does not dispute this, because it cannot. *See* BIO 9-10. Instead, the State argues only that "calling out a circuit court for applying a too-high substantive standard for certification is not the same as saying that they applied an illegal procedure." *Ibid.* (citing *Jordan*, 576 U.S. at 1071 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari)). But the question presented asks this Court to decide which side of the split is correct on the *substantive standard* for certification. And as previously highlighted, this Court granted the petition in *Buck*, which also relied on the dissent from denial of certiorari in *Jordon* to argue that this Court's review was warranted. *See* Pet., *Buck v. Davis*, *supra*, at 26 (quoting *Jordan*, 576 U.S. at 1078 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari)).

III. This Case Is A Perfect Vehicle To Decide The Question Deeply Dividing The Circuits.

The question is starkly presented. The State does not dispute that Gordon would have been permitted to appeal the denial of his federal habeas petition had he been imprisoned in bordering states Pennsylvania (Third Circuit), West Virginia (Fourth Circuit), or Indiana (Seventh Circuit), given Judge White's vote to grant him a COA. BIO 3, 7-8; *see* Pet. 12-13. Nor does the State dispute that the full Sixth Circuit was aware of the circuit conflict when it denied rehearing en banc. *See* Pet. 13.

Instead, the State argues this is a poor vehicle to resolve the question dividing the circuits because

Gordon's constitutional challenges to his conviction are frivolous. *See* BIO 13-15. The claims are obviously not frivolous, or a *majority* of the state court of appeals and a Justice of the Supreme Court of Ohio would not have voted to grant Gordon a new trial. *See* Pet. 8-10. But in all events, "the only question" at the COA stage "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*, 580 U.S. at 115 (quoting *Miller–El*, 537 U.S. at 327). Like the respondent in *Buck*, the State asks the Court to "invert[] the statutory order of operations and 'first decide[] the merits,'" and on that basis, deny the petition. *Contra id.* at 116-17 (quoting *Miller–El*, 537 U.S. at 336-37). This Court rejected the respondent's similar attempt in *Buck*, admonishing that doing so places "too heavy a burden on the prisoner *at the COA stage*." *See ibid.*; *see also id.* at 116 (when a court of appeals rejects a COA based on the court's pre-briefing analysis of the merits, that "is in essence deciding an appeal without jurisdiction").

The State acknowledges that the state court of appeals granted Gordon a new trial based on his Sixth Amendment claim. BIO 2. A Justice of the Supreme Court of Ohio agreed with the court of appeals panel majority. *See* Pet. App. 129a (O'Neill, J., dissenting). If this is a poor vehicle to resolve the acknowledged circuit split over the COA standard, then there is *no* good vehicle to answer the question presented. When the underlying habeas claim has obvious merit, the state court or a federal district court will have already granted relief, or the circuit court will have already

granted leave to appeal the district court's denial of the habeas petition.

IV. The Sixth Circuit's Side Of The Split Is Wrong.

The State argues that Gordon is wrong on the question presented, because under his view of the COA standard, "this Court would have refused relief in cases where it found the state court adjudication unreasonable" under the substantive review provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). BIO 12-13. The State points to times when this Court granted habeas relief under AEDPA despite disagreement among state judges on the merits. *See* BIO 12-13 (citing *Brumfield v. Cain*, 576 U.S. 305 (2015); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Wiggins v. Smith*, 539 U.S. 510 (2003)). That conflates the reasonable jurist standard for granting ultimate relief with the reasonable jurist standard for granting a COA so the applicant can appeal the denial of his claim.

Each case shows why merits review under AEDPA is wholly different from the antecedent question whether a COA is warranted so the applicant can appeal. In *Brumfield*, this Court held that the state court's decision to deny a prisoner's request for an evidentiary hearing to determine intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 576 U.S. at 307 (quoting 28 U.S.C. § 2254(d)(2)). In *Panetti*, the Court held that "[t]he state court's failure to provide the procedures

mandated by *Ford* [*v. Wainwright*, 477 U.S. 399 (1986),] constituted an unreasonable application of clearly established law as determined by this Court." 551 U.S. at 948-54 (citing 28 U.S.C. § 2254(d)(1)). And in *Wiggins*, this Court held that the state court's "conclusion that the scope of counsel's investigation into petitioner's background met the legal standards set in *Strickland* [*v. Washington*, 466 U.S. 668 (1984),] represented an objectively unreasonable application of [the Court's] precedent." 539 U.S. at 528-29 (citing 28 U.S.C. § 2254(d)(1)).

But recall that for a COA applicant like Gordon merely to *appeal* the district court's denial of his habeas claim under AEDPA, reasonable jurists need only find "'that the issues are debatable among jurists of reason,'" that "'a court could resolve the issue in a different manner'" than the federal district judge, "'*or* that the questions are adequate to deserve encouragement to proceed further.'" *See* BIO 4 (quoting *Estelle*, 463 U.S. at 893 & n.4). To then prevail on the merits, the petitioner must show that "the state court adjudication" of the federal claim was "unreasonable," that is, that no jurist of reason could debate that the petitioner is entitled to the habeas relief he seeks. *See* BIO 12.

Thus, it is entirely appropriate to rely on the state judges' views of the merits to establish that Judge White (and the federal magistrate judge) were not unreasonable in concluding that, at a minimum, "'the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 580 U.S. at 115 (quoting *Miller–El*, 537 U.S. at 327). That is a different question than whether the state supreme court reasonably disagreed with the state court of

appeals' conclusion that Gordon was entitled to a new trial. *Contra* BIO 11-13.

Three state judges agreed with Gordon that the trial court violated his Sixth Amendment right to counsel. *Compare Jordan*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari) (noting that *one* state judge agreed with petitioner in reasoning "that reasonable minds could differ—*had differed*—on the resolution of Jordan's claim"); *Vandergriff*, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of certiorari) (same). Two federal judges then concluded that Gordon should be allowed to appeal the district court's denial of his claims, including Judge White of the Sixth Circuit, dissenting. Pet. App. 98a, 160a. Gordon is correct on the question presented, and under a proper application of the COA standard, he is entitled to an appeal. *See Buck*, 580 U.S. at 115.

CONCLUSION

The petition for certiorari should be granted.

March 18, 2024

Respectfully submitted,

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