Capital Case

Case No. _____

October Term, 2017

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT GROUP, PETITIONER,

VS.

NORM ROBINSON, WARDEN, RESPONDENT.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Sixth Circuit Court of Appeals' *pro forma,* non-reasoned, and blanket denial of a COA pursuant to 28 U.S.C. § 2253(c) in a capital case violates the gate-keeping function of COAs contrary to this Court's precedents?

II. Whether the Sixth Circuit's *pro forma,* non-reasoned, and blanket denial of a COA that merely pays lip service to the language of 28 U.S.C. § 2253(c) is insufficient within the context of a capital case and violates due process?

LIST OF PARTIES

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The Memorandum Opinion and Order of the district court denying Group's petition for a writ of habeas corpus and also denying without analysis any certificate of appealability is reported at *Group v. Robinson*, 158 F.Supp.3d 632,667-68 (N.D. Ohio 2016), and is reproduced in the Appendix at A-1 to A-23.

The Order of the district court (*Group v. Robinson*, Judgment Entry, Case No. 4:13-cv-01636, Doc. #55, PageID #8820, filed 01/20/2016), issuing a blanket denial of any COA, is unreported, and reproduced in the Appendix A-24.

The Order of the three-judge panel of the Court of Appeals for the Sixth Circuit, (*Group v. Robinson*, Order, Case No. 16-3726, Doc. 21-1, filed 05/25/2017), which issued a *pro forma* and blanket denial of Groups request for COAs is unreported and is reproduced in the Appendix at A-25 to A-26.

The Order of the Court of Appeals for the Sixth Circuit denying Group's request for rehearing and suggestion of rehearing *en banc* specific to the Sixth Circuit panel's blanket denial of any COA (*Group v. Robinson*, Order, Case No. 16-3726, Doc. 26-1, filed 12/21/2017) is unreported, and is reproduced in the Appendix at A-27.

Mr. Group's request for a COA to the Sixth Circuit Court of Appeals (*Group v Robinson*, Petitioner-Appellant's Motion for a Certificate of Appealability, Case No. 16-3726, Doc. 11, filed 08/29/2016) is reproduced in the Appendix at A-28 to A-112.

JURISDICTIONAL STATEMENT

Petitioner Scott Group timely filed a Petition for a Writ of Habeas Corpus in the United States District Court, Northern District of Ohio, on 05/17/2014. On January 20, 2016, the district court denied relief on Group's petition and sua sponte, and without articulated reasoning, denied any Certificate of Appealability (COA).

On May 5, 2017, the Sixth Circuit Court of Appeals affirmed the district court's blanket denial of a COA and without articulated reasoning denied Group's request for a COA. On December 21, 2017, the Sixth Circuit, again without articulated reasoning, denied rehearing and request for rehearing *en banc* specific to the panel's original denial of any COA.

This petition timely follows. Group asks this Court to grant this petition, vacate the Sixth Circuit's *pro* forma Order issuing a blanket denial of Group's request for a COA, and remand this case with instructions to conduct a proper COA analysis consistent with the gate-keeping function mandated by 28 U.S.C. § 2253(c) and this Court's precedents. Jurisdiction is appropriate under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28 U.S.C. § 2253, as amended in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reads as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

INTRODUCTION

When President William J. Clinton signed AEDPA into law in 1996, the President issued a Statement saying he would not have "signed this bill" if he thought the federal courts would "interpret[] [it] in a manner that would undercut meaningful Federal habeas corpus review." (Statement of the President of the United States upon Signing the Antiterrorism Bill (available in LEXIS, 32 Weekly Comp. Pres. Doc. 719 (White House, April 24, 1996))). He called upon "the Federal courts ... [to] interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary." *Id.*

Consistent with this directive and understanding, this Court has repeatedly issued decisions that have construed or applied provisions of AEDPA in ways that respect and safeguard the core nature and functions of the writ. And this has been particularly true in this Court's capital jurisprudence. In this now significant body of jurisprudence, a majority of the Court have time and again demonstrated its commitment to the principle that AEDPA should not be interpreted so as to deny a habeas corpus petitioner at least "one full bite" – *i.e.*, at least one meaningful opportunity for post-conviction review in a district court, a court of appeals, and via *certiorari*, the Supreme Court. (Randy Hertz and James S. Leibman, Federal Habeas Corpus Practice and Procedure, Seventh Edition § 3.2 (Matthew Bender)) (applying "one full bite" metaphor in AEDPA context and citing cases.) As Justice Breyer observed, the decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) and *Slack v. McDaniel*, 529 U.S. 473

(2000), reflect this Court's tendency to "assume that Congress did not want to deprive state prisoners of first federal habeas corpus review" and the Court's practice of "interpret[ing] statutory ambiguities accordingly." *Duncan v. Walker*, 533 U.S. 167, 192 (2001) (Breyer, J., dissenting) (citing *Martinez-Villareal* and *Slack*).

In construing AEDPA's "certificate of appealability" provision, this Court has similarly ensured that habeas corpus petitioners who are denied relief in the district court have a meaningful opportunity for appellate review of the district court's ruling. So, in *Slack v. McDaniel*, when the state asked the Court to interpret the "certificate of appealability" provision to limit appeals to "constitutional" merits rulings and thus forbid the issuance of a certificate of appealability when a district court denies a claim on procedural grounds, the Court "reject[ed] this interpretation" because of the restrictive effect on the writs ability to fulfill its "vital role in protecting constitutional rights." *Slack*, 529 U.S. at 483.

Consistently, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and referencing its decision in *Slack*, "reiterate[ing]" the limited nature of the burden a habeas corpus petitioner must satisfy at the COA stage, this Court again soundly rejected a circuit court's attempt to "sidestep" proper COA procedures and construe AEDPA's COA provision in a manner that would unduly limit habeas corpus petitioners' ability to appeal an adverse ruling by the district court. *Id.* at 335-36. Noting that it "may or may not be the case" that, as the state contended, "petitioner will not be able to sustain his burden" on the merits, this Court

declared that this "is not . . . the question before us" at the COA stage. The Court rejected the 5th Circuit's procedure of "[d]eciding the substance of an appeal in what should only be a threshold inquiry," precisely because it "undermines the concept of a COA." *Id.* at 342. "It follows that issuance of a COA must not be *pro forma* or a matter of course." *Id.* at 337.

It is amidst this precedent that the Sixth Circuit Court of Appeals' *pro forma* decision denying Group any COA consideration stands anathema. The Sixth Circuit's Order stands particularly egregious given that this is a capital case, upon review of a district court decision that itself *sua sponte* issued Group a *pro forma,* unreasoned and blanket denial of a COA without ever addressing any specific claim (defaulted or otherwise).

Group remains sentenced to death having been denied the right to appeal any issue, whether defaulted or denied on the merits, and without any habeas court ever having analyzed any single claim pursuant to AEDPA's statutory COA procedures. To date, Mr. Group has been offered no understanding by any habeas court why he has not been allowed to appeal anything. If allowed to stand, the Sixth Circuit Court of Appeals decision will eviscerate the idea that a habeas petitioner is entitled to "one full bite" of the habeas apple. Rather, the Sixth Circuit's outlier ruling makes clear, contrary to its own precedent, there is no right to any habeas review at all in the federal court of appeals. The perfunctory ruling by the Sixth Circuit Court of Appeals is unique and new precedent for the proposition that AEDPA's COA provisions have no minimal requirements for a habeas court to follow.

This petition for *certiorari* asks this Court, consistent with its longstanding AEDPA jurisprudence, to reject the Sixth Circuit Court of Appeals' *pro forma*, unreasoned, blanket denial of a COA as a proper application of the appellate process in a capital habeas case. If allowed to stand as precedent, the Sixth Circuit Court of Appeals will effectively undercut federal habeas review in favor of paying mere lip service to AEDPA's statutory requirements contrary to this Court's clear precedent, contrary to most circuit precedent, and contrary to Sixth Circuit precedent.

STATEMENT OF THE CASE

I. State Court Litigation

In January 1997, a Mahoning County grand jury indicted Group on three counts. The grand jury returned a superceding indictment in June 1998. Group went to trial in March 1999. The jury convicted him on all counts and specifications. Following the mitigation phase, the jury recommended Group be sentenced to death for murdering Robert Lozier. On the jury's recommendation, the court sentenced Group to death.

Group timely appealed his convictions and sentence to the Ohio Supreme Court. He raised sixteen propositions of law. The Ohio Supreme Court affirmed his convictions and sentence in December 2002. *State v. Group*, 781 N.E.2d 980, 985-87 (Ohio 2002).

Group petitioned for post-conviction review while his direct appeals were pending. In June 2003, he amended his post-conviction petition to assert thirteen claims for relief. The court granted the summary judgment.

Group timely appealed to the Mahoning County Court of Appeals. The appellate court affirmed. Group then appealed to the Ohio Supreme Court, which declined to accept jurisdiction.

II. Review in Federal District Court

A. The habeas petition and the district court's blanket denial of a COA.

Group then filed a timely federal habeas corpus petition on May, 07, 2014, raising seven claims for relief: 1) counsel rendered ineffective assistance in the guilt phase by inadequately cross-examining the State's key witness, Sandra Lozier; 2) counsel were ineffective in the guilt phase because they failed to prepare the alibi witnesses or present evidence of another suspect; 3) counsel were ineffective in the guilt phase because they failed to use an expert to rebut the State's DNA expert and ineffectually cross-examined that expert; 4) counsel were ineffective in the guilt phase because they failed to present evidence that Group's hands were seriously impaired and tested negative for gunshot residue; 5) the trial court improperly dismissed for cause a properly qualified, unbiased juror; 6) the trial court improperly dismissed for cause a properly qualified, unbiased alternate juror who expressed reservations about the guilty verdict; 7) the evidence of intimidation and of the second attempted aggravated murder was constitutionally insufficient.

He filed a motion for discovery, which was eventually denied by the district court on September 18, 2015. On April 30, 2015, Group moved to amend his petition with an Eighth Ground, alleging ineffective trial counsel based on counsel's false promise to the jury that it would hear testimony from a defense

DNA expert. On September 18, 2015, citing *Mayle v. Felix*, 545 U.S. 644, 659 (2005), the district court permitted that amendment because the new claim related back to a core set of facts pleaded in the "original, timely filed petition."

On January 21, 2016, the district court denied the habeas petition, and *sua sponte* denied any COA. Aside from reciting the COA standard, the district court's denial of any COAs was *pro forma*, unreasoned and perfunctory as to each and every specific claim:

> This Court concludes reasonable jurists could not debate (1) the finding that Group procedurally defaulted certain claims without good cause to excuse the default or (2) the disposition of those claims Group preserved for habeas review. The Ohio courts thoroughly considered Group's arguments and rejected them with considerable record support. This Court thus denies Group a COA as to all claims.

Group v. Robinson, 158 F.Supp.3d 632, 667 (N.D. Ohio 2016).

B. Civil Rule 59 motion.

On February 17, 2016, Group timely moved to alter or amend the judgment under Rule 59, by offering the opinion of Christine Funk, an attorney expert on forensic, DNA issues. Funk's report explained how Group's trial counsel performed in a professionally unreasonable manner in confronting the state's DNA evidence. On March 11, 2016, Group then moved to stay the case to allow him the opportunity to offer the expert opinions of Dr. Dan E. Krane, Ph. D., of the Department of Biological Sciences at Wright State University in Dayton, Ohio. Group explained that he had entered into a contract for Dr. Krane's services on March 5, 2016, and habeas counsel asked the district court to stay the case until April 15, 2016, the date when Dr. Krane could complete his analysis and habeas counsel could offer Dr. Krane's opinions to the court.

C. Second Motion to Amend habeas petition.

On April 13, 2016, Group filed Dr. Krane's sworn declaration in support of his Eighth Ground, filed a second motion to amend the petition to add a Ninth Ground for Relief based upon the DNA-related report of Dr. Krane, and also filed a Motion to Alter or Amend the Judgment. Group asserted that Dr. Krane's declaration supported his ineffective trial counsel claim in two important respects. First, the prosecution misrepresented and grossly overstated the statistical significance of the population frequency statistic provided by the state's DNA expert. Second, the evidence showed "[t]he presence of an additional allele ... consistent with the proposition that the results obtained from A8-1 [a sole blood spot on Group's shoe] are from a mixture of two or more individuals."

D. District Court's final order.

The district court denied Group's two post-judgment motions on May 27, 2016. Group timely appealed that judgment on June 27, 2016.

III. Review in Sixth Circuit Court of Appeals.

Group moved the Sixth Circuit Court of Appeals for an order to stay his appeal for exhaustion of his ninth ground in the state courts, but the court denied that motion. Given that the district court had *sua sponte* denied any COA, the Court set a briefing schedule for Group to request a COA by August 29, 2016. Group complied.

On August 29, 2016, in a detailed and extensive eighty-five-page pleading, Group timely sought a COA from the Sixth Circuit Court of Appeals. *See* Apx. A-28 to A-112, citing the appropriate COA standards (*i.e*, *Slack v. McDaniel*, 529

U.S. 473 (2000); *Barefoot v. Estelle*, 463 U.S. 880 (1983)), he challenged the district court's blanket denial of any and all claims. Group specifically sought a COA on Claims 1-3, and 8, challenged the specific procedural default rulings by the district court specific to his habeas claims, and also properly challenged the district court's denial of discovery, denial of his motion to alter or amend the judgment pursuant to Rule 59, as well as the motion to amend his federal habeas petition.

On May, 25, 2017, after citing the proper COA standard, the three-judge panel for the Sixth Circuit Court of Appeals issued a *pro forma*, perfunctory and non-specific blanket denial of Group's requests. The entire analysis is as follows:

> Upon consideration, we **DENY** the COA application because Group has failed to make the required showing. We also **DENY** Group's request that we authorize federal habeas counsel's pursuit of the suggested state-court litigation.
>
> Apx. at A-26.

Group timely petitioned for rehearing and rehearing *en banc* of the court's order denying his application for a certificate of appealability. On December 21, 2017, in a one paragraph, non-reasoned Order, the *en banc* Sixth Circuit Court of Appeals denied the request. In its entirety, the Order reads:

> Scott A. Group petitions for rehearing en banc of this court's order, entered on May 25, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing.

> Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.
>
> Apx. at A-27.

Scott Group remains sentenced to death having been given no issues to appeal and without any articulated understanding as to why not. This petition for *certiorari* timely follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE MINIMAL REQUIREMENTS OF A HABEAS COURT'S STATUTORY GATE-KEEPING FUNCTION PURSUANT TO 28 U.S.C. § 2253(c) IN A CAPITAL CASE.

A. The Sixth Circuit's *Pro-Forma*, Non-Reasoned, And Blanket Denial Of A COA, Upholding The District Court's Similar Non-Reasoned, Non-Individualized, And Blanket Denial Of A COA, Breaks With The Clear Precedent Of This Court.

This Court has repeatedly acknowledged that AEDPA's COA provision serves an important "gatekeeping function," that is only fulfilled when the habeas court makes an actual "determination" that the COA is or is not warranted. *Gonzalez v. Thaler*, 565 U.S. 134, 157, (Scalia dissenting) (2012). *See also, Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003) (discussing "[t]his threshold inquiry," and noting that "[t]he COA determination under § 2253(c) *requires an overview of the claims* in the habeas petition and a *general assessment of their merits.*") (emphasis added.) Section 2253(c)(3) clearly states that a certificate of appealability "*shall* indicate which specific issue or issues satisfy the [COA] showing." At the end of the day, the 'indication' requirement in § 2253(c)(3) is "'imposed by the legislature and not by the judicial process.'" *Id.* at 170 (Scalia dissenting) (citing to *Torres v. Oakland Scavenger Company*, 487 U.S. 312, 318 (1988) (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986)). "When a court of appeals sidesteps this process, . . . it is in essence deciding an appeal without jurisdiction. *Miller-El v. Cockrell*, 537 U.S. at 337.

This Court has been clear that statutes such as AEDPA place numerous restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners, and similarly that its holdings "should not be misconstrued" as

directing that a COA always must issue. *Duncan v. Walker,* 533 U.S. 167, 178 (2001). However, in so holding, this Court had also reasoned that it is historically clear "[t]he concept of a threshold, or gateway, test was not the innovation of AEDPA," rather it was Congress that established "a threshold prerequisite to appealability" as far back as 1908. *Miller-El v. Cockrell,* 537 U.S. at 337 (citing *Barefoot v. Estelle,* 463 U.S. 880, 892, n. 3 (1983). In that regard, this Court has specifically ruled that the COA procedures are not discretionary but rather fundamental to the habeas process and this Court has specifically directed the habeas court to perform, however minimal, a specific analysis in order to fulfil its judicial obligations. "By enacting AEDPA, using the *specific standards* the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. *It follows that issuance of a COA must not be pro forma or a matter of course." Id.* (emphasis added.)

Consistent with these holdings, this Court has not hesitated upon review of a record to conclude that a COA should issue because, for example, "the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case." *Miller-El v. Cockrell,* 537 U.S. at 341. In *Miller-El,* similar to the *pro forma* and unreasoned review by both the district court and the Sixth Circuit Court of Appeals in Group's case, this Court rejected the Circuit Court of Appeals upholding a district court's denial of a COA in a manner inconsistent with the specific mandates of the AEDPA statute. *Id.*

As such, the Sixth Circuit Court of Appeal's ruling conflicts with this Court's precedent.

1. This Court has long acknowledged that "death is different," and as such it is appropriate for a habeas court to take into account the severity of the sentence when deciding whether to issue a certificate of appealability.

Since the days of pre-AEDPA caselaw on the issuance of certificates of probable cause (CPC) to appeal in capital cases, this Court has recognized the appropriateness of taking into account the severity of the sentence when deciding whether to issue a certificate of appealability in a capital case. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) ("In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause . . . .").

In this capital case, Group stands uniquely alone in the Sixth Circuit as having been given no issues to appeal and provided no reasons why that is so. Without giving the severity of his sentence any consideration at all, the Sixth Circuit Court of Appeals' unreasoned *pro forma* ruling again conflicts with this Court's precedent.

B. The Sixth Circuit's *Pro-Forma*, Non-Reasoned, And Blanket Denial Of A COA Splits From Decisions Of Other Circuit Courts As To How To Determine Whether A Certificate of Appealability Should Issue.

The Sixth Circuit's blanket denial of Mr. Group's request for a certificate of appealability creates a split among the circuits as to whether the blanket denial (or grant) of a COA is permissible under 28 U.S.C. § 2253(c), which provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. §§ 2253(c)(1)-(c)(3).

Rule 11 of the Rules Governing 2254 Cases in the United States District Court also provides that, "[I]f the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." *See* Hertz and Liebman, 2 Federal Habeas Corpus Practice and Procedure § 35.4b at 1574, n. 40 (5th Ed. 2005) (discussing See 28 USC § 2253(c)(3) and citing cases to effect that an issuing court may not simply find that the overall petition meets (or not) the standard; *also* Ryan Hagglund, Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions, 72 U. Chi. L. Rev. 989, 1024 (2005).

This Rule requiring some reasoned gate keeping explanation be provided in the granting or denial of a certificate of appealability has been applied in the Fifth, Sixth, Tenth, Eleventh and D.C. Circuits. For example, in *Muniz v. Johnson*, 114 F.3d 43, 46 (5th Cir. 1997), the Court held that "when a district

court issues a CPC or COA that does not specify the issue or issues warranting review, as required by 28 U.S.C. § 2253(c)(3), the proper course of action is to remand to allow the district court to issue a proper COA, if one is warranted."

In *Porterfield v. Bell*, 258 F.3d 484, 486 (6th Cir. 2001) the Sixth Circuit Court of Appeals previously held that:

> Both [blanket grants and blanket denials] undermine the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability. Moreover, because the district court is already deeply familiar with the claims raised by petitioner, it is in a far better position from an institutional perspective than this court to determine which claims should be certified.

See also Murphy v. Ohio, 263 F.3d 466 (6th Cir. 2001) ("Such a blanket *denial* of a COA by the district court in this case is at least as objectionable as the blanket *grant* of a COA by the lower court in *Porterfield*, if not more so.")

The Tenth Circuit has also construed the statute in the same way. *See LaFevers v. Gibson*, 182 F.3d 705, 710 (10th Cir. 1999) ("It is equally important, however, that district courts do not proceed to the other end of the jurisdictional spectrum and make a blanket denial of a certificate of appealability unless the court is convinced there is nothing in the petition that is of debatable constitutional magnitude."); *Herrera v. Payne*, 673 F.2d 307, 307 (10th Cir. 1982) ("Clearly the rule imposes a responsibility on the district judge to issue a certificate or a statement detailing his reasons for declining to confer one.")

In *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014), the Eleventh Circuit Court of Appeals stated, "We will not be so lenient in future

appeals when a certificate fails to conform to the gatekeeping requirements imposed by Congress. Going forward, a certificate of appealability, whether issued by this Court or a district court, must specify what constitutional issue jurists of reason would find debatable. Even when a prisoner seeks to appeal a procedural error, the certificate must specify the underlying constitutional issue." In addition to *Spencer,* the Eleventh Circuit in *Franklin v. Hightower,* 215 F.3d 1196 (11th Cir. 2000), noted that pursuant to AEDPA's amended 28 U.S.C. §2253, a COA must indicate which specific issues show a denial of a constitutional right. In discussing the blanket denial of a COA, the court held that, "[b]y applying AEDPA's standards to this appeal and issuing a proper COA (if warranted), this panel may 'fix' the inadequacies of the present [certificate of probable cause]." *Id.* at 1199. *See also, Rostan v. United States,* 213 F. Appx. 943 (11th Cir. 2007) (remanding to the district court a grant of a COA that did not specify reasons for the grant.)

Similarly, in *United States v. Weaver,* 195 F.3d 52, 53 (D.C. Cir. 1999), the D.C. Circuit remanded to the district court "to specify the issue or issues for appeal," where the lower court "did not ... specify the issue or issues as to which Weaver made a substantial showing he was denied a constitutional right."

Such a generalized blanket denial of a COA by the Sixth Circuit court on all of Group's issues effectively delegated the COA determination process to this Court, thereby undermining the gate keeping function of certificates of appealability that is reflected in all the above decisions. Such statements do not comport with the proper review process.

Yet not all circuit courts interpret the gatekeeping function in such a uniform manner. The Eight Circuit, for example, has interpreted 28 U.S.C. §2253 and this Court's precedent very differently. In *Dansby v. Hobbs*, 691 F.3d 934 (8th Cir. 2012), that court stated:

> We do not think § 2253(c) or the Supreme Court's decisions regarding certificates of appealability dictate that a court of appeals must or must not publish a statement of reasons when it denies an application for a certificate. Whether to issue a summary denial or an explanatory opinion is within the discretion of the court.

Id. at 936.

Thus, it is imperative that this Court clarify whether there are any minimal requirements for the grant or denial of a certificate of appealability. Mr. Group is in the unique position of having been granted no issues to litigate in this capital habeas appeal, in spite of having asserted numerous viable constitutional claims to the district court. *See* Petitioner-Appellant's Motion for a Certificate of Appealability, Apx. A-28 to A-112. And at this point, he has no idea why not.

1. The Sixth Circuit's *pro-forma*, non-reasoned, and blanket denial of a COA splits from decisions of other circuit courts that give special consideration to the COA procedure in *capital* cases.

It is important to note that *Barefoot, supra,* commands that "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of [appealability].... [,]" *Barefoot,* 463 U.S. at 893. The Sixth Circuit Court of Appeals gave this concern absolutely no consideration in their *pro-forma* denial of any COA. Courts other than the Sixth Circuit, however, have recognized the appropriateness of taking into account the severity of the sentence when deciding to issue a certificate of appealability in a capital case.

See, e.g., Smith v. Dretke, 422 F.3d 269, 273 (5th Cir. 2005) (" 'Because the present case involves the death penalty, any doubt as to whether a COA should [be] issue[d] must be resolved in [the petitioner's] favor.'"); *Graves v. Cockrell*, 351 F.3d 143, 150 (5th Cir. 2003), *cert. denied*, 541 U.S. 1057 (2004) ("Any doubt regarding whether to grant a COIA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination."); *Valerio v. Crawford*, 306 F.3d 742, 767 (9th Cir. 2002) (*en banc*), *cert. denied*, 538 U.S. 994 (2003) ("Because this is a capital case, we resolve in Valerio's favor any doubt about whether he has met the standard for a COA."); *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (citing *Barefoot*, 463 U.S. at 893, and noting "Although not dispositive, '[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of [appealability]...'"); *Jermyn v. Horn*, 266 F.3d 257, 279 n.7 (3d Cir. 2001) ("in a capital case, the nature of the penalty is a proper consideration in determining whether to grant a [certificate of appealability]" (internal citation omitted)); *Petrocelli v. Angelone*, 248 F.3d 877, 884 (9th Cir. 2001).

The Sixth Circuit Court of Appeals' perfunctory *pro forma* denial of a COA posits that indeed 'death is no longer different.'

C. The Sixth Circuit's *Pro-Forma*, Non-Reasoned, And Blanket Denial Of A COA Runs Contrary To Its Own Circuit Precedent.

The *pro forma* and unreasoned denial of any COA by the Sixth Circuit Court of Appeals in Group's case, is also contrary to its own circuit precedent. As noted above, in *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001), the Sixth

Circuit addressed the COA issue in which the district court "failed to undertake the individualized determination of each claim presented by petitioner in considering whether to grant a COA under 28 U.S.C. § 2253(c)." Similar to Group's case, it was noted that "the lower [district] court denied Murphy a COA before Murphy had even applied for one, and failed to provide any analysis whatsoever as to whether Murphy had made a 'substantial showing of the denial of a constitutional right.'" *Id.* (citing 28 U.S.C. 2253(c)(2), and *Slack v. McDaniel,* 529 U.S. 473, 483 (2000)). In rejecting that improper and summary COA analysis, the Sixth Circuit ruled that "[s]uch a blanket *denial* of a COA by the district court in this case" was "at least as objectionable" as a blanket *grant* of a COA by a lower district court. *Id.*

The *Murphy* court referenced its prior precedent, *Porterfield v. Bell,* 258 F.3d 484, 487 (6th Cir. 2001), which discouraged as improper a district court's blanket grant of COAs without the individualized analysis that the AEDPA statute mandates. *Murphy,* 263 F.3d at 467. As the *Murphy* court explained, "[t]he district court here failed to consider each issue raised by Murphy under the standards set forth by the Supreme Court in *Slack. Id.* (citing to *Porterfield,* 258 F.3d at 486 ("[I]n granting a certificate of appealability as to all claims, the court did not provide us with any analysis to indicate that it had engaged in the two-pronged inquiry set forth in *Slack* as to each of the procedurally defaulted claims.")).

In both *Murphy* and *Porterfield,* the Sixth Circuit Court of Appeals held that the district court's failure to conduct any COA analysis consistent with the

AEDPA statute and this Court's precedent thereby "undermined the gate keeping function of certificates of appealability." *Porterfield,* 258 F.3d at 487.

In *Frazier v. Huffman,* 343 F.3d 780, 788 (6th Cir.2003), like *Porterfield,* a capital case, the Sixth Circuit re-addressed a blanket grant by the district court in which the lower court did no individualized analysis of any of the claims. In rejecting that behavior, the circuit court of appeals stated that the district court's blanket grant "has hindered our consideration of this appeal," and declared that the district court's "rationale is contrary to our decision in *Porterfield." See also, Bradley v. Birkett,* 156 F. App'x 771, 774 (6th Cir. 2005) ("Under these circumstances, we vacate the certificate of appealability granted by the district court in this case and remand to the district court, directing it to make a reasoned assessment of each of Bradley's claims as required by 28 U.S.C. § 2253, *Slack, Miller-El, Porterfield,* and *Frazier.* We expect the district court to comply fully with the prescriptions established by statute, Supreme Court precedent, and our own precedent."); *id.* (citing *Frazier* and *Porterfield,* and ruling that in those cases "we emphasized," that "such a blanket grant conformed to neither the commands of 28 U.S.C. § 2253(c) ... nor the Supreme Court's construction of the statute in *Slack.*") (citations omitted); *id.* (noting that Sixth Circuit precedent "underscored" that "[t]he language of § 2253(c) is mandatory. It was therefore error for the district court to issue a blanket certificate of appealability without any analysis."); *id.* (finding error because district court "granted a COA as to all of Bradley's claims without individualized analysis, explained only by an expression of the district court's awareness of its own fallibility, thus

manifestly failing to follow the requirements set forth in 28 U.S.C. § 2253, *Slack,* and *Miller-El.*). *See also, Lundgren v. Mitchell,* 440 F.3d 754, 762 (6th Cir. 2006) (citing procedural history and noting, "In February 2003, a panel of this Court vacated the decision of the district court and remanded the case for individual treatment of Petitioner's claims.)

Here, in Group's capital habeas case, not only did the district court fail to perform the mandated gate keeping function, but the Sixth Circuit panel, contrary to its own longstanding Sixth Circuit precedent, engaged in precisely the same inadequate and improper behavior in denying Group a COA. The Sixth Circuit's *pro forma* adjudication of extensive COA requests warrants this Court's attention. The blanket denial should be vacated and this capital case should be remanded to the lower court to provide a properly reasoned review consistent with AEDPA's standards.

D. The Sixth Circuit's *Pro-Forma*, Non-Reasoned, And Blanket Denial Of A COA Does Not Comply With The Minimum Requirements Of 28 U.S.C. § 2253(c) And Thus Violates Due Process.

The perfunctory ruling by the Sixth Circuit Court of Appeals is unique precedent for the proposition that AEDPA's COA provisions have *no* minimal requirements for a habeas court to follow. The Sixth Circuit Court of Appeals rendered meaningless its statutory duty to independently assess Group's COA application, denying him due process of law. The ultimate question for the Sixth Circuit Court of Appeals to decide under the *Slack* standard was whether the district court's assessment of the constitutional claims and procedural issues

was debatable among reasonable jurists. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). That assessment was not made.

As noted, in its two-page Order, the Sixth Circuit Court of Appeals identified the correct standard to assess whether a COA should issue:

> If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling."
>
> Apx. at A-26, (quoting *Slack*, 529 U.S. at 484.)

But after stating the standard, the court abruptly and perfunctorily denied Group's application, stating "we **Deny** the COA application because Group has failed to make the required showing." *Id.* The court supplied no reasoning or analysis to inform Group why he had failed to meet this standard.

The Sixth Circuit Court of Appeals' failure to apply its own reasoned analysis to Group's COA application infringed on his right to due process. As a threshold matter, it does not matter that Group has "no right," constitutional or otherwise, to a habeas appeal. *See*, 28 U.S.C. §2253(b). Relevant by analogy, in *Evitts v. Lucey*, 469 U.S. 387, 405 (1985), this Court held that constitutional principles of fundamental fairness apply even when "the Constitution does not require States to grant appeals of right to criminal defendants seeking to review alleged trial court errors." *Id.* at 393 (quoting *McKane v. Durston*, 153 U.S. 684 (1894)). Due process rights apply because state legislatively- created appeals are

"an integral part of the system for finally adjudicating the guilt or innocence of a defendant." *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

Consistent with the underlying reasoning of *Evitts,* is longstanding precedent in which this Court has ruled that defendants who had no federal constitutional right to an appeal still possessed a due process right to a fundamentally fair appeal process once such an appeal was legislatively provided. *Compare Evitts*, 469 U.S. at 401 (reasoning States may choose to "institute ... welfare program[s]" or "set[] policies governing [discretionary] parole decisions" but such State action must comport with the fairness strictures and "dictates" of the Due Process Clause.)(citations omitted), with, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that a state's denial of a trial transcript for an indigent's appeal violated due process and acknowledging that although there is no federal right to appeal a state-imposed conviction, "[a]ppellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant" such that "all stages of the proceedings" are protected from "invidious" discriminations "by "the Due Process and Equal Protection Clauses."; *also Douglas v. California*, 372 U.S. 353, 355-58 (1963) (finding due process violation resulting from the state's refusal to appoint appellate counsel to indigent defendants where under California's system, "the state appellate courts ... [made] an independent investigation of the record [to] determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed," such that it had become a "meaningless ritual." (citation and internal quotation marks omitted); *Cf. Ohio*

Adult Parole Authority v. Woodard, 523 U.S. 272, 283-85 (1998) (distinguishing *Evitts*, *Douglas*, and *Griffin*, as inapplicable to the context of executive clemency, and reasoning that "function and significance" of executive clemency differed substantially from the "function and significance" of the appeal rights at issue in the *Evitts* line of cases.)

Group's due process rights were violated by the Sixth Circuit Court of Appeals' phantom review of his COA application, and the "function and significance" of the gatekeeping provisions in 28 U.S.C. §2253(c) lead to that conclusion. *See*, *Woodard*, 523 U.S. at283-85. The focus falls on the important function and significance of federal habeas review and not on whether a habeas appeal is required by §2253. As a result "[t]he writ of habeas corpus plays a vital role in protecting Constitutional rights." *Slack*, 529 U.S. at 483. Given the importance and historical role of the Great Writ, *Boumediene v. Bush*, 553 U.S. 723, 745 (2008), habeas review is "an integral part of the system for finally adjudicating the guilt or innocence of a defendant." *See Evitts*, 469 U.S. at 393 (citing *Griffin*, 351 U.S. at 18).

"The importance of the writ is that it protects those detained by providing a tool to call their jailer into account." *Boumediene*, 553 U.S. at 745. This Court "[has] made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

The Great Writ is "a vital instrument for the protection of individual liberty ...." *See Boumediene*, 553 U.S. at 743; *cf. Burger v. Kemp*, 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). This integral part of the criminal justice system was rendered meaningless, in violation of the Due Process Clause, when the Sixth Circuit Court of Appeals perfunctorily denied Mr. Group's COA application. This effectively permits his execution without ever having any issue to appeal and without ever knowing why he was denied.

Habeas appeals are obviously far more "structured" than the largely discretionary, clemency proceeding reviewed in *Woodard*. *Woodard*, 523 U.S. at 284. The structured nature of habeas appeals includes a statutorily mandated review of a COA application by the Court of Appeals. The requirement to obtain a COA in order to appeal is part and parcel of the structure of habeas review, 28 U.S.C. §2253(c), and the requirement includes the Court's precedent as discussed in *Slack*. Under the *Slack* standard, the petitioner's burden is not steep. For merit review, the petitioner satisfies that standard if he states a valid claim alleging the denial of a constitutional right. *Slack*, 529 U.S. at 844. For review of procedural default found by the district court, the petitioner satisfies the standard if he states a valid claim alleging the denial of a constitutional right, and a question exists as to the correctness of the district court's procedural ruling. *Id.* And the appellate court's COA review is not deferential because it may also issue a COA to the petitioner if it simply finds the district court's conclusions

to be debatable among jurists of reason. *Id.* But in this case there were no articulated findings by the circuit court whatsoever.

The federal habeas scheme includes a standard for determining when an appeal may be taken from the district court. Given the historically important role habeas review plays in our criminal justice system, *see Boumediene*, 553 U.S. at 739-46, due process requires that this standard must be applied to Group's case. By analogy, depriving Group of the proper appellate standard is like depriving a defendant of transcript in an appeal or the right to hearing when welfare benefits are terminated because deprivation renders the proceeding meaningless. *See, Griffin*, 351 U.S. at 18-19; *Goldberg v. Kelly*, 397 U.S. 254, 261-64 (1970).

The Sixth Circuit Court of Appeals' failure to apply any standards deprived Group of a meaningful appellate review of his habeas claims. Simply put, Group was denied "the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation marks omitted). That is the antithesis of fundamental fairness. *See id.*

CONCLUSION

The Court should grant the petition for *certiorari*. The Sixth Circuit Court of Appeals' *pro forma* and perfunctory Order should be vacated and this capital case should be remanded for a full and proper COA review consistent with AEDPA's statutory standards.

Respectfully submitted,

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