Capital Case

Case No. 17-8188

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT A. GROUP, PETITIONER,

VS.

NORM ROBINSON, WARDEN, RESPONDENT.

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

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**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### There is a circuit split specific to how the appellate courts are to meet their gatekeeping function when addressing a request for a COA in a capital case.

The Warden dismisses Scott Group's claim of a circuit split, arguing that none of the cases cited by him constitute a split with the Sixth Circuit Court of Appeals' decision in this case. The Warden argues that blanket grants and blanket denials of COA are "separate questions," Brief in Opposition at 16, and suggests that AEDPA only places statutory obligations on a court *issuing* a COA. *Id.* What the Warden misses is that the split in the circuits is less a technical parsing of statutory words than it is a very broad-based disparity between the way federal appellate courts understand and manage the gatekeeping function that they all recognize as being their collective responsibility and obligation to oversee capital habeas appellate practice. The circuit split is not whether courts recognize their responsibilities and obligations. It is rather about the wild disagreement on what those specific management responsibilities are in performing their gatekeeping obligations.

The Warden seeks to technically dismiss *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001), because it was decided before Rule 11 was enacted, Brief in Opposition at 18, while ignoring that the demands of 28 U.S.C. § 2253(c) still would have required the same analysis. But the reasoning of the Court of Appeals is reflective of the broad problem Group asks this Court to address. The Court of Appeals equated the failure to consider each issue presented under *Slack* in denying the COA "at least as objectionable" as a blanket grant of a COA, "if not

more so." *Murphy*, 263 F.3d at 467. *See also Cantu v. United States*, Case No. 1:07-CV-535, 2008 WL 5060042, *1 (W.D. Mich. Nov. 21, 2008) ("The Sixth Circuit has disapproved blanket denials of certificates of appealability.") The Court of Appeals recognizes that whether the court is issuing a blanket grant or a blanket denial, the concern for how to manage the gatekeeping function of the task at hand remains the same. There is an equivalence that reduces to a simple concern for how to responsibly perform its gatekeeping function and properly manage the appellate process.

So too, the Warden references *LaFevers v. Gibson*, 182 F.3d 705 (10th Cir. 1999), and again insists upon there being a fine legal distinction between blanket grants and blanket denials. The Warden asserts all federal appellate courts that rule a blanket denial of a COA is similarly violative of § 2253 (c) are inconsequential to this entire discussion. Brief in Opposition at 16 *et seq.* In *LeFevers*, the Tenth Circuit reviewed a district court's flawed interpretation of 28 U.S.C. § 2253 (c) to not apply to appeals arising from cases involving a death sentence. But the court of appeals' admonishing comments about "blanket denials" were made in the context that "[i]ndeed, it is in those very [death-sentenced] cases in which **the deft scrutiny of the district court is most essential to the appellate process**. Reading section 2253(c) to suggest otherwise deprives it of all purpose and meaning and surely obverts the legislative will of Congress." *LaFevers*, 182 F.3d at 710 (emphasis added). The Warden ignores that critical context. Immediately after expressing its overriding concern for the integrity of that "essential" appellate process, the court issued

its twin caveats that "district courts do **not** proceed to the other end of the jurisdictional spectrum and make a blanket denial of a certificate of appealability," and mandating that district courts "render[] judgment as Congress has prescribed." *Id.* (Emphasis added). The court was rightly concerned with properly performing its critical gatekeeping function in order to assure that the appellate process was being responsibly managed. Its ruling reflects an honest effort to figure out how that COA process is supposed to work.

These caveats are, however, completely anathema to the far more lackadaisical attitude reflected towards the application of § 2253(c) in *Dansby v. Hobbs*, 691 F.3d 934, 936 (8th Cir. 2012), where the court ruled: "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." This ruling obviously reflects an entirely different view of the gatekeeping function and what the court's management responsibilities are.

The conflict Group asserts rests precisely in how the federal appellate courts address their gatekeeping obligations specific to granting or denying capital petitioners a right to appeal. The Warden cites as "irrelevant" to the split–in-the-circuits concern raised by Group, the case of *Herrera v. Payne,* 673 F.2d 307 (10th Cir.1982), because it spoke to "pre-AEDPA rules." Brief in Opposition at 19-20. This ignores that the reasoning of the *Hererra* case has been adopted and cited authoritatively in post-AEDPA rulings from other Circuits. In *Haynes*

*v. Quarterman*, 526 F.3d 189, 193–94 (5th Cir. 2008), the court of appeals addressed a district court's *sua sponte* denial of a certificate of appealability that did "not supply adequate individualized reasons for its denial." The court recognized this as a blanket denial of a COA and first noted that Rule 22(b)(1) states, "[i]f an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability *or state why* a certificate should not issue." (emphasis added). *Id.* The Fifth Circuit Court of Appeals reasoned as follows:

> We have not explicitly ruled on what is required under Rule 22(b)(1), but other Circuit courts have rejected *pro forma* blanket denials. In *Herrera v. Payne,* 673 F.2d 307, 307 (10th Cir.1982), the Tenth Circuit vacated a blanket denial of a COA even though the denial referred to the extensive analysis in the court's decision to deny habeas relief. *See also Brown v. Booker,* 622 F. Supp. 993, 994 & n. 2 (E.D.Va.1985). In accordance with the Tenth Circuit, the Sixth Circuit has more recently held in *Murphy v. Ohio,* 263 F.3d 466, 467 (6th Cir. 2001), that even after setting forth reasons denying habeas relief, the district court must also give individualized consideration to each claim under *Slack,* 529 U.S. at 483, 120 S. Ct. 1595, in its denial of COA.

*Id.* Nonetheless, the court ruled that even assuming *arguendo* that it "should follow these persuasive authorities" and find that the district court violated the COA standards in its failure to provide "individualized reasons in its denial of COA," it was "not necessarily require[d]" to remedy a violation by vacating the district court's defective issuance or denial of COA and remanding the case back to the district court. *Id.* That is a simple reflection that the court lacks definitive guidance as to what the extent of their responsibilities are when gatekeeping the appellate process for habeas petitioners.

In other words, the *Haynes* decision, citing both *Herrera* and *Murphy*, reflects precisely the confusion and inconsistency that is rife throughout the circuits specific to the management of the COA process. And *Haynes*, cited also to *Brown v. Booker*, 622 F. Supp. 993, 996–97 (E.D. Va. 1985), in which that court addressed in what form and to what extent should the district judge state the reasons for his denial of the certificate of probable cause. The *Booker* court, itself citing to *Herrera,* 673 F.2d at 308, noted what seemed obvious to itself, that "the proper exercise of [the discretion to issue a certificate] cannot be adequately reviewed where no reasons for the determination had been given," such that a district judge must issue a "statement detailing his reasons for declining to issue" a certificate. *Id. See also, Gardner v. Pogue,* 558 F.2d 548, 550 (9th Cir.1977), *appeal after remand,* 568 F.2d 648 (9th Cir.1978); *Wilks v. Young*, 586 F. Supp. 413, 415 (E.D. Wis. 1984) (citing *Herrera*); *Vick v. Parsons*, 941 F.2d 1213 (10th Cir. 1991) (citing *Herrera*).

What all these cases reflect is that the federal appellate courts are looking to do the right thing and meet their gatekeeping function, which they all recognize. The courts just do not have any consistent sense as to what is required of them when managing the COA process. There is simply no consistency around the country, or even within the Sixth Circuit, as to what is required to manage the habeas appellate process responsibly.

Finally, the Warden argues that *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014), is also irrelevant to this discussion. Brief in Opposition at 19. The Warden again parses distinctions in an effort to deny there is any

inconsistency in the way COAs are being managed by courts of appeals. But these sundry cases decided, by sundry appellate courts, all anchor themselves in a common concern as to how to responsibly meet their gatekeeping functions demanded by the COA process. So, in agreeing to address the appeal, the *Spencer* court admonished that "[w]e 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." *Spencer*, 773 F.3d at 1138.

The Warden fails to acknowledge that all over the country federal courts of appeals repeatedly admonish lower courts in a variety of situations, each believing those admonishments are consistent with their gatekeeping requirements to address COA requests. Those admonishments are as varied as the inconsistent rulings seeking clarification of the correct way to manage and fulfill the minimal requirements of fulfilling this important appellate obligation.

Following the Court of Appeals' decision, Group has nothing to appeal in this capital case, and only a blanket denial of an eight-four page COA request with which to try to figure out why. This Court should clarify those procedures so he might discern why this is the case.

**Group's due process claim is ripe for review.**

Group asserted that "[t]he Sixth Circuit Court of Appeals rendered meaningless its statutory duty to independently assess Group's COA application, denying him due process of law." Petition for Writ of Certiorari at 23. The Warden

contends Group did not preserve this argument in the court of appeals, Brief in Opposition at 3, 19, and as a result, this Court should not consider Group's due process claim. *Id.* at 19-20.

The Warden's argument fails because Group's due process claim ripened after the Sixth Circuit Court of Appeals denied his petition for panel rehearing and *en banc* rehearing. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations and internal quotation marks omitted.

Group's due process claim ripened after the court of appeals denied his motion for panel rehearing and *en banc* review. *See Texas*, 523 U.S. at 300. Under the Sixth Circuit Court of Appeals' own precedent, the summary, unexplained review done by the panel in this case was improper. *See Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001); *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001). Group reasonably anticipated that the court of appeals would correct the same type of error in his case that had previously led to remands issued by the court of appeals in *Murphy* and *Porterfield*. And if the court of appeals had corrected the same error, or if the court of appeal had itself fulfilled its statutory gatekeeping role as anticipated by its case law, there would have been no deprivation of due process. On these circumstances, the perfunctory denial by the Sixth Circuit Court of Appeals—issued contradistinctively without regard for its own precedent—was an unexpected, future event. *See Texas*, 523 U.S. at 300.

Group's due process claim ripened after the original court of appeals panel denied rehearing and the entire bench similarly denied review and issued its *en banc* order. Before that order, his claim was not ripe because it was contingent on the future event of the court of appeals ignoring its own precedent as to the proper scope for review of a COA. *See Murphy*, 263 F.3d at 467; *Porterfield*, 258 F.3d at 487.

Group was denied due process of law when the original three-judge panel and then the entire Sixth Circuit Court of Appeals issued their perfunctory summary blanket denial of his request for a COA. As discussed at page 27-28 of Group's petition for writ of certiorari, the hollow review of Group's case by the court of appeals deprived Group of due process of law.

**The district court's review of Group's claims is irrelevant to this issue.**

Group's claim flows from the Sixth Circuit Court of Appeals' failure to do its own proper and independent assessment of his request for a COA. The Warden suggests the deficiencies in the appellate court's procedure are legally meaningless because the district court conducted a "thorough order denying Group's petition on each ground." Brief in Opposition at 9. According to the Warden, Group is not entitled to a COA because the district court properly determined that reasonable jurists could not debate the district court's conclusion that Group was not entitled to a COA. *Id.* at 10 (quoting district court's Order, Apx. at A-23).

Group's right to a COA is in no way foreclosed by the district court's merits analysis. "The COA inquiry … is not coextensive with a merits analysis." *Buck v.*

*Davis*, __U.S. __, 137 S. Ct. 759, 773 (2017). Rather, the appellate court conducts a "threshold inquiry" into the merits of the underlying claims that the petitioner seeks to appeal. *Id.* at 774 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

As to the district court's COA analysis, the Warden does not contest it was an unreasoned, blanket denial. Group asserts it suffers from the same defect as the unreasoned ruling issued by the court of appeals. Apx. at A-23. Indeed, prior to Group's case, the precedent of the Sixth Circuit Court of Appeals had been to remand habeas cases to the district court for a "reasoned assessment of each procedurally defaulted claim as required by *Slack* [*v. McDaniel*, 529 U.S. 473 (2000)]." *Porterfield v. Bell*, 285 F.3d 484, 485 (6th Cir. 2001); *accord Murphy vs. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (capital habeas case remanded to district court for reasoned assessment of each habeas claim under the *Slack* standard).

Nor is Group's entitlement to a COA foreclosed by even a well-reasoned *Slack* analysis by the district court. Even where the district has made a reasoned COA analysis, that is insufficient to satisfy § 2253(c). The ultimate question for the court of appeals to decide under the *Slack* standard is whether the *district court's assessment* was debatable among reasonable jurists. *Slack*, 529 U.S. at 483-84. The Warden ignores that "[t]he holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Miller-El,* 537 U.S. at 337.

**The Warden's opinion of the merits is irrelevant to this issue.**

The Warden denigrates Group's petition as an attempt at mere "error correction." Brief in Opposition at 12. This is a misrepresentation. He is not seeking error correction. Indeed, if Group had sought error correction by seeking certiorari on any of his denied habeas claims, the petition would not be justiciable under the guidelines for seeking certiorari under Supreme Court Rule 10. Rather, his petition presents the justiciable issue as to the minimal requirements for the review of a capitally-sentenced petitioner's request for a COA to the Sixth Circuit Court of Appeals and whether the court of appeals was badly out of step with other federal courts when it denied any COA in a ruling that was an unreasoned, blanket denial. *See* Supreme Court Rule 10(a).

The Warden also faults Group's petition because he does not seek review on the basis of any of his habeas grounds. *Id.* at 3. The Warden opines that Group's claims are clearly meritless or clearly defaulted, obviating this Court's review. *Id.* at 12-13, 22-29. In support of this argument the Warden contends Group's convictions are supported by "[o]verwhelming evidence." *Id.* at 13. None of these points should be well-taken and they are irrelevant to this discussion.

As to the merits of Group's claims, they are not presented in his petition for writ of certiorari, but as reflected in his extensive request for a COA, it suffices that they are "adequate to deserve encouragement to proceed further." *See Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983)). Group's habeas claims are available to the Court as Group included his eighty-four page "Motion for a Certificate of Appealability," which was filed in the Sixth

Circuit Court of Appeals and is included in the Appendix to his petition. Apx. at A-28 to A-112. Group's COA motion apprised the court of appeals that there was certainly arguable merit to several of his claims warranting a habeas appeal. *See id.*

Although Group's petition does not seek error correction review based on specific habeas claims, the Warden's response has irrelevantly and misleadingly addressed them, and Group briefly responds here, only to suggest the evidence against Group was not "overwhelming" and the COA requests presented arguments supporting a substantial denial of a constitutional right.

The Warden asserts the blood found on Group's shoe "matched" the DNA of the victim, Robert Lozier. *See* Brief in Opposition at 1, 5, 6. The Warden's assertion follows from the trial prosecutor's argument that the blood on Group's shoe was, conclusively, Robert Lozier's.

Group sought a COA as to whether the district court's decisions denying his Civil Rule 59 motion for relief from the judgment, and his Civil Rule 15 motion to amend his petition with a Ninth Ground were proper given that he properly presented a claim and made a substantial showing he was denied a constitutional right. The Ninth Ground alleged a DNA-based ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668 (1984). To support both motions, Group offered the declaration of a scientist, Dr. Dan Krane.

Dr. Krane explained that the prosecutor misrepresented the statistical significance of the population frequency statistic provided by the State's DNA

expert. The prosecutor told the jury that "it's Robert Lozier's blood [that was found on Group's shoe]." Trial Tr. p. 2515, Doc. # 22-4, PageID #: 5955. However, Dr. Krane indicates "it is 'scientifically inappropriate' to say to a 'reasonable degree of scientific certainty' a specific person is the source to the exclusion of all others" based upon "the evidentiary DNA sample … for this case." Dr. Krane's Declaration Doc #: 66, PageID #: 8963. Dr. Krane also discussed "[t]he presence of an additional allele … consistent with the proposition that the results obtained from A8-1 [a blood spot on Group's shoe] are from a mixture of two or more individuals." *Id.*, PageID #: 8964.

This new evidence demonstrates that the State's DNA evidence does not conclusively put Robert Lozier's blood on one of Group's shoes. Group's new evidence demonstrates that the tested, genetic material was derived from a mixed sample meaning that another person's DNA profile was present. The frequency with which Robert's DNA profile would be found was also grossly misrepresented at trial by the State. Contrary to what the jury was told, it cannot be scientifically proven that Robert's DNA was in fact found on Group's gym shoe. And Robert's genetic profile was not unusual within the population.

For purposes of a COA, reasonable jurists could debate whether the claim was defaulted and the rule in *Trevino v. Thaler*, 569 U.S. 413 (2013), provides Group with cause and prejudice to excuse his failure to present the DNA evidence, and the Ninth Ground, to the State courts during state post-conviction review. The Warden attempts to bury the significance of *Trevino* to the procedural default issue in this case, *see* Brief in Opposition at 24-27, but the Warden's

argument is as misleading (as it is unnecessary to this petition) because the application of *Trevino* in Ohio remains an open question.

The Ohio Supreme Court has long recognized in several cases that some *Strickland* claims cannot be litigated on direct appeal if the claim depends on evidence beyond the trial record to demonstrate prejudice for an ineffective counsel claim. *State v. Kirkland*, 15 N.E.3d 818, 830 (Ohio 2014); *State v. Mammone*, 13 N.E.3d 1051, 1087 (Ohio 2014); *State v. Madrigal*, 721 N.E.2d 52, 65 (Ohio 2000); *State v. Keith*, 684 N.E.2d 47, 67 (Ohio 1997) (Citation omitted). These cases show that some *Strickland* claims cannot be litigated on direct appeal by the "operation and design" of Ohio's system and collateral review is only "meaningful opportunity to raise [this] ineffective assistance of trial counsel" claim. *See Trevino*, 569 U.S. at 428.

The court of appeals' decision in *McGuire v. Warden, Chillicothe Correctional Institution*, 738 F.3d 741 (6th Cir. 2013), also makes it an open question whether the *Trevino* exception to default applies to an Ohio habeas petitioner's case. *See id.* at 751 ("Third, while we need not determine whether *Trevino* applies to Ohio cases, it is not obvious that *Trevino* applies here."). Group's habeas claims, and the question of whether some of them were procedurally defaulted, are "adequate to deserve encouragement to proceed further." *See Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983)).

Unlike the Warden, Group does not seek to convince this Court he made a substantial showing of the denial of a constitutional right specific to any of his individualized claims. That adversarial discussion of course, is properly

conducted in the first instance within the COA process itself. Group was entitled to have that process resolved in a meaningful, non-perfunctory and substantive way consistent with AEDPA's statutory provisions and this Court's jurisprudence. Because that process did not occur Group has been denied the opportunity to seek an appeal of any issue or claim in his capital case.

## CONCLUSION

There is a substantial divergence among the federal appellate courts regarding the manner in which a COA application must be reviewed and what is required of the appellate court in assessing a COA application. This divergence among the federal appellate courts "call[s] for an exercise of this Court's supervisory power[]" to provide guidance and uniformity among the appellate courts for the review of a habeas petitioner's COA application. *See* Supreme Court Rule 10(a). Additionally, this Court should grant the writ to decide the "important question of federal law" of whether Petitioner Scott Group's due process rights were violated by the perfunctory manner in which the Court of Appeals for the Sixth Circuit "reviewed" his COA application. *See* Supreme Court Rule 10(c).

Respectfully submitted,

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