SUPREME COURT OF THE UNITED STATES

No. 01–7662

THOMAS JOE MILLER-EL, PETITIONER *v.* JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

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

[February 25, 2003]

JUSTICE SCALIA, concurring.

I join the Court's opinion, but write separately for two reasons: First, to explain why I believe the Court's willingness to consider the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) limits on habeas relief in deciding whether to issue a certificate of appealablity (COA) is in accord with the text of 28 U. S. C. §2253(c). Second, to discuss some of the evidence on the State's side of the case—which, though inadequate (as the Court holds) to make the absence of a claimed violation of *Batson* v. *Kentucky*, 476 U. S. 79 (1986), undebatable, still makes this, in my view, a very close case.

I

Many Court of Appeals decisions have denied applications for a COA only after concluding that the applicant was not entitled to habeas relief on the merits—without even analyzing whether the applicant had made a substantial showing of a denial of a constitutional right. See, *e.g.*, *Kasi* v. *Angelone*, 300 F. 3d 487 (CA4 2002); *Wheat* v.

Johnson, 238 F. 3d 357 (CA5 2000).* The Court today disapproves this approach, which improperly resolves the merits of the appeal during the COA stage. *Ante*, at 6, 11–13. Less clear from the Court's opinion, however, is why a "circuit justice or judge," in deciding whether to issue a COA, must "look *to the District Court's application of AEDPA* to [a habeas petitioner's] constitutional claims and ask whether *that resolution* was debatable amongst jurists of reason." *Ante*, at 11–12 (emphasis added). How the district court applied AEDPA has nothing to do with whether a COA applicant has made "a substantial showing of the denial of a constitutional right," as required by 28 U. S. C. §2253(c)(2), so the AEDPA standard should seemingly have no role in the COA inquiry.

Section 2253(c)(2), however, provides that "[a] certificate of appealability *may issue* . . . *only if* the applicant has made a substantial showing of the denial of a constitutional right." (Emphasis added). A "substantial showing" *does not entitle* an applicant to a COA; it is a necessary and not a sufficient condition. Nothing in the text of §2253(c)(2) prohibits a circuit justice or judge from imposing additional requirements, and one such additional requirement has been approved by this Court. See *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000) (holding that a habeas petitioner seeking to appeal a district court's denial of habeas relief on procedural grounds must not only make a substantial showing of the denial of a constitutional right but *also* must demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural ruling).

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* In what can be regarded as a logical development from the error of analyzing a request for a COA like a merits appeal, some courts have simply allowed merits appeals to be taken *without* a COA—in flat contravention of 28 U. S. C. §2253(c)(1)(A). See, *e.g.*, *Bates* v. *Lee*, 308 F. 3d 411 (CA4 2002).

The Court today imposes another additional requirement: a circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. *Ante*, at 12. To give an example, suppose a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any "clearly established" Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings). Under the Court's view, a COA must be denied, *even if* the habeas petitioner satisfies the "substantial showing of the denial of a constitutional right" requirement of §2253(c)(2), because all reasonable jurists would agree that habeas relief is impossible to obtain under §2254(d). This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of §2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

II

In applying the Court's COA standard to petitioner's case, we must ask whether petitioner has made a substantial showing of a *Batson* violation and also whether reasonable jurists could debate petitioner's ability to obtain habeas relief in light of AEDPA. The facts surrounding petitioner's *Batson* claims, when viewed in light of §2254(e)(1)'s requirement that state-court factual determinations can be overcome only by clear and convincing evidence to the contrary, reveal this to be a close, rather than a clear, case for the granting of a COA.

Petitioner maintains that the following six African-

American jurors were victims of racially motivated peremptory strikes: Edwin Rand, Wayman Kennedy, Roderick Bozeman, Billy Jean Fields, Joe Warren, and Carrol Boggess. As to each of them, the State proffered race-neutral explanations for its peremptory challenge. Five were challenged primarily because of their views on imposing the death penalty (Rand, Kennedy, Bozeman, Warren, and Boggess), and one (Fields) was challenged because (among other reasons) his brother had been convicted of drug offenses and served time in prison. By asserting race-neutral reasons for the challenges, the State satisfied step two of *Batson*. See *Purkett* v. *Elem*, 514 U. S. 765, 767–768 (1995) (per curiam). Unless petitioner can make a substantial showing that (*i.e.*, a showing that reasonable jurists could debate whether) the State fraudulently recited these explanations as pretext for race discrimination, he has not satisfied the requirement of §2253(c)(2). Moreover, because the state court entered a finding of fact that the prosecution's purported reasons for exercising its peremptory challenges were not pretextual, App. 878, a COA should not issue unless that finding can reasonably be thought to be contradicted by clear and convincing evidence. See §2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). *Ante*, at 12.

The weakness in petitioner's *Batson* claims stems from his difficulty in identifying any unchallenged white venireman similarly situated to the six aforementioned African-American veniremen. Although petitioner claims that two white veniremen, Sandra Hearn and Marie Mazza, expressed views about the death penalty as ambivalent as those expressed by Rand, Kennedy, Bozeman, Warren, and Boggess, the *voir dire* transcripts do not clearly bear that out. Although Hearn initially stated that she thought

the death penalty was inappropriate for first-time offenders, she also said, "I do not see any reason why I couldn't sit on a jury when you're imposing a death penalty." App. 694. She further stated that someone who was an extreme child abuser deserved the death penalty, whether or not it was a first-time offense. Reply Brief for Petitioner 14a. Hearn also made pro-prosecution statements about her distaste for criminal defendants' use of psychiatric testimony to establish incompetency. *Id.*, at 17a. As for Mazza, her stated views on the death penalty were as follows: "It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that—a decision that I think I could make one way or the other." App. 519.

Compare those statements with the sentiments expressed by the challenged African-American veniremen. Kennedy supported the death penalty only in cases of mass murder. "Normally I wouldn't say on just the average murder case—I would say no, not the death sentence." *Id.*, at 216. Bozeman supported the death penalty only "if there's no possible way to rehabilitate a person . . . I would say somebody mentally disturbed or something like that or say a Manson type or something like that." *Id.*, at 79. When asked by the prosecutors whether repeated criminal violent conduct would indicate that a person was beyond rehabilitation, Bozeman replied, "No, not really." *Id.*, at 79. Warren refused to give any clear answer regarding his views on the death penalty despite numerous questions from the prosecutors. *Id.*, at 139–140 ("Well, there again, it goes back to the situation, you know, sometimes"); *id.*, at 140. When asked whether the death penalty accomplishes anything, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't [*sic*]. Sometimes you have mixed feelings about things like that." *Ibid.* When asked, "What do you think it accomplishes

when you feel it does?," Warren replied, "I don't know." *Ibid.* Boggess referred to the death penalty as "murder," *Id.*, at 197, and said, "whether or not I could actually go through with murder—with killing another person or taking another person's life, I just don't know. I'd have trouble with that," *ibid.* Rand is a closer case. His most ambivalent statement was "Can I do this? You know, right now I say I can, but tomorrow I might not." *Id.*, at 161. Later on Rand did say that he could impose the death penalty as a juror. *Id.*, at 162–164. But Hearn and Mazza (the white jurors who were seated) also said that they could sit on a jury that imposed the death penalty. At most, petitioner has shown that one of these African-American veniremen (Rand) may have been no more ambivalent about the death penalty than white jurors Hearn and Mazza. That perhaps would have been enough to permit the state trial court, deciding the issue *de novo* after observing the demeanor of the prosecutors and the disputed jurors, to find a *Batson* violation. But in a federal habeas case, where a state court has previously entered factfindings that the six African-American jurors were not challenged because of their race, petitioner must provide "clear and convincing evidence" that the state court erred, and, when requesting a COA, must demonstrate that jurists of reason could debate whether this standard was satisfied. *Ante*, at 12.

Fields, the sixth African-American venireman who petitioner claims was challenged because of his race, supported capital punishment. However, his brother had several drug convictions and had served time in prison. App. 124. (Warren and Boggess, two of the African-American veniremen previously discussed, also had relatives with criminal convictions—Warren's brother had been convicted of fraud in relation to food stamps, *id.*, at 153, and Boggess had testified as a defense witness at her nephew's trial for theft, *id.*, at 211, and reported in her

questionnaire that some of her cousins had problems with the law, Joint Lodging 43. Of the four white veniremen who petitioner claims also had relatives with criminal histories and therefore "should have been struck" by the prosecution—three (Noad Vickery, Cheryl Davis, and Chatta Nix) were actually so pro-prosecution that *they were struck by the petitioner*. *Id.*, at 111. The fourth, Joan Weiner, had a son who had shoplifted at the age of 10. App. 511. That is hardly comparable to Fields's situation, and Weiner was a strong state's juror for other reasons: She had relatives who worked in law enforcement, *id.*, at 510, and her support for the death penalty was clear and unequivocal, *id.*, at 506, 511.

For the above reasons, my conclusion that there is room for debate as to the merits of petitioner's *Batson* claim is far removed from a judgment that the State's explanations for its peremptory strikes were implausible.

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With these observations, I join the Court's opinion.