

ORDER DENYING MOTION
FOR REHEARING WITH DISSENT

No. 17-2076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 16, 2018
DEBORAH S. HUNT, Clerk

CARL BURNIE WELLBORN,
)
)
Petitioner-Appellant,
)
)
v.
)
MARY BERGHUIS, Warden,
)
)
Respondent-Appellee.
)

ORDER

Before: GUY, COOK, and DONALD, Circuit Judges.

Carl Burnie Wellborn, a former Michigan prisoner proceeding through counsel, petitions for rehearing of this court's May 16, 2018, order denying him a certificate of appealability. The application for a certificate of appealability arose from the district court's judgment denying Wellborn's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

Upon careful consideration, this panel concludes that the court did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a). Accordingly, Wellborn's petition for rehearing is **DENIED**.

BERNICE BOUIE DONALD, Circuit Judge, dissenting. I disagree with my colleagues’ conclusion that this court did not misapprehend or overlook any point of law or fact in its May 16, 2018, order, in which the court ruled that reasonable jurists could not debate the district court’s procedural ruling in light of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). As Petitioner noted, other jurists have adopted his proposed interpretation of *Weaver*—that he can meet the *Strickland* standard by establishing fundamental unfairness. *See, e.g., Ledet v. Davis*, No. 4:15-cv-882, 2017 WL 2819839, at *14 (N.D. Tex. June 28, 2017) (“The burden is on the defendant to show either a reasonable probability of a different outcome in his case or that

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the particular public-trial violation was so serious as to render his trial fundamentally unfair.”); *In re Salinas*, 408 P.3d 344, 353 (Wash. 2018) (McCloud, J., concurring) (“[Weaver] listed a showing of ‘fundamental unfairness’ as an alternative to proof of ‘prejudice’ as a means of gaining relief.”). Reasonable jurists could also debate whether Wellborn’s petition “states a valid claim of the denial of a constitutional right.” *Dufresne v. Palmer*, 876 F.3d 248, 252 (6th Cir. 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Therefore, I would grant Wellborn’s rehearing petition and his application for certificate of appealability as to his claim that *Weaver* altered the standard for establishing actual prejudice. I respectfully dissent.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 17-2076, *Carl Wellborn v. Mary Berghuis*
Originating Case No. : 1:05-cv-00346

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill Colyer
Case Manager
Direct Dial No. 513-564-7024

Enclosure

**ORDER DENYING MOTION
FOR COA**

