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

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INDEX OF APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1722

William Weaver

Petitioner - Appellant

v.

Michael Bowersox

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:96-cv-02220-CAS)

JUDGMENT

Before GRUENDER, SHEPHERD and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

November 19, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:96-CV-2220 CAS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

JUDGMENT

In accordance with the memorandum and order of this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that petitioner William Weaver's First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is **GRANTED** as to the sentence of death, based on portions of Claim Two, and **DENIED** on all other claims.

IT IS FURTHER ORDERED that petitioner has not made a substantial showing of the denial of a constitutional right, such that reasonable jurists would find the Court's assessment of the constitutional claims debatable or wrong; or that reasonable jurists would find it debatable whether the Court was correct in its procedural rulings, and therefore this Court does not reach the issue whether reasonable jurists would find it debatable that the petition states a valid claim of the denial

of a constitutional right, and therefore this Court will not issue a certificate of appealability. See Slack v. McDaniel, 529 U.S. 473, 484-85 (2000).

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 7th day of May, 2003.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:96-CV-2220 CAS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This closed matter is before the Court on petitioner William Weaver's motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from final judgment. Petitioner requests that the Court re-open his § 2254 habeas petition. Petitioner argues that a defect in his prior habeas corpus proceeding led to this Court erroneously applying a more stringent standard to petitioner's claims than was proper. Petitioner moves that the Court review de novo his claim under Batson v. Kentucky, 476 U.S. 79 (1986), that his constitutional rights were violated by the prosecutor's use of two preemptory challenges in jury selection (the "Batson claim"). For relief, petitioner moves that he be granted a new trial. Respondent opposes the motion on a number of grounds. For the following reasons, the Court will deny petitioner's request for relief from final judgment.

I. Procedural Background

On July 19, 1988, petitioner William Weaver was convicted of first-degree murder in the death of Charles Taylor by a jury in St. Louis County, Missouri. The next day, the jury sentenced Weaver to death.

Petitioner timely filed a pro se Motion to Vacate, Set Aside or Correct a Judgment of Guilty and a Sentence of Death, pursuant to Missouri Supreme Court Rule 29.15. Appointed counsel for petitioner timely filed an amended motion, which incorporated the pro se motion and asserted additional points for relief. The state court conducted an evidentiary hearing on petitioner's 29.15 motion on September 13-15, 1993, with a subsequent hearing on July 28, 1994. The postconviction motion court denied relief on all grounds on November 29, 1994.

Weaver appealed his conviction and sentence to the Missouri Supreme Court. Weaver's direct appeal was consolidated with his appeal from the denial of his postconviction motions. On December 19, 1995, the Missouri Supreme Court affirmed the conviction and death sentence. See State v. Weaver, 912 S.W.2d 499 (Mo. 1995) (en banc).

On April 18, 1996, Weaver filed a pro se habeas petition in federal district court. At that time, he had not yet petitioned the United States Supreme Court for review of the Missouri Supreme Court's decision affirming his conviction and death sentence, although he had indicated his intention to do so. On or about July 1, 1996, Weaver did file a petition with the United States Supreme Court for a writ of certiorari on his state court appeal. This Court dismissed his federal habeas petition without prejudice to permit Weaver to fully exhaust his state remedies. He filed a notice of appeal and requested a certificate of appealability on the dismissal, which was denied by the Eighth Circuit Court of Appeals. Petitioner did not seek a rehearing or a rehearing en banc, nor did he file a petition for writ of certiorari with the Supreme Court as to the dismissal of his first federal habeas petition. Weaver's petition for a writ of certiorari on his state court appeal was denied by the Supreme Court on October 7, 1996. Weaver v. Missouri, 519 U.S. 856 (1996). On November 12, 1996, Weaver filed a second pro se habeas petition, which is the case at bar. Weaver's second

habeas petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became effective on April 24, 1996. The AEDPA set stricter standards for the federal courts' review of challenges to state custody. See generally, Williams v. Taylor, 529 U.S. 362 (2000). The Court appointed counsel to assist Weaver with his federal habeas petition. Counsel filed an amended petition, and argued that the AEDPA did not apply to Weaver's second federal habeas petition because it was a continuation of his first petition, which was filed before the effective date of the AEDPA. The State opposed the petition and argued that the AEDPA's new, more stringent standard should apply.

On August 9, 1999, this Court issued a Memorandum and Order, in which it granted petitioner a writ of habeas corpus on his Batson claim only. The Court did not address petitioner's other claims for relief. Although the issue was raised by the parties, the Court determined that it need not decide whether the AEDPA applied to the second petition because "the Court finds that the petition in this case should be granted even under the newer, more deferential standard of review provided for under the AEDPA." Doc. 29 at 5.

The State appealed the granting of the petition to the Eighth Circuit Court of Appeals. The issue of whether the AEDPA and its new standard of review applied to petitioner's second petition was squarely before the Eighth Circuit. Weaver v. Bowersox, 241 F.3d 1024, 1029 (8th Cir. 2001). Weaver argued that the AEDPA standard should not apply to his case, but the Eighth Circuit held that it did: "AEDPA's provisions apply to all habeas corpus petitions filed after the Act's effective date. . . . We hold that this rule applies even when a prisoner's original petition was filed prior to the AEDPA's effective date and dismissed without prejudice for failure to exhaust state remedies." Id. (citations omitted). The Eighth Circuit proceeded to review Weaver's Batson claim under the

AEDPA's standard of review. Giving deference to the state court, the Eighth Circuit found that the Missouri Supreme Court had properly applied clearly established constitutional law, and that its factual determinations were not unreasonable. Id. at 1032. The Eighth Circuit reversed and remanded, directing this Court to address the remaining claims in petitioner's habeas petition. Id. at 1033. Petitioner did not appeal this ruling to the United States Supreme Court, and the Eighth Circuit issued its mandate on July 12, 2001.

In a Memorandum and Order dated May 7, 2003, this Court once again took up Weaver's petition and addressed the remaining 21 claims for relief. As instructed, this Court employed the standard of review from the AEDPA and found that Weaver was entitled to a writ of habeas corpus vacating his sentence of death on the ground that the prosecutor made inflammatory statements during closing arguments in the penalty phase that violated petitioner's due process rights. Doc. 46 at 133. This Court further found that all other claims for relief were either procedurally barred or failed on the merits. This Court vacated petitioner's death sentence and ordered that he either be sentenced to life in prison without the possibility of parole or be given a new penalty-phase trial. The Court did not issue a certificate of appealability as to any of the claims it denied. Following Weaver's motion to alter, amend or set aside judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, this Court amended its judgment and did issue a certificate of appealability as to two of petitioner's claims relating to the prosecutor's closing arguments during the guilt phase of the trial.

The State appealed the granting of habeas relief to the Eighth Circuit. Weaver also filed a cross-appeal. Weaver appealed this Court's decision regarding six statements the prosecutor made during the guilt phase closing arguments. This Court had determined that the claims were

procedurally defaulted under Coleman v. Thompson, 501 U.S. 722, 750 (1991), and that Weaver had failed to show cause and prejudice, or demonstrate a fundamental miscarriage of justice arising from the failure to consider the claims. Doc. 46 at 16. The Eighth Circuit held that Weaver had failed to address the procedural default issue in his appellate briefs and, therefore, he had abandoned his cross-appeal. Weaver v. Bowersox, 438 F.3d 832, 838 (8th Cir. 2006). It declined to review the merits of Weaver's cross-appeal. Id.

As for the State's appeal, the Eighth Circuit held that the claims fell under the AEDPA's standard of review.[1] Applying the more stringent standard of review, the Eighth Circuit affirmed the judgment of this Court. Id. at 842. The Eighth Circuit found:

> The conclusion by the Missouri Supreme Court that "the penalty phase arguments . . . [were] reasonable" is unreasonable under existing United States Supreme Court precedents. It is unclear which precedents the Missouri Supreme Court applied. Regardless, there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents.[2]

Id. The parties filed petitions for rehearing by the panel and for rehearing en banc, which were denied.

Weaver did not appeal. The State, however, filed a petition for a writ of certiorari with the United States Supreme Court, which was granted. Roper v. Weaver, 550 U.S. 598 (2007). The

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[1]The issue before the Eighth Circuit this time around was not whether or not the AEDPA applied because petitioner had filed his first habeas petition prior to its enactment, but rather whether the state court had adequately addressed the claims at issue such that its decision was entitled to discretionary review under the AEDPA. Weaver, 438 F.3d at 838.

[2]The prosecutor in Weaver's trial had made essentially the same closing arguments in two other cases that had come before the Eighth Circuit: Shurn v. Delo, 177 F.3d 662, 667 (8th Cir. 1999), and Newlon v. Armontrout, 885 F.2d 1328 (8th Cir.1989). Applying the pre-AEDPA standard, the Eighth Circuit vacated the sentences in these two cases, including that of Daryl Shurn, the man who hired petitioner to kill Mr. Taylor. Shurn, 177 F.3d at 668, Newlon, 885 F.2d at 1329.

Supreme Court granted certiorati on the issue of whether the Eighth Circuit's application of the more stringent standard of review under the AEDPA was consistent with the Supreme Court's interpretation of the statute. Id. at 599. In a per curiam opinion dated May 21, 2007, the Supreme Court noted that it had become "aware" of Weaver's argument that the AEDPA should not govern his case because he had filed his original federal habeas petition before the effective date of the AEDPA. Id. Citing Lawrence v. Florida, 549 U.S. 327, 332 (2007), the Supreme Court stated that this Court had erroneously dismissed Weaver's first federal habeas petition. Id. at 601 ("'state review ends when the state courts have finally resolved an application for state postconviction relief' – even if a prisoner filed a certiorari petition"). The Supreme Court, however, declined to resolve whether the AEDPA applied to Weaver's second petition, and dismissed the writ of certiorari as "improvidently granted," writing:

> Whether this unusual procedural history leads to the conclusion, as respondent colorably contends, that the AEDPA standard is simply inapplicable to this case, is a question we find unnecessary to resolve. Regardless of the answer to that question, we find it appropriate to exercise our discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed respondent's pre-AEDPA petition.

Id. at 601-02 (citing Shurn, 177 F.3d at 668; Newlon, 885 F.2d at 1329).

The last entries in the Eighth Circuit Court of Appeals docket are the May 21, 2007 opinion from the Supreme Court and its judgment. Weaver sought no further relief from the Eighth Circuit.

On August 22, 2013, new counsel entered an appearance on behalf of Weaver and filed a "Motion to Enforce Judgment and Issue an Unconditional Writ of Habeas Corpus Vacating Petitioner's Unconstitutional Sentence of Death." Doc. 83. According to the motion, over five years after the Supreme Court had issued its opinion, petitioner remained under a sentence of death as the

State had made no effort to resentence petitioner. The parties briefed petitioner's motion, but it was later rendered moot on February 21, 2014, when he was resentenced by the State to life without parole.

Three years later, Weaver filed the motion that is presently before the Court. Petitioner now moves, pursuant to Rule 60(b), that the Court set aside its 2003 Judgment and issue a new judgment granting him a new trial on his Batson claim. Weaver argues that his first federal habeas petition, which was filed pre-AEDPA, should not have been dismissed, and but for the erroneous dismissal, all of his claims would have been reviewed de novo. He argues that under de novo review, his Batson claim would be granted. Petitioner moves that this Court vacate the final judgment in this case, and reinstate its 1999 judgment, in which the Court granted Weaver habeas relief on his Batson claim.

The State opposes Weaver's Rule 60(b) motion and argues: (1) this Court does not have the authority to reconsider the Batson claim under the 2001 mandate from the Eighth Circuit; (2) the Court cannot consider petitioner's motion because under 28 U.S.C. § 2244(b) it is a successive habeas petition;(3) the motion is untimely; and (4) there are no exceptional circumstances that would warrant relief.

II. Discussion

A. Petitioner's Motion is a Successive Habeas Petition.

Rule 60(b) of the Federal Rules of Civil Procedure allows a party to seek relief from a final judgment and request reopening a case, under a limited set of circumstances including fraud,

mistake, and newly discovered evidence.[3] A habeas petitioner may seek relief from final judgment under Rule 60(b) in certain circumstances. "Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules." Gonzalez v. Crosby, 545 U.S. 524, 529 (2005) (citing 28 U.S.C. § 2254). See also Ward v. Norris, 577 F.3d 925, 932 (8th Cir. 2009).

There are limits on a petitioner's filing successive habeas petitions in federal court:

> First, any claim that has already been adjudicated in a previous petition must be dismissed. § 2244(b)(1). Second, any claim that has not already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. § 2244(b)(2). Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions. § 2244(b)(3).

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[3]Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Gonzalez, 545 U.S. at 529. According to Supreme Court law, a Rule 60(b) motion is a second or successive habeas corpus application which falls under the restrictive requirements of § 2244 if the motion contains a "claim." Id. When a Rule 60(b) motion presents a "claim," it must be treated as a second or successive habeas petition. Id.

According to the Eighth Circuit, "a claim is defined as an 'asserted federal basis for relief from a state court's judgment of conviction' or as an attack on the 'federal court's previous resolution of the claim on the merits.'" Ward, 577 F.3d at 933 (citing Gonzalez, 545 U.S. at 530, 532). "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." Id. No claim is presented if the motion attacks "some defect in the integrity of the federal habeas proceedings." Id. "Likewise, a motion does not attack a federal court's determination on the merits if it 'merely asserts that a previous ruling which precluded a merits determination was in error-for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" Id. (quoting Gonzalez, 545 U.S. at 532 n. 4).

Here, petitioner urges the Court to re-examine the merits of his Batson claim and enter judgment in his favor. Based on Supreme Court precedent as interpreted by the Eighth Circuit, the Court finds petitioner is asserting a "claim" in his Rule 60(b) motion, which has already been adjudicated. Ward, 577 F.3d at 933. This Court, in its August 9, 1999 Memorandum and Order, granted petitioner relief on his Batson claim. The state appealed to the Eighth Circuit. The Eighth Circuit reviewed the Batson claim on its merits and reversed. Weaver, 241 F.3d at 1029. As the State points out in its response, the Eighth Circuit issued a mandate on its reversal of the Batson claim, and petitioner did not appeal that decision. Petitioner's current motion is, therefore, "an

attack on the 'federal court's previous resolution of the claim on the merits.'" Ward, 577 F.3d at 933 (citing Gonzalez, 545 U.S. at 530).

Petitioner disputes that his Rule 60(b) motion is a second or successive petition, but rather he argues that it is an attack on the integrity of the federal habeas proceeding. Weaver contends that there was a "defect" in his prior habeas proceeding, and because of this so-called defect, this Court and the Eighth Circuit have incorrectly applied the AEDPA's standard of review to his claims. As a result, Weaver argues, he is not presenting a "claim" that would be deemed successive under Gonzalez, 545 U.S. at 530. The Court does not agree.

First, the so-called defect upon which petitioner relies – the erroneous dismissal of his first federal habeas petition – was not a defect in the federal habeas proceedings, but rather an incorrect ruling by this Court that petitioner did not properly challenge through the appellate process. Erroneous rulings in the district courts are not unheard of, and there are appellate procedures in place to correct such errors. Petitioner, however, did not pursue his appeal of the dismissal of his pre-AEDPA petition. After being denied a certificate of appealability, he did not ask for a rehearing en banc or seek a writ of certiorati. Petitioner abandoned his appeal, and has offered no explanation as to why. The basis upon which petitioner seeks relief is not"some defect in the integrity of the federal habeas proceedings" as petitioner contends. Ward, 577 F.3d at 933. Petitioner had avenues of relief that he chose not to pursue.

Second, even if the Court were to find that there was a defect in the prior habeas proceedings, petitioner has not established that he would be entitled to review under the pre-AEDPA standard. From the beginning of this case, petitioner has argued that the more stringent standard of the AEDPA should not apply because his initial federal habeas petition should not have been dismissed

for failure to exhaust. In fact, petitioner raised this argument in the first appeal to the Eighth Circuit, where it was considered and rejected. Weaver, 241 F.3d at 1029 ("AEDPA's provisions apply to all habeas corpus petitions filed after the Act's effective date. . . . We hold that this rule applies even when a prisoner's original petition was filed prior to AEDPA's effective date and dismissed without prejudice for failure to exhaust state remedies.") (citations omitted). Petitioner did not appeal this ruling to the Supreme Court. A mandate was issued, and the case was remanded to the undersigned for a determination on petitioner's remaining claims.

On remand, this Court was bound by the law of the case to follow the Eighth Circuit's holding that the AEDPA did indeed apply to petitioner's remaining claims, which is exactly what the Court did when it granted petitioner's claim relating to inflammatory arguments that were made during closing arguments of the penalty phase. See Jaramillo v. Burkhart, 59 F.3d 78, 80 (8th Cir. 1995) ("Under the law of the case doctrine, a district court must follow our mandate, and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms.").

There has never been a ruling by a higher court in this case that the pre-AEDPA standard of review would apply, and Weaver cites to no legal authority for his assertion that he is entitled to review under the pre-AEDPA standard. In support of his motion, Weaver cites to Lawrence, 549 U.S. at 332. This case clarifies the tolling effect of a petition for writ certiorari on § 2244(d)(2)'s exhaustion requirement; it does not address the applicable standard of review for habeas petitions filed pre- or post-AEDPA.

Petitioner also cites to the Supreme Court opinion in his own case, Roper v. Weaver, 550 U.S. 598, in support of his argument that he is entitled to benefit of the pre-AEDPA standard. But

in Roper v. Weaver, the Supreme Court declined to address whether the pre-AEDPA standard would apply to Weaver's claim. Id. at 601-02.

The third case upon which he relies, Buck v. Davis, 137 S. Ct. 759 (2017), also does not establish that Weaver is entitled to the benefit of the pre-AEDPA standard. The prisoner in Buck filed his federal habeas case well after the enactment of the AEDPA. Id. at 770. In Buck, the district court had dismissed the habeas claim on the grounds that the prisoner had not pursued his claim in state court and, therefore, it was subject to procedural default under Coleman v. Thompson, 501 U.S. at 752-53. At the time, an attorney's failure to raise a claim during state postconviction review did not constitute cause to lift the procedural bar under Coleman. Id. But in 2012, the Supreme Court modified the holding in Coleman. In Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 569 U.S. 413 (2013), the Supreme Court ruled that under certain circumstances a procedural bar on a habeas claim can be lifted if postconviction counsel had been constitutionally ineffective for failing to raise it in the state court proceedings. The Court in Buck held that the petitioner was entitled to relief under Rule 60(b) because his defaulted claims would have been reviewable under the new law. Buck, 137 S. Ct. at 778-80. In the case at bar, there has been no change in the applicable law.

In sum, the Court finds that Weaver's Rule 60(b) motion is a second or successive petition in that it raises a claim that was already adjudicated on the merits. The motion does not, as Weaver contends, attack "some defect in the integrity of the federal habeas proceedings." Ward, 577 F.3d at 933.

B. Alternatively, Petitioner's Motion Is Untimely.

Even if this Court were to find that petitioner's motion for relief was not barred by Gonzalez, 545 U.S. at 529, petitioner would still not be entitled to relief under Rule 60(b) because the motion is time barred. As stated above, Rule 60(b) allows for relief from final judgment for six specific reasons. Petitioner states in his motion and memorandum in support of the current motion that he is seeking relief under Rule 60(b)(6), the catch-all provision, which allows relief for final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). A motion under the catch-all provision for relief from judgment must be made "within a reasonable time." Id.

Petitioner's Rule 60(b) motion was brought almost ten years after the Supreme Court dismissed the petition for writ of certiorari in this case in May 2007. In support of his Rule 60(b) motion, petitioner cites to the opinion dismissing his writ and another Supreme Court case from 2007, Lawrence, 549 U.S. at 332. Petitioner, however, waited until 2017 to file his Rule 60(b) motion. In other words, Weaver did not file his motion for Rule 60(b) relief for almost ten years, which is not within a reasonable time. See Nucor Corp. v. Nebraska Pub. Power Dist., 999 F.2d 372, 374-75 (8th Cir. 1993) (Rule 60(b)(6) motion filed after three years was untimely). Petitioner is precluded from seeking relief pursuant to Rule 60(b) because his motion is untimely. See id.; Lester v. Empire Fire & Marine Ins. Co., 653 F.2d 353, 354 (8th Cir. 1981) (motion based on fraud was time barred).

C. Alternatively, Petitioner Has Not Shown Extraordinary Circumstances that Would Warrant Relief.

Finally, petitioner has not shown that there exist extraordinary circumstances that warrant relief under Rule 60(b). Weaver argues that like Buck v. Davis, his case involves claims of race discrimination and, therefore, there exist extraordinary circumstances such that this Court should

re-open his case pursuant to Rule 60(b). In his habeas petition, Weaver challenged the prosecutor's use of preemptory challenges under Batson. The underlying claim in Buck, however, was not based on Batson, but rather the petitioner argued his trial counsel was ineffective because he did not object to an expert's testimony during the penalty hearing that he was more likely to commit future crimes because he was black. Buck, 137 S. Ct. at 768-69. Noting that the petitioner "may have been sentenced to death in part because of his race," in conjunction with the fact that he would benefit from the new rule under Martinez and Trevino, the Supreme Court found there were "extraordinary circumstances" to warrant reopening the case under Rule 60(b). Id. at 778 & 779-80. The same set of circumstances is not present here.

Relief is available under Rule 60(b) only in "extraordinary circumstances," which will "rarely occur in the habeas context." Gonzalez, 545 U.S. at 535. The rule "is not a substitute for other legal remedies," and a motion for relief under Rule 60(b) "is to be granted only when exceptional circumstances prevented a party from seeking redress through the usual channels." Nucor Corp., 999 F.2d at 374. Petitioner could have pursued an appeal of the dismissal of his first habeas petition, but he did not. And as discussed above, petitioner has not shown that he would be entitled to the pre-AEDPA standard of review. Furthermore, unlike Buck, there has been no change in the applicable law since the judgment became final in this case. In short, petitioner had not shown "extraordinary circumstances" that would warrant relief, and the recent case petitioner cites, Buck v. Davis, 137 S. Ct. 759, is simply not analogous to the case at bar.

III. Conclusion

This Court finds petitioner is not entitled to relief from final judgment pursuant to Rule 60(b) because he is raising a claim that amounts to a second or successive habeas petition. Petitioner must receive permission from the United States Court of Appeals for the Eighth Circuit before he may bring such claims in this Court. 28 U.S.C. § 2244(b)(3). In the alternative, the Court finds petitioner's motion for relief pursuant to Rule 60(b) is time barred. The Court also finds, in the alternative, that petitioner has not established extraordinary circumstances that would warrant relief under Rule 60(b).

Accordingly,

IT IS HEREBY ORDERED petitioner William Weaver's motion for relief from final judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure is **DISMISSED** for failure to obtain prior authorization from the Eighth Circuit Court of Appeals. [Doc. 93]

IT IS FURTHER ORDERED, in the alternative, that movant's motion is **DENIED** as untimely, and there are no extraordinary circumstances that would warrant relief under Fed. R. Civ. P. Rule 60(b).

IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability.

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 28th day of February, 2018.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No.4:96-CV-02220-CAS**
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. PRO. 60(b)(6)

Petitioner William Weaver, by and through newly retained counsel, respectfully requests relief from this Court's judgment of May 7, 2003 pursuant to Fed. R. Civ. Pro. 60(b)(6) in light of the Supreme Court's recent opinion in *Buck v. Davis*, 137 S. Ct. 759 (2017), as well as the prior opinions from the Supreme Court in *Lawrence v. Florida*, 349 U.S. 327 (2007) and *Roper v. Weaver*, 550 U.S. 598 (2007). This case should be reopened pursuant to *Gonzalez v. Crosby*, 545 U.S. 524, 632 (2005) because there is a defect that occurred in the prior habeas corpus proceedings that led to this Court's judgment of May 7, 2003 denying all of petitioner's guilt phase claims because subsequent legal proceedings and intervening authority indicates that this Court, as well as the Eighth Circuit, erroneously held that the standard of review provisions of 28 U.S.C. § 2254 were applicable to petitioner's claim that his conviction violated the Fourteenth

Amendment because the state excluded two venirepersons on the basis of their race under the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Supreme Court's intervening decisions in *Roper v. Weaver* and *Lawrence v. Florida* clearly indicate that this Court should reopen its 2003 judgment and, thereafter, review petitioner's *Batson* claim *de novo* and reinstate the pertinent provisions of this Court's August 9, 1999 order and judgment granting petitioner a new trial on this *Batson* violation. This legal mistake, coupled with the fact that the underlying constitutional claim is a Fourteenth Amendment violation involving racial discrimination, clearly provide sufficient extraordinary circumstances to grant 60(b)(6) relief in this case under the recent decision in *Buck v. Davis*.

SUGGESTIONS IN SUPPORT

A. PROCEDURAL HISTORY

On April 18, 1996, petitioner filed a *pro se* habeas corpus petition before this Court. At that time, petitioner had not yet filed a petition for a writ of certiorari before the United States Supreme Court seeking review of the Missouri Supreme Court's judgment affirming the denial of his Rule 29.15 challenge to his murder conviction and death sentence. Due to this fact, this Court dismissed the petition without prejudice because the court believed that petitioner's claims were not fully exhausted until the certiorari petition was litigated to completion. After the

petition for a writ of certiorari was denied on October 6, 1996, petitioner filed a second *pro se* habeas petition. After the court appointed counsel, an amended petition was filed. This Court, on August 9, 1999, granted petitioner a writ of habeas corpus on his *Batson* claim and reserved ruling on the other twenty-one claims for relief.

On appeal, the Eighth Circuit reversed this 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 relief on the *Batson* claim under 2254(d). *Id.* at 1032-1033. After the Eighth Circuit reversed the grant of relief on the *Batson* claim, the court remanded the case to this Court for consideration of petitioner's remaining twenty-one grounds for relief. *Id.* at 1032.

On May 7, 2003, this Court issued another order and judgment which granted petitioner penalty phase relief based upon an improper closing argument and denied guilt phase relief on all other claims. This judgment was affirmed by the Eighth Circuit on appeal in *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006).

Thereafter, respondent filed a petition for a writ of certiorari. The Supreme 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, the Supreme Court dismissed the writ of certiorari as improperly granted, which had the effect of upholding the portion of this Court's May 7, 2003 order reversing petitioner's death sentence. *Roper v. Weaver*, 550 U.S. 598 (2007).

The Supreme Court based its decision to dismiss the writ in *Roper* by finding that its recent decision in *Lawrence v. Florida*, *supra*, "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." *Id.* at 601. Although the Supreme Court found it unnecessary to address the question conclusively, this aspect of the Supreme Court's decision in *Roper* clearly indicates that, because this 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, 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 was recently retained by petitioner to litigate the issues contained in this motion.

B. RELIEF SHOULD BE GRANTED UNDER 60(b)(6) FROM THIS COURT'S PRIOR 2003 JUDGMENT IN LIGHT OF THE INTERVENING DECISIONS IN *BUCK*, *LAWRENCE*, AND *ROPER* BECAUSE THESE INTERVENING AUTHORITIES INDICATE THAT THE COURT COMMITTED A LEGAL ERROR IN SUBJECTING PETITIONER'S *BATSON* CLAIM TO REVIEW UNDER THE AEDPA, AND, AS A RESULT, THIS COURT SHOULD REINSTATE ITS 1999 JUDGMENT, GRANTING GUILT PHASE RELIEF ON PETITIONER'S *BATSON* CLAIM AFTER REVIEWING THIS UNDERLYING CLAIM OF RACIAL DISCRIMINATION *DE NOVO*.

Rule 60(b)(6) give 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). The Supreme 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).

More recently, the Supreme Court has specifically held that the provisions of the AEDPA did not eliminate a habeas petitioner's right to obtain relief under Rule 60(b). *Gonzalez v. Crosby*, 545 U.S. 524, 535, n.7 (2005). The court in *Gonzalez* stated that Rule 60(b) "has an unquestionably valid role in play in habeas corpus cases." *Id.* at 529. Thus, a habeas petitioner's 60(b) motion is appropriate and should be granted in extraordinary circumstances where the motion attacks, "not the substance of the federal court's resolution of the claim on the merits, but some

defect in the integrity of the federal habeas corpus proceedings..." *Id.* at 531. In such situations, a 60(b) motion should not be treated as a successive habeas petition. *Id.* at 532-533.

Based on the foregoing facts, it is beyond dispute that there was a defect in the prior federal habeas corpus proceedings that resulted in the denial to petitioner the relief to which he was entitled under *Batson* because this Court and the Eighth Circuit incorrectly applied the standard of review provisions of the AEDPA to this claim that was properly advanced in a pre-AEDPA petition. Earlier this year, the United States Supreme 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.

The 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 provided sufficient extraordinary

circumstances to establish that the district court abused its discretion in denying Mr. Buck's 60(b)(6) motion. *Id.* Because there is no principled basis to distinguish this case from *Buck*, petitioner is entitled to the same relief from his conviction based upon a claim of racial discrimination that was not fairly adjudicated because of a legal error that occurred during the prior habeas proceeding.

60(b)(6) relief is also appropriate in circumstances, like this case, where the petitioner has no other legal remedies and cannot seek redress in any other manner. *In re Zimmerman*, 869 F.2d 1126, 1128 (8th Cir. 1989). Under the *Zimmerman* framework, petitioner has no legally viable avenues to seek relief from his unconstitutional conviction other than the present Rule 60(b)(6) motion. Petitioner is precluded from filing a successive federal habeas petition under 28 U.S.C. § 2244(b). Likewise, petitioner is precluded from filing a successive Rule 29.15 motion in state court. *See* Rule 29.15(l).

This Circuit has held that Rule 60(b) should be interpreted broadly and "should be liberally construed when substantial justice will be served." *Mohammed v. Sullivan*, 866 F.2d 258, 260 (8th Cir. 1989). Under Rule 60(b)(6), an intervening decision from the United States Supreme Court which undermines the correctness of a prior judgment has been found to be a sufficient ground to grant a Rule 60(b)(6) motion in *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir.

1987). In *Ritter*, the Eleventh Circuit, in a death penalty habeas case, granted the state relief from a previous judgment under Rule 60(b)(6) due to the intervening Supreme Court decision in *Baldwin v. Alabama*, 461 U.S. 1085 (1984). The *Baldwin* decision indicated that the court's prior decision that had granted Mr. Ritter relief from his sentence of death was wrong. Similar circumstances are presented here.

CONCLUSION

In light of all the foregoing factors, this Court should set aside its 2003 judgment under Rule 60(b)(6) and thereafter issue a new judgment granting petitioner a new trial on his *Batson* claim for the same reasons set forth in this Court's August 9, 1999 judgment that was mistakenly reversed by the Eighth Circuit as demonstrated by the *Lawrence* and *Roper* decisions, or grant such other and further relief that the court deems fair and just.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That Petitioner's Motion for Relief from Judgment under Fed. R. Civ. Pro. 60(b)(6) complies with the provisions of FRAP 27 and contains 1,765 words, as determined by Microsoft Word, Times New Roman font, size 14; and,

2. That on March 29, 2017 the foregoing was electronically filed using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Kent E. Gipson
Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:96-CV-02220-CAS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

RESPONSE TO COURT ORDER

Because Weaver presents no extraordinary circumstances warranting the reopening of this 1996 habeas matter, the Court should deny the Rule 60(b) motion.

Facts and Procedural Background

During Weaver's consolidated appeal, the Missouri Supreme Court described the facts surrounding the thirty-year-old murder.

> Prior to July 1987, Charles Taylor and members of Daryl Shurn's family had been involved in the ownership and operation of drug houses. A federal drug prosecution had been commenced against Daryl Shurn's brothers, Charles and Larry Shurn, in which Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name.
>
> On the morning of July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's home in the Mansion Hills apartment complex. Their plan was to force Taylor to sign over the Shurns' drug properties which Taylor was retaining in his name against the Shurns' will. After Taylor had signed the paperwork, Weaver

was supposed to kill Taylor. The plan was not completely successful.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. Numerous residents saw Weaver and Shurn running after Taylor, shooting at him. Weaver and Shurn followed Taylor to a wooded area where Taylor fell from his wounds. Weaver and Shurn went back to the automobile. Then Weaver returned to the wooded area where Taylor had fallen and shot Taylor again. Taylor died from several gunshot wounds to the head.

Weaver and Shurn drove away from the murder scene at a high rate of speed. Witnesses at the scene immediately reported the incident to police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward the Hillcrest apartment complex adjacent to the highway. Not far away, another police officer located Weaver running shoeless on a concrete street, sweating profusely. On approach by the officer, Weaver claimed he was jogging, although he was many miles from his home. He claimed to be lost. Weaver was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified Weaver as the man who ran away from the Shurn car after the crash.

While awaiting trial, Weaver was incarcerated with a man by the name of Robert Dutch Tabler. Tabler testified that Weaver told him he was a hit man on the streets, that defendant and Shurn had killed Charles Taylor, and that defendant's testimony at trial would be that he was merely out jogging when the police stopped him. Weaver's primary defense at trial was misidentification by police.

> On this evidence the jury convicted Weaver of first degree murder in the shooting death of Charles Taylor. He was sentenced to death. A post-conviction relief motion was filed and denied.

State v. Weaver, 912 S.W.2d 499, 507-08 (Mo. banc 1995), *cert. denied*, 519 U.S. 856 (1996). After the state court litigation, Weaver began his appeals in federal court.

The docket sheet in No. 4:96-CV-00774-CAS reflects that Weaver began his federal court appeals by filing a pro se motion to proceed in forma pauperis in federal district court on April 18, 1996 (Doc.1). He filed a petition for writ of habeas corpus on July 1, 1996 (Doc.9). The district court dismissed the petition as premature (Doc.10). The court of appeals denied a certificate of appealability and issued its mandate on November 29, 1996 (Doc.18).

Meanwhile, Weaver began the current litigation in No. 4:96-CV-2220-CAS by filing a "Motion to Appoint Counsel in a Habeas Corpus Petition Action in a Death Penalty Case" with a "Petition for Writ of Habeas Corpus" (Docs.1, 3). After amendment of the petition (Doc.15) and responsive pleadings (Docs.18, 21, 26), the district court granted the petition, vacating the conviction (Docs.29, 30). Respondent appealed, and the court of appeals reversed. It also remanded for consideration of the remaining claims. *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001).

On remand, the district court again issued a writ, vacating the capital sentence (Docs.46, 47). The court of appeals affirmed. 438 F.3d 832 (8th Cir. 2006). An equally divided court denied rehearing en banc. *Id.* at 832. After initially granting certiorari review, the Supreme Court dismissed the writ as improvidently granted. *Roper v. Weaver*, 127 S.Ct. 2022 (2007). The state court formally resentenced Weaver on February 21, 2014; thus, the district court denied as moot Weaver's Motion to Enforce Judgment and Issue an Unconditional Writ of Habeas Corpus (Doc.92).

On March 29, 2017, Weaver filed a motion for relief from the judgment granting habeas relief under Federal Rule of Civil Procedure 60(b)(b). The Court should deny the motion.

Discussion

Weaver contends that the district court should reopen its previous judgment and reconsider Weaver's claim that his equal protections rights were violated by the prosecutor's use of two peremptory challenges (Doc.93, pp. 1-2, *citing Batson v. Kentucky*, 476 U.S. 79 (1986)). Weaver contends that the Court should reopen its judgment due to two ten-year-old Supreme Court decisions—*Lawrence v. Florida*, 549 U.S. 327 (2007) and *Roper v. Weaver*, 550 U.S. 598 (2007). The Court should deny Rule 60(b) relief for several alternative reasons.

Weaver agrees that he presented his *Batson* claim in the November 12, 1996 petition for writ of habeas corpus (Doc.1, p. 7). The district court granted habeas relief on the *Batson* claim on August 9, 1999 (Docs.29, 30). The court of appeals reversed because the *Batson* claim was meritless and remanded "for further proceedings consistent with this opinion." *Weaver v. Bowersox*, 241 F.3d at 1032. Because of the Eighth Circuit ruling, the district court did not reconsider the *Batson* claim in its May 7, 2003 Memorandum and Order (Doc.46, p. 7 n.2). The mandate rule prohibited the Court's reconsideration of its *Batson* ruling in 2003. The mandate rule should prohibit the Court's reconsideration of its *Batson* ruling in 2017.

The mandate rule requires a district court to comply strictly with the mandate rendered by the appellate court; thus, the district court did not and does not have the authority to reconsider the *Batson* ruling by the court of appeals. *Huffman v. Saul Holdings Ltd. Partnership*, 262 F.3d 1128, 1132, 1133 (10th Cir. 2001); *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003). "Under the law of the case doctrine, a district court must follow our mandate, and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms." *Jaramillo v. Burkhart*, 59 F.3d 78, 80 (8th Cir. 1995). The district court properly declined to re-examine its *Batson* ruling in 2003, and it should decline to re-examine the ruling in 2017.

Alternatively, the Court should decline to re-examine the appellate court's *Batson* ruling because Congress prohibits the re-examination. 28 U.S.C. § 2244(b). Congress prohibits the filing of a second or successive habeas petition without permission by the appellate court. 28 U.S.C. §2244(b)(3). Weaver has received no permission. Nor can he because Congress prohibits the filing of a second petition with repetitive claims. 28 U.S.C. § 2244(b)(1). Weaver does not contend that his claim is not repetitive. Instead, Weaver may contend that he is presenting the repetitive claim in a Rule 60(b)(6) motion, not a second habeas petition. The difference in form does not allow a difference in result. *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). Here, Weaver's Rule 60(b) motion re-presents his *Batson* claim and attacks the appellate court's "previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532.

Recognizing that his motion is barred under § 2244, Weaver contends that *Gonzalez* stated that Rule 60(b) has a "valid role" in federal habeas cases (Doc.93, p.5). *Id.* at 534. The context of the language is, however, important. The valid role identified by the Supreme Court occurred where the Rule 60(b) motion presented no claim for setting aside the movant's state court conviction. *Id.* at 533. In contrast, Weaver's Rule 60(b) motion presents a

Batson claim, a claim for setting aside the conviction. The Supreme Court identified other valid-role situations, such as when the district court entered a default judgment or when the district court entered a judgment that was void for lack of subject-matter jurisdiction. *Id.* at 534. Weaver's motion does not invoke these valid examples.

Weaver seems to contend that the Rule 60(b) motion can be appropriate in a habeas proceeding where the motion attacks a defect in the integrity of the federal habeas proceedings (Doc.93, pp. 5-6, *citing Gonzalez v. Crosby*, 545 U.S. at 532 & n.5). But Weaver does not accuse the district court or the court of appeals of lacking integrity. And other than his disagreement with the court of appeals about the outcome of the 2001 decision, Weaver does not complain. The actual example of the lack of integrity used by the Court in *Gonzalez* was where there was fraud on the federal district court. *Id.* at 532 & n.5. The Court cited *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001) as the example where a witness had an allegedly fraudulent basis for refusing to appear at a federal habeas hearing. *Id.* In contrast, Weaver does not make any such allegations in his motion. In sum, Weaver fails to allege or demonstrate a lack of integrity by the district court, the court of appeals or the proceedings in the consideration of the *Batson* issue.

Weaver also refers the Court to *Buck v. Davis* to support his Rule 60(b)(6) motion. 137 S.Ct. 759 (2017). In *Buck*, the offender contended he

received ineffective assistance of trial counsel because counsel called a witness who testified about a link between the race of a person and their future dangerousness. *Id.* at 768-9. In Buck's first habeas litigation, the district court enforced the procedural bar to review, and the court of appeals affirmed. *Id.* at 77-1. After decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), Buck filed a Rule 60(b) motion, asking for an initial review of his ineffective assistance of counsel claim by the federal court. *Id.* at 772. The Supreme Court discussed two factors that justified the initial review of the ineffectiveness claim—the risk of injustice to the parties and the risk of undermining public confidence in the judicial process. *Id.* at 778 *quoting Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

In *Buck*, the Supreme Court focused on the extraordinarily high level of prejudice the offender demonstrated by his ineffective assistance of counsel claim that the offender may have been sentenced to death in part because of his race. *Id.* In contrast, with a *Batson* claim, one of the premises of the *Batson* decision is that the racial composition of a jury does not affect the outcome of the trial. "A person's race simply 'is unrelated to his fitness as a juror.'" *Batson v. Kentucky*, 476 U.S. 79, 87 (1986), *quoting Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946)(Frankfurter, J., dissenting). Accordingly, in resolving claims of ineffective assistance of counsel for failing

to object on the basis of *Batson*, federal courts have determined those ineffectiveness claims are meritless because the offender cannot demonstrate a reasonable probability that the outcome of the trial would have been different. *E.g. Young v. Bowersox*, 161 F.3.d 1159, 1161 (8th Cir. 1998), *quoting Wright v. Nix*, 928 F.2d 270 (8th Cir. 1991). The "risk of injustice" is low.

Weaver also seems to contend that Rule 60(b) relief is warranted because of the risk of undermining public confidence in the judicial process (Doc.93, p. 6). Unlike *Liljeberg*, Weaver does not contend that either the district court or the court of appeals had a financial interest in the outcome of the litigation. Moreover, Weaver does not contend that either the district court or the court of appeals had a racial motivation in rendering their respective decisions on the *Batson* claim. Weaver does not contend that every federal litigant can simply continuously re-argue their *Batson* issue in post-judgment litigations. Weaver does not contend that every person in state custody can continuously re-argue their *Batson* issue in post-judgment federal habeas litigation. Unlike *Buck*, the state court did not rely on race to impose criminal sanctions on Weaver.

Where the claims in the federal petition are not the same as the ineffectiveness presented by *Buck*, the claims are not worthy of habeas relief or a certificate of appealability under 28 U.S.C. § 2253.

> Although the issues raised by Morris here involve race, they are not the claims presented before the United States Supreme Court in *Buck*. Unlike in *Buck*, Petitioner's jury was not presented expert evidence, or any evidence, that would tie his race to an aggravating factor in the penalty phase. Further, there is no indication in the record that he was sentenced to death based on his race. *Buck* was an extraordinary circumstance, which is not present in the instant case. *See Buck*, 137 S. Ct. at 781 (Thomas, J., dissenting) ("Today's decision has few ramifications, if any, beyond the highly unusual facts presented here.")
>
> The mere insertion of race as a collateral issue, as with the issues presented here, does not make a claim debatable among reasonable jurists based on *Buck*. The allegations in paragraphs 9(N), 9(P), 24, 27 11(H) & 29(L) of the amended petition are not entitled to a COA.

Morris v. Westbrooks, 2017 WL 2199010, at *13 (W.D. Tenn. May 18, 2017). In summary, *Buck* does not authorize Rule 60(b)(6) relief in the present case.

Independent of the considerations in § 2244(b), a motion under Rule 60(b) must be made within a reasonable time. Federal Rule of Civil Procedure 60(c). The basis for the Rule 60(b) motion is that there is "new law" that authorizes relief on the *Batson* claim: the 2007 decisions in *Lawrence v. Florida* and *Roper v. Weaver* (Doc.93, p. 1). Weaver presents no argument that his ten-year delay in presenting the Rule 60(b) motion is somehow a reasonable time under Rule 60(c). He cannot make that argument. See *Williams v. Kelley*, 2017 WL 1395613, at * 5 (E.D. Ark. Apr. 18, 2017)(lack of diligence when offender waited a year after *Trevino* to file motion).

Weaver argues that Rule 60(b) relief is appropriate because he had no other legal remedy by which to present his *Batson* claim (Doc.93, p. 7 citing *In re Zeimmerman*, 869 F.2d 1126, (8th Cir. 1989)). Weaver sought federal habeas relief for his *Batson* claim when he filed his petition. Indeed the federal district court granted relief. Weaver had a legal remedy. The State pursued its legal remedy -- appellate review of the grant of relief. Once the State sought review, Weaver had the legal remedy of briefing his claim for the appellate court. Once the court of appeals issued its decision, Weaver could have sought rehearing and/or petitioned for a writ of certiorari. Weaver had appellate remedies that he could have used in lieu of today's Rule 60(b) motion.

Weaver contends that exceptional circumstances exist to warrant the Rule 60(b) relief in the form of new decisions by the Supreme Court (Doc.93, p. 7). "New decisions" from 2007 do not warrant Rule 60(b) relief. The first case is *Lawrence*. Weaver argues that the Court's original decision to dismiss the habeas petition in No. 96-774 was erroneous because the filing of a petition for writ of certiorari after the consolidated appeal in state court was not part of the statutory exhaustion requirement under 28 U.S.C. § 2254(b). Weaver continues that if No. 96-774 had been his actual habeas litigation, not No. 96-2220, the petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), and it would have

received federal habeas review without the deferential lens of 28 U.S.C. § 2254(d). Weaver continues that without the deferential review given by the court of appeals, he would have received habeas relief on his *Batson* claim. Weaver supports this chain of logic by referring the Court to *Roper v. Weaver*, where the Supreme Court dismissed the State's petition for writ of certiorari in 2007 (on the penalty phase closing argument issue) as being improvidently granted.

First, Weaver actually argued on the first habeas appeal that the standard of review under AEDPA should not apply because he filed an earlier petition. *Weaver v. Bowersox*, 241 F.2d at 1029. Weaver could have expanded his argument to include what he now presents in his Rule 60(b) motion. Weaver could have presented that argument in a petition for writ of certiorari, requesting Supreme Court review of the 2001 decision.

Second, Weaver could have argued on appeal of the No. 06-774 that a petition for writ of certiorari was not part of the exhaustion requirement. The legal tools for making that claim existed since the mid-century. *Lawrence v. Florida*, 549 U.S. 327, 333 (2007), *citing Fay v. Noia*, 372 U.S. 391 (1963). Neither *Lawrence* nor *Roper* were necessary for Weaver to make the convoluted argument he makes in his Rule 60(b) motion. Neither *Lawrence* nor *Roper* are extraordinary circumstances.

Third, the 2007 order dismissing the State's petition for writ of certiorari does not have precedential value. *See Darr v. Buford*, 339 U.S. 200, 226 (1950)(Frankfurter, J., dissenting)(order denying certiorari review not precedential); *Gressman* and *Geller*, Supreme Court Practice, section 5.15 (2007)(dismissal-as-improvidently-granted orders are discretionary and arise from a variety of causes).

Fourth, whether the federal court reviews the *Batson* issue under the pre-AEDPA standard of review or the post-AEDPA standard does not affect the outcome of the *Batson* issue. In Weaver's 2001 decision, the appellate court treated the state court *Batson* findings as factual findings. *Weaver*, 241 F.3d at 1029. That corresponded to the treatment given *Batson* findings before AEDPA. *Batson v. Kentucky*, 476 U.S. at 98; *Hernandez v. New York*, 500 U.S. 352, 364 (1991). Before AEDPA, the federal habeas court reviewed state court findings of fact under the older version of § 2254(d), which accorded a presumption of corrections to fact findings. *Purkett v. Elem*, 514 U.S. 765, 769 (1995). AEDPA only recodified the presumption of correction to § 2254(e). The court of appeals properly denied the *Batson* claim, and it would have done so under either version of § 2254(d).

Conclusion

The Court should deny Weaver's motion under Rule 60(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed using the CM/ECF system and thereby served to counsel for Petitioner, this 11 day of July, 2017.

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