No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM WEAVER,

Petitioner,

vs.

MICHAEL BOWERSOX,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This habeas corpus case, involving former Missouri death row inmate William Weaver, comes before this Court a second time. In *Roper v. Weaver*, 550 U.S. 698 (2007), this Court, after briefing and oral argument, dismissed the Writ of Certiorari it had previously granted that was filed by the State of Missouri as improvidently granted, which had the effect of upholding the Eighth Circuit's previous decision granting penalty phase relief to petitioner based upon improper closing arguments by the prosecution. In so doing, this Court noted that the District Court erroneously dismissed petitioner's pre-AEDPA habeas corpus petition by finding that petitioner had to exhaust his state remedies by way of a petition for a writ of certiorari from his consolidated state court appeal before filing his habeas corpus petition. *Id*. at 601; *See also Lawrence v. Florida*, 549 U.S. 327 (2007). As a result of this erroneous ruling, all of petitioner's claims that were rejected in his first habeas corpus petition were erroneously subjected to the more stringent standard of review provisions of 28 U.S.C. § 2254(d) and (e) of the AEDPA.

After he was resentenced to life imprisonment in 2014, petitioner filed a Rule 60(b) motion in the District Court under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), urging the court to set aside its judgment denying relief on petitioner's claims so his *Batson v. Kentucky*, 476 U.S. 79 (1986) claim could later be reexamined *de novo* in light of *Roper*, *Lawrence*, and *Buck v. Davis*, 137 S.Ct. 759 (2017). The District Court denied the motion and denied a Certificate of Appealability (COA). After filing a notice of appeal and filing an application for a COA in the Eighth Circuit, the Court of Appeals, as is their custom in both capital and non-capital cases, issued a three line unexplained denial of the application and dismissed the appeal.

In light of the foregoing facts, this petition presents the following questions:

1. Does this Court's decision in *Gonzalez v. Crosby* completely foreclose a habeas petitioner from obtaining Rule 60(b) relief arising from a demonstrable defect in the prior proceedings if, as a result, the District Court will ultimately be required to reexamine some of petitioner's constitutional claims that were previously adjudicated on the merits.

2. Whether the grounds raised by petitioner in his appeal from the denial of his Rule 60(b) motion presented issues upon which reasonable jurists could differ concerning the correctness of the District Court's decision, which required the issuance of a COA.

3. Whether the Eighth Circuit Court of Appeals' standard practice of issuing unexplained blanket denials of COAs in both capital and non-capital habeas corpus cases improperly obstructs and constrains this Court's discretionary review of its decisions.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Weaver prays that a writ of certiorari issue to review the judgment of the Court of Appeals below, which denied his application for a certificate of appealability ("COA"), and dismissed his appeal challenging the judgment of the District Court denying his motion to reopen his habeas corpus case pursuant to Fed. R. Civ. Pro. 60(b)(6).

OPINIONS BELOW

The Eighth Circuit's unpublished order and judgment denying petitioner a COA issued on November 19, 2018 and is published in the appendix at A-1. The District Court's unpublished order and judgment of February 28, 2018, denying petitioner's motion pursuant to Rule 60(b)(6) for relief from the court's 2003 judgment denying his habeas corpus petition is published in the appendix at A-4. The underlying judgment of the District Court, issued on May 7, 2003, is unpublished and is published in the appendix at A-2.

JURISDICTIONAL STATEMENT

Petitioner's application for a COA was denied by the Eighth Circuit on November 19, 2018. Under 28 U.S.C. § 2201(c) and Rule 13.1, the present petition for a writ of certiorari was required to be filed by petitioner within ninety days. Upon application of petitioner pursuant to Rule 13, Circuit Justice Neil Gorsuch

extended the time for filing the petition up to and including April 18, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2253(c), which provides in pertinent part:

> (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.
>
> (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.

This case also involves 28 U.S.C. § 2254(a), which provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the

ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

In 1998, a St. Louis County, Missouri jury convicted William Weaver of first degree murder for the death of Charles Taylor and subsequently sentenced him to death. Petitioner, thereafter, filed a timely notice of appeal and a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After the post-conviction motion was denied by the trial court, the Missouri Supreme Court affirmed petitioner's conviction and sentence on consolidated appeal in *State v. Weaver*, 912 S.W.2d 499 (Mo. banc 1995).

In his direct appeal, one of the primary issues advanced by petitioner was a challenge to the prosecutor's use of two peremptory strikes to remove African-American venire persons from his jury under this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Missouri Supreme Court denied petitioner's *Batson* claim by concluding that the prosecutor's stated reasons for striking these two black jurors were race neutral. *State v. Weaver*, 912 S.W.2d at 509-510.

On April 18, 1996, petitioner filed a *pro se* habeas corpus petition in the United States District Court for the Eastern District of Missouri before Judge Charles Shaw challenging his St. Louis County murder conviction and sentence of death. At that time, petitioner had not yet filed a petition for a writ of certiorari before this Court seeking review of the Missouri Supreme Court's judgment

affirming the denial of his constitutional challenges to his murder conviction and death sentence. Due to this fact, the District Court dismissed the petition without prejudice because the court believed that petitioner's claims were not fully exhausted until the aforementioned certiorari petition was litigated to completion. After the petition for a writ of certiorari was denied by this Court on October 6, 1996[1], petitioner filed a second *pro se* habeas petition. After the court appointed counsel, an amended petition was filed. The District Court, on August 9, 1999, granted petitioner a writ of habeas corpus on his *Batson* claim and reserved ruling on petitioner's other twenty-one claims for relief.

On appeal, the Eighth Circuit reversed the District Court's decision granting relief on the *Batson* claim, finding that petitioner was not entitled to relief under the deferential standard of review provisions of the AEDPA. *Weaver v. Bowersox*, 241 F.3d 1024, 1029, 1032 (8th Cir. 2001). Judge Morris Arnold dissented, expressing the view that he would affirm the grant of relief on the *Batson* claim under 2254(d). *Id*. at 1032-1033. After the Court of Appeals reversed the grant of relief on the *Batson* claim, the court remanded the case to Judge Shaw for consideration of petitioner's remaining twenty-one grounds for relief. *Id*. at 1032.

On May 7, 2003, the District Court issued another order and judgment which granted petitioner penalty phase relief based upon an improper closing argument

[1] In this interim period, the AEDPA became the law on April 24, 1996.

and denied guilt and penalty phase relief on all other claims. (A-2). This judgment was affirmed on appeal in *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006).

Thereafter, respondent filed a petition for a writ of certiorari. This Court granted certiorari, *Roper v. Weaver*, 549 U.S. 1092 (2006), to decide whether the Eighth Circuit had exceeded its authority under 2254(d)(1) by setting aside petitioner's death sentence due to the prosecution's inflammatory closing arguments. After briefing and argument, this Court dismissed the writ of certiorari as improvidently granted, which had the effect of upholding the portion of the District Court's May 7, 2003 order reversing petitioner's death sentence. *Roper v. Weaver*, 550 U.S. 598 (2007).

This Court based its decision to dismiss the writ in *Roper* by finding that its recent decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), "conclusively establishes that the district court was wrong to conclude that, if respondent chose to seek certiorari he had to exhaust that remedy before filing the federal habeas petition." 550 U.S. at 601. Although this Court found it unnecessary to address the question conclusively, this aspect of the Court's decision in *Roper* clearly indicates that, because the District Court erroneously dismissed respondent's pre-AEDPA petition, that all of petitioner's claims, including his *Batson* claim, should have been reviewed *de novo*, rather than under the lens of 2254(d)(1). *Id*. at 601-602.

After the *Roper* decision issued, the state took no action to reinitiate penalty phase proceedings against petitioner. As a result, on February 21, 2014, St. Louis County Circuit Judge Barbara Wallace set aside the death sentence that had previously been imposed and resentenced petitioner to life without parole. *See State v. Weaver*, 21CCR-565118B (order and judgment of February 21, 2014).

Undersigned counsel, after being retained, filed a Rule 60(b)(6) motion in the district court on March 29, 2017. (A-19). The state filed a response on July 11, 2017. (A-28).

Petitioner's Rule 60(b)(6) motion urged the District Court to set aside its 2003 judgment denying relief on his *Batson* claim under *Gonzalez v. Crosby*, 545 U.S. 524 (2005). (A-19-28). Petitioner argued that under *Gonzalez*, there was a defect in the prior habeas petition involving the District Court's erroneous order dismissing petitioner's pre-AEDPA habeas petition for failure to exhaust his state remedies by requiring him to wait until after certiorari was denied to refile his petition. As noted earlier, it was not disputed that this ruling was clearly erroneous in light of this Court's decisions in *Lawrence* and *Roper*. This defect in the proceedings resulted in the denial of relief on petitioner's *Batson* claim because both the District Court and the Eighth Circuit reviewed this claim under the deferential provisions of 28 U.S.C. § 2254(d), instead of affording the claim the correct *de novo* review. (A-19-24). This motion also argued that this case

presented extraordinary circumstances warranting 60(b)(6) relief because it involved a claim of racial discrimination similar to the circumstances this Court confronted in *Buck v. Davis*, 137 S.Ct. 759 (2017), where this Court held that Rule 60(b)(6) relief should have been granted to a Texas death row inmate in similar circumstances. (A-24-25).

On February 28, 2018, the District Court denied appellant's Rule 60(b)(6) motion for three reasons. (A-18). First, the court ruled that this motion constituted a successive habeas petition. (A-10-15). Second, the court held that the motion was untimely. (A-16). Finally, the court held that appellant did not show extraordinary circumstances sufficient to grant the motion. (A-16-17).

In its order denying the 60(b) motion, the District Court also denied petitioner a COA. (A-18). Petitioner, thereafter, filed a timely notice of appeal. On March 29, 2017, petitioner filed an application for a COA in the Eighth Circuit. As is their practice, the Eighth Circuit summarily denied a COA in a one page order without issuing any opinion setting forth its reasons for doing so. (A-1). The present petition for a writ of certiorari is now before this Court for discretionary review.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE COURT OF APPEALS' DENIAL OF A COA, IN LIGHT OF THE

UNDISPUTED FACT THAT PETITIONER'S FIRST HABEAS PROCEEDING WAS TAINTED BY AN ERRONEOUS RULING BY THE DISTRICT COURT THAT PETITIONER'S CLAIMS WERE NOT EXHAUSTED, CONFLICTS WITH *SLACK V. MCDANIEL*, *GONZALEZ V. CROSBY*, AND DECISIONS FROM OTHER CIRCUITS.

By any objective measure, the undisputed facts of this case clearly weigh in favor of finding that petitioner can meet the modest standard for receiving a COA to obtain plenary appellate review of the District Court's decision not to reopen his habeas case under Rule 60(b). This Court has explained that the requisite showing to obtain a COA requires an appellant "show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a District Court also rejects a claim on procedural grounds, to obtain a COA, the appellant must demonstrate that both the ruling on the procedural issue was debatably wrong and that the underlying constitutional claim debatably had merit. *Id.* at 484-485.

Most of the factual and legal underpinnings of the 60(b) motion were not disputed and, at the very least, arguably demonstrate that the District Court judgment was wrong and that appellate review of this decision should have been allowed. For instance, neither respondent, nor the District Court quarreled with the fact that the District Court erroneously dismissed Mr. Weaver's pre-AEDPA habeas petition by finding that he had not exhausted his state remedies because he

intended to file a petition for a writ of certiorari from the denial of his consolidated state appeal. *See Roper v. Weaver,* 550 U.S. 598, 601-602 (2007). Respondent and the District Court also did not dispute that the dismissal of this pre-AEDPA petition for failure to exhaust created an unwarranted and illegal procedural hurdle by spawning the erroneous application of the deferential standard of review provisions of 28 U.S.C. § 2254(d) to the adjudication of petitioner's constitutional claims.

Instead, the District Court essentially held that this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005) categorically precludes any habeas petitioner from successfully obtaining Rule 60(b) relief in any case where the District Court previously addressed the underlying constitutional claims on the merits. (A-10-15). The District Court, however, read *Gonzalez* too broadly.

It is clearly debatable whether the District Court's erroneous determination that Mr. Weaver failed to exhaust his state remedies constitutes "some defect in the integrity of the federal habeas proceedings" as contemplated in *Gonzalez*. *Id*. at 532. In fact, this Court in *Gonzalez* noted that one of the examples of such a defect would be where a district court improperly denies a petition for failure to exhaust. *Id.* at n.4. Although the District Court's prior erroneous ruling on the exhaustion question did not completely foreclose merits review, there can be no dispute it imposed a significant procedural barrier to the grant of relief on the merits by

subjecting petitioner's claims to the more onerous standard of review provisions of 28 U.S.C. § 2254(d)(1) and (2) and (e)(1).

This Court in *Gonzalez* cited with approval the Second Circuit's decision in *Rodriguez v. Mitchell*, 252 F.3d 191 (2nd Circuit 2001) as an example where 60(b) relief would be warranted. 545 U.S. at 532 & n.5. The Second Circuit in *Rodriguez* held that a fraud on the court was a sufficient qualifying defect to justify 60(b) relief to a habeas petitioner despite the fact that the District Court had previously addressed the underlying constitutional claims on the merits. 252 F.3d at 198-199. The defect in *Rodriguez*, as here, sufficiently undermined the integrity of the District Court's prior judgment on the merits to open the door to Rule 60(b) relief despite the fact that the practical effect of its holding, necessarily, could lead to the potential reexamination of the substantive claims for relief at a later stage. *Id*.

By prominently citing *Rodriguez* and describing the fraud on the court in that case as a qualifying "defect", it follows that this Court in *Gonzalez* clearly did not hold that a defect in the integrity of the federal habeas proceeding sufficient to allow 60(b) relief is strictly limited to situations where the alleged defect prevented the District Court from reaching the merits of the petitioner's underlying claims for habeas relief. *See Gonzalez*, 545 U.S. at 532 & n.5. Instead, *Gonzalez* recognized the authority of district courts to entertain 60(b) motions as necessary to police their own proceedings and ensure the integrity and validity of its rulings.

In this case, as in *Rodriguez*, the petitioner previously received a ruling on the merits from a flawed proceeding. Although the ultimate effect of the 60(b) motion here and in *Rodriguez*, would be an ultimate reexamination of the merits of the underlying claims for relief, the court in *Rodriguez* held that, in demonstrably flawed prior proceedings, the focus of the inquiry should be on the more immediate relief sought, a request to vacate the tainted judgment previously entered denying the habeas petition.

In *Rodriguez*, the Second Circuit described the tension between, on one hand, a 60(b) petitioner's immediate claim for relief and the ultimate objective of all habeas petitioners to obtain relief from a state conviction, in the following passage:

> "The fact that the Rule 60(b) motion contemplates ultimately the vacating of the conviction is shared with every motion the petitioner might make in the course of pursuing his habeas—motions to compel disclosure or to quash respondent's discovery demands, motions for extensions of time to answer the adversary's motion, motions to be provided with legal assistance, motions for summary rejection of the respondent's contentions. All such motions, like the motion under Rule 60(b), seek to advance the ultimate objective of vacating the criminal conviction. But each seeks relief that is merely a step along the way. In our view, neither of these motions, nor the motion under 60(b) that seeks to vacate the dismissal of the habeas petition, should be deemed a second or successive petition within the meaning of 28 U.S.C. § 2244(b)."

Rodriguez, 252 F.3d at 198-199.

The fact that this Court in *Gonzalez* relied on *Rodriguez* clearly demonstrates that both respondent's and the District Court's broad reading of

Gonzalez to preclude 60(b) relief in all cases involving a prior decision on the merits is, at least, debatably wrong. In light of the unique procedural posture of this case, petitioner's appeal deserved to be heard.

The District Court's second reason for denying 60(b) relief [2], that the motion was not brought in a timely manner, is also debatably wrong. Although the court below did not quarrel with the chronology of events set forth in the application indicating that there was no judgment for Mr. Weaver to challenge by way of Rule 60(b) until he was resentenced in 2014, respondent argued that, under 28 U.S.C § 2254(a), a prisoner in Mr. Weaver's situation could have challenged the District Court's judgment earlier because he was still "in custody." This argument conveniently ignores the entire text of 2254(a), which clearly states that an application for habeas corpus can be entertained on behalf of "a person in custody pursuant to the judgment of a state court…" Because there was no valid state court judgment in place between 2007 and 2014, petitioner could not have possibly filed his 60(b) motion before this latter date.

The District Court and respondent also found fault with the fact that Mr. Weaver did not file the present 60(b) motion until 2017, approximately ten years after his first habeas petition was litigated to completion, and three years after he

[2] The District Court's decision, not only is in conflict with *Gonzalez* and *Rodriguez*, but also conflicts with decisions from the Sixth Circuit. *See e.g. Abdur' Rahman v. Bell*, F.3d 738, 741 (6th Cir. 2007) (analyzing motion under Rule 60(b) where district court erroneously determined a claim to be unexhausted.)

was resentenced. This argument ignores the fact that Mr. Weaver is an indigent prisoner who has received appointed counsel throughout his state court proceedings and during the protracted federal habeas litigation in this case. After this Court's decision issued in *Roper v. Weaver, supra*, prior CJA appointed counsel undertook no further efforts on Mr. Weaver's behalf. As pointed out in the underlying application, the 60(b) motion was not filed until Mr. Weaver secured the services of undersigned counsel to do so. In light of these facts, it is certainly debatable as to whether untimeliness was a legally sufficient alternative ground to justify the denial of the 60(b) motion by the District Court below.

Rule 60(b)(6) gives federal courts broad discretion to grant relief from previous final judgments when that action is "appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949). This Court has also held that a court should only exercise its discretionary power under 60(b)(6) when a case presents "extraordinary circumstances." *Ackermann v. United States*, 340 U.S. 193, 199 (1950).

Based on the foregoing facts, it is beyond dispute that there was a defect in the prior federal habeas corpus proceedings that arguably resulted in the denial to petitioner to a new trial to which he was entitled under *Batson* because both the Eighth Circuit and the District Court incorrectly applied the standard of review provisions of the AEDPA his claims that were properly advanced in a pre-AEDPA

petition. Two years ago, this Court issued its decision in *Buck v. Davis*, granting Texas death row inmate Duane Buck penalty phase relief under Rule 60(b)(6). *Buck v. Davis*, 137 S. Ct. 759 (2017). The facts surrounding Mr. Buck's Rule 60(b)(6) litigation bear striking similarities to this case. As in *Buck*, there are intervening Supreme Court decisions here that undermined the correctness of the result in the previous habeas proceeding. Most importantly, however, petitioner's case is comparable to *Buck* because the underlying constitutional claim here also involves a claim of racial discrimination.

This Court in *Buck* noted that claims of racial discrimination are particularly "pernicious in the administration of justice" and "poisons public confidence in the judicial process." *Id*. As a result, the nature of the substantive claim for relief, coupled with the intervening caselaw arguably provided sufficient extraordinary circumstances to establish that the District Court abused its discretion in denying Mr. Buck's 60(b)(6) motion. *Id*. Because this case is comparable to *Buck*, petitioner is arguably entitled to the same relief from his conviction based upon a claim of racial discrimination that was not fairly adjudicated because of a clear legal error that occurred during the prior habeas proceeding.

Because two different federal judges found that petitioner was entitled to a new trial based on his *Batson* claim, this underlying claim is undoubtedly "debatably meritorious," which requires that a COA be issued under *Slack*. The

District Court's conclusion that the facts of this case are not extraordinary is also arguably erroneous. The bizarre procedural twists and turns surrounding the prior 2254 litigation in this case are truly extraordinary.

The *Lawrence* decision, coupled with the subsequent decision in *Roper v. Weaver*, indicates that the District Court clearly erred in compelling petitioner to dismiss his pre-AEDPA petition, which debatably compromised the litigation of all his claims, including his *Batson* claim and the claim upon which his death sentence was ultimately set aside. It is, therefore, certainly debatable that this legal error also caused both the Court of Appeals and the District Court below to reach the wrong result in adjudicating petitioner's *Batson* claim. As a result, petitioner believes that it is not a close question that the extraordinary facts of this case deserved to be heard on appeal.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER COURTS OF APPEALS MUST EXPLAIN DENIALS OF CERTIFICATES OF APPEALABILITY TO ALLOW PETITIONERS TO HAVE A MEANINGFUL OPPORTUNITY FOR DISCRETIONARY REVIEW BEFORE THIS COURT.

In both capital and non-capital habeas corpus cases, it is the Eighth Circuit's practice to issue one page unexplained orders denying COAs. These orders usually state only that the court has reviewed the record and files and that the application is denied. (A-1). Petitioner filed a detailed application for a COA before the Court of

Appeals. The state filed a response and thereafter, petitioner filed a reply in support of the application. The Court of Appeals panel however, addressed none of the issues raised in these pleadings, and did not provide any reasoned basis for its decision to deny a COA. This Court has also been made aware of the disparity between circuits in the frequency of granting COAs in capital cases. *See Buck v. Davis*, brief of petitioner, appendix A. (showing that between 2011 and 2016, COAs were denied on all claims in 58.9 percent of the cases arising from the Fifth Circuit, while a COA was only denied in 6.3 percent, and in 0 percent of the cases arising out of the Eleventh and Fourth Circuits).

Similar data from the Eighth Circuit was presented to this Court in *Greene v. Kelley*, No. 16-7425, 137 S.Ct. 2093 (2017). This evidence presented in *Kelley* indicated that, since 2011, 47.6 percent of capital cases in which a COA was sought in the Eighth Circuit, were denied.

The Eighth Circuit's treatment of COAs is outside of the mainstream when compared with the common practices of other courts of appeals. Despite the fact that the standard for obtaining a COA is modest, the Eighth Circuit has summarily denied COAs in capital habeas cases nearly 50 percent of the time between 2011 and 2016. The Eighth Circuit's practice of issuing one page unexplained denials of COAs is also inconsistent with the practices of virtually every other court of appeals. Unlike most other courts of appeals, the Eighth Circuit does not explain

why a petitioner's claims are not debatably meritorious. Instead, the Eighth Circuit always issues a uniform three line summary order like the one that was issued in this case. (A-1).

In stark contrast, the Sixth Circuit explained the importance of issuing reasoned opinions in this context in *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). In *Murphy*, the court reversed a summary denial of a COA by a district court and remanded the case with directions to analyze the individual issues presented in the application. The Sixth Circuit held that this remand was required because "The District Court here failed to consider each issue raised by *Murphy* under the standards set forth by the Supreme Court…" *Id.* at 467. *See also Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001).

The practice of the Eighth Circuit in issuing unexplained denials conflicts with the practices of virtually every other circuit court of appeals. The petition for a writ of certiorari in *Greene v. Kelley*, identified reasoned orders denying COAs in capital cases from every circuit except the Seventh and Eighth Circuits. *See e.g. Swisher v. True*, 325 F.3d 225 (4th Cir. 2003); *Griffin v. Secretary*, 787 F.3d 1086 (11th Cir. 2015). The circuits which have not denied a COA in capital cases have issued reasoned opinions when denying COAs in non-capital cases. *See e.g. Middleton v. Attorneys General*, 396 F.3d 207 (2nd Cir. 2005); *Pickens v. Workman*, 373 Fed. Appx. 847 (10th Cir. 2010).

This Court's discretionary intervention is necessary to bring the practices of the Eighth Circuit in line with the nearly uniform behavior of other courts of appeals in considering state prisoners' 2254 appeals. This Eighth Circuit practice has the appearance of a rubber stamp, which undermines public confidence in the integrity of judicial process. In addition, these unexplained denials effectively preclude this Court from fully and fairly exercising its discretionary power by way of a writ of certiorari to intervene to correct clear injustices when there is nothing of substance from the Court of Appeals for the Court to consider. Although this Court has jurisdiction to review the denial of a COA by courts of appeals, under *Hohn v. United States*, 524 U.S. 236 (1998), unexplained denials from the Eighth Circuit effectively insulates those decisions from review by this Court, by forcing it to speculate, *de novo*, whether an unexplained decision in a particular case warrants intervention to correct a clear injustice.

The modest and simple standard for granting a COA should be uniformly applied throughout this country by the Federal Courts. The above-cited statistics clearly indicate this is not happening. This Court can no longer turn a blind eye to the aberrant practice of the Eighth Circuit in issuing summary orders that effectively shields its decisions from this Court's scrutiny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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