CAPITAL CASE

No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT MCLAUGHLIN,

Petitioner,

v.

ANNE L. PRECYTHE,

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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Dated: November 15, 2019

QUESTIONS PRESENTED

A disturbing trend is developing in capital cases in federal courts in Missouri regarding the *pro forma* denial of certificates of appealability ("COA"). In Petitioner's case, both the District Court and the Eighth Circuit summarily denied Petitioner a COA. It has been over an entire calendar year since the Eighth Circuit has granted a COA in a capital case. This *pro forma* practice presents the following questions:

1. Does the Eighth Circuit's *pro forma* practice of issuing unexplained blanket denials of COAs in capital habeas cases conflict with 28 U.S.C. § 2253, and this Court's decisions in *Slack v. McDaniel*, 539 U.S. 473 (2000), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Barefoot v. Estelle*, 463 U.S. 880 (1983), by preventing a condemned prisoner from obtaining meaningful appellate review of a first habeas petition?

2. Whether the summary denial of a COA was proper as it pertains to Petitioner's plain violation of the Confrontation Clause as interpreted by this Court in *Giles v. California*, 554 U.S. 353 (2008), when the state court allowed admission of prior testimonial hearsay statements without satisfying *Giles*' intent requirements to establish admissibility under the Sixth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Scott McLaughlin, was the movant before the United States Court of Appeals for the Eighth Circuit. Mr. McLaughlin is a prisoner sentenced to death and in the custody of Anne Precythe, Director of Missouri Corrections.

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Missouri v. Scott McLaughlin, Missouri Supreme Court, Case No. SC88181, Judgment Entered: August 26, 2008, published at 265 S.W.3d 257.

Missouri v. Scott McLaughlin, Missouri Court of Appeals, Eastern District, Case No. ED90801, Judgment Entered: December 30, 2008, published at 272 S.W.3d 506.

Scott McLaughlin v. Missouri, U.S. Supreme Court, Case No. 08-822, Petition denied Entered: April 6, 2009.

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Scott McLaughlin v. Missouri, Missouri Supreme Court, Case No. SC91255 Judgment Entered: July 3, 2012, published at 378 S.W.3d 328.

Scott McLaughlin v. Anne Precythe, U.S. District Court for the District of Eastern Missouri, Case No. 4:12-CV-1464-CDP, Entered: March 22, 2016.

Scott McLaughlin v. Anne Precythe, U.S. Court of Appeals for the Eighth Circuit, Case No. 18-3628, Order denying application for a certificate of appealability is denied Entered: April 22, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Scott McLaughlin, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals below, which denied him a certificate of appealability ("COA") *pro forma* without explanation and dismissed his cross-appeal from the denial of his first petition for federal habeas corpus relief.

OPINIONS BELOW

The March 22, 2016 memorandum, order and judgment of the United States District Court for the Eastern District of Missouri granting in part and denying in part Petitioner's habeas corpus petition pursuant to 28 U.S.C. § 2254 is reported as *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D. Mo. 2016) and is included in the appendix at App. 3 through App. 41. The April 22, 2019 judgment of the Eighth Circuit Court of Appeals denying Petitioner a COA in No. 18-3628 and dismissing Petitioner's cross-appeal is unpublished and included in the appendix at App. 1. The June 18, 2019 order of the Eighth Circuit Court of Appeals denying Petitioner's petition for rehearing and suggestion for rehearing en banc is unpublished and is included in the appendix at App. 2.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its judgment on on April 22, 2019. Petitioner's petition for rehearing and rehearing en banc was denied on June 18, 2019. 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 (90) days. Upon application of Petitioner under Rule 13, Associate Justice and Eighth Circuit Justice Neil M. Gorsuch extended the time for filing a petition for a writ of

certiorari in this cause up to and including November 15, 2019. *See* Case No. 19A269. Jurisdiction of this Court is invoked under 28 U.S.C. § 2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution that states, in pertinent part: "no state shall . . . 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." U.S. Const. amend. XIV. It also involves the Sixth Amendment that states in pertinent part gives a criminal defendant "the right...to be confronted with the witnesses against him." U.S. Const. amend. VI.

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

> (d)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This case also involves 28 U.S.C. § 2253, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under § 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in the which the detention complained arises out of process issued by a state court; or

(B) the final order in a proceeding under § 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.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

This case also involves F.R.A.P. 22(b), which provides:

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

STATEMENT OF THE CASE

A. Procedural History

A St. Louis County jury convicted Scott McLaughlin in 2006 of first-degree murder related to the tragic killing of his former girlfriend, Ms. Beverly Guenther. Specifically, the jury found Petitioner guilty of the offenses of first-degree murder, armed criminal action, and forcible rape. (Tr. 1470-1472).[1] The jury found Petitioner not guilty of one count of armed criminal action pertaining to the forcible rape conviction. (*Id.*).

On October 2, 2006, the jury rejected two aggravating circumstances that the murder was committed for the purpose of preventing the victim from testifying in pending burglary and domestic abuse investigations and prosecutions. (L.F. 856-857; 865-866; Tr. 1999-2000). Further, the jury issued a sentencing phase verdict finding that they could not unanimously agree upon punishment. (Tr. 1999-2001; L.F. 865-866). Without a recommendation from the jury, the trial court sentenced Petitioner to death.

On direct appeal, the Missouri Supreme Court affirmed Petitioner's convictions and sentences. *State v. McLaughlin*, 265 S.W.3d 257 (Mo. banc 2008) App. 42 through App. 58) *cert denied McLaughlin v. Missouri*, 556 U.S. 328 (2009).

Petitioner subsequently sought post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. The St. Louis County Circuit Court denied 29.15 relief

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[1] Petitioner's citations to the trial transcript are "Tr. #." Petitioner's citation to the trial record is "L.F. #." State post-conviction record cites are "29.15 L.F. #." All cited materials were filed with the District Court during habeas proceedings by the Respondent-Warden.

to Petitioner. (29.15 L.F. 179-192). The Missouri Supreme Court subsequently affirmed the denial of post-conviction relief. *McLaughlin v. State*, 378 S.W.3d 328 (Mo. banc 2012).

Petitioner commenced the present federal habeas corpus proceeding by filing a timely habeas petition in the United States District Court for the Eastern District of Missouri, raising twelve habeas claims. *McLaughlin v. Steele*, No. 4:12cv1464 (E.D. Mo.). The District Court issued a memorandum, order and judgment granting penalty phase relief as to Petitioner's Habeas Claim 1A and 3, while denying habeas relief on the remaining ten claims and a portion of an eleventh. *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D. Mo. 2016) (App. 3 through App. 41). In that same order, the District Court denied a COA on Petitioner's remaining ten claims and a portion of an eleventh on the basis of "I find that reasonable jurists could not differ on any of the claims I denied, so I will deny a Certificate of Appealability on those claims." (App. 1). Respondent filed a timely notice of appeal and Petitioner thereafter filed a timely cross-appeal in the district court. (Dist. Ct. Docs. 99, 101).

The Eighth Circuit docketed the warden's appeal and Petitioner's cross-appeal and designated them as Case Nos.18-3510 and 18-3628 respectively. Thereafter in Case No. 18-3628, Petitioner filed a COA request before the Eighth Circuit requesting review of four additional issues. Petitioner's COA motion included a claim premised on this Court's ruling in *Giles v. California*, 554 U.S. 353 (2008). On April 11, 2019, the state filed a response. On April 18, 2019, Petitioner filed a motion for an extension of time to file a reply. On April 22, 2019, the Eighth Circuit issued a

summary blanket denial of the COA application and dismissed the cross-appeal, while simultaneously denying Petitioner's request to file a reply as moot. (App. 1). With no legal analysis at all, the declarative statement denying the COA reads in its entirety as follows:

> 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.

(App. 1).

The Eighth Circuit subsequently denied Petitioner's rehearing and rehearing en banc on June 18, 2019. (App. 2).

B. Facts Relevant to the *Giles* Claim.

At the penalty phase, the prosecution used of the out-of-court statements of the deceased victim as aggravating evidence in an attempt to secure a death sentence. These hearsay statements concerned other uncharged bad acts and incidents between Petitioner and Ms. Guenther before she died. (Tr. 1510-1514, 1521, 1529-1530). The state presented the hearsay statements via live testimony from police officers reading in the damaging police reports that had been admitted as State's Exhibit 101 and 500. These documented assaults, increasing violence, and his stalking of Ms. Guenther, and were read to the jury.

The prosecutor also read to the jury Ms. Guenther's statements from her petition for an order of protection from a Lincoln County Adult Abuse proceeding, State's Exhibit 74, indicating alleged acts of abuse or stalking that occurred at her home and at her workplace. (Tr. 1520-1522). The prosecutor displayed the petition

on an overhead projector and read to the jury Ms. Guenther's allegations that Petitioner "knowingly and intentionally" coerced, stalked, harassed, sexually assaulted, and followed her from place to place. (Tr. 1529; St. Ex. 74).

No party or court has disputed that the statements made by Ms. Guenther to law enforcement came under the ambit of the Confrontation Clause. *See McLaughlin*, 173 F. Supp. 3d at 900–01; Dist. Ct. Doc. 38 (Warden's Response) at 64–65; *McLaughlin*, 265 S.W.3d at 271–72 (Mo. banc 2008).

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE EIGHTH CIRCUIT'S POLICY OF ISSUING *PRO FORMA* UNEXPLAINED BLANKET DENIALS OF COA APPLICATIONS IN A CAPITAL PRISONER'S FIRST HABEAS APPEAL CONFLICTS WITH THIS COURT'S DECISIONS IN *MILLER-EL* AND *BAREFOOT*.

As set forth earlier in this petition, the Eighth Circuit dismissed Petitioner's cross-appeal after issuing a one-line order denying Petitioner a COA on his cross-appeal without any analysis or explanation. (App. 1). In the last year, the Eighth Circuit has neither granted a COA nor expanded a COA in a capital case under the liberal COA standard:

Case Caption	Date	Result
Deck v. Steele, Case No. 18-1617	8/20/18 10/10/18	COA Denied Rehearing Denied
Rhines v. Young, Case No. 18-2376	9/7/18	COA Denied over a dissent
Barton v. Griffith, Case No. 18-2241	12/21/18 3/20/19	COA Denied Rehearing on COA denied over a dissent
Montgomery v. United States, Case No. 17-1716	1/25/19	COA Denied
McLaughlin v. Precythe, Case No. 18-3628	4/22/19	COA Denied Rehearing on COA Denied
Johnson v. Steele, Case No. 18-2513	6/6/19	COA Denied
Bolden v. United States, Case No. 17-1087	9/5/19	Expand COA Denied

Lee v. United States, Case No. 19-2432	11/4/19	COA Denied over a dissent

One year. Eight capital cases. Eight requests. Eight denials. The identical twenty-two words in four of the orders denying a COA: "The Court has carefully review the original file of the district court, and the application for a certificate of appealability is denied." (*McLaughlin*; *Barton*; *Montgomery*; *Deck*). The other orders varied but none contained any legal analysis. *See e,g. Lee* ("The application for a certificate of appealability has been considered by the court and is denied.") Eight capital cases with no analysis whatsoever. [2]

In addition to being *pro forma* and not applying the COA standard, the Eight Circuit's practice conflicts with the express statutory language of 28 U.S.C. § 2253 (c)(1), as echoed by FRAP 22(b)(1), which only requires a "circuit judge" to issue a COA. Thus, in the past year, the Eighth Circuit three denied COAs over a dissent, even though the express language of the federal statute and the appellate rules empowered that judge to grant a COA. A COA should have issued in *Barton, Lee,* and *Rhines.*

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[2] Reasoned capital COA denials occur in the Fourth Circuit (*Swisher v. True*, 325 F.3d 225 (4th Cir. 2003)), the Fifth Circuit (*Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016)), the Sixth Circuit (*Treesh v. Robinson*, 2013 U.S. App. LEXIS 3878 (6th Cir. 2013)), the Seventh Circuit (*Woods v. Buss*, 234 F. App'x 409 (7th Cir. 2007)), the Ninth Circuit (*Dickens v. Ryan*, 552 F. App'x 770 (9th Cir. 2014)), the Eleventh Circuit (*Griffin v. Sec'y*, 787 F.3d 1086 (11th Cir. 2015)). In non-capital cases, the remaining circuits issue reasoned COA rulings. *McGonalge v. United States*, 137 F. App'x 373 (1st Cir. 2005); *Middleton v. Attorneys General*, 386 F.3d 207 (2nd Cir. 2005); *Webster v. Adm'r N.J. State Prison*, 2013 U.S. App. LEXIS 25719 (3rd Cir. 2013); *Pickens v. Workman*, 373 F. App'x 847 (10th Cir. 2010).

This lack of process has insulated the Eighth Circuit's non-rulings from meaningful discretionary review by this Court. This lack of process has metastasized. This Court must take corrective action not only in this case, but because the Eighth Circuit will likely continue to decline to issue COAs in future cases, too.

Discretionary review is warranted in this case to determine whether this Eighth Circuit practice conflicts with 28 U.S.C. § 2253, FRAP 22(b)(1), and this Court's prior decisions in *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*").

The panel's *pro forma* unexplained, blanket denial of a COA does not comport with the standards required by statute and settled case law. As this Court noted in *Miller El I*: "the COA determination under § 2253(c) *requires* an overview of the claims in the habeas petition and *a general assessment* of their merits." 537 U.S. at 336 (emphasis added). This Court further noted that the COA process "must not be *pro forma* or a matter of course." *Id.* at 337. In *Miller-El I*, this Court reversed the Fifth Circuit's COA denial because it had "sidestep[ped]" the appropriate procedure. *Id.* at 336.

In *Slack*, this Court held: "The COA statute establishes procedural rules and *requires* a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S. at 482 (emphasis added); *see also Hohn v. United States*, 524 U.S. 236, 248 (1998). In *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), this Court also reversed the Fifth Circuit for "paying lip service" to the COA standard, and remanded the case for further proceedings.

The Eight Circuit's outlier *pro forma* process contradicts the underpinnings of *Hohn*. In *Hohn*, this Court held it has jurisdiction over COA denials. Of course, meaningful review requires something to review. The Eighth Circuit's *pro forma* denial is unreviewable – it is usually the same twenty-two words the court uses when denying COAs.

Both the district court and the Eighth Circuit panel failed to comply with the dictates of 2253 and F.R.A.P. 22(b). The unexplained, blanket denials of Petitioner's COA requests also conflict with *Barefoot*. In *Barefoot*, this Court considered the Fifth Circuit's dismissal of a capital habeas appeal via a motion for stay of execution only after full briefing and unlimited oral argument where the Fifth Circuit, thereafter, denied a COA by issuing an extensive written opinion on the merits of the claims. *Barefoot*, 463 U.S. at 893.

The Eighth Circuit's blanket COA denial failed to analyze and address the merits of Petitioner's claims. Therefore, this Court's discretionary intervention is warranted because the panel failed to conduct a reasoned analysis as required by the statute, the federal rules and conflicts with decisions from other circuits. *See Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (remanding COA application to district court because its "blanket denial" did not comport with Rule 22(b)(1); *Porterfield v. Bell*, 258 F.3d 484, 485-487 (6th Cir. 2001) (same); *Porter v. Gramley*, 112 F.3d 1308, 1311 (7th Cir. 1997) (noting in procedural history it had previously remanded the case to allow the district court to comport with 22(b)(1)).

Inconsistently, the Eighth Circuit does not permit blanket grants of a COA. *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). In *Tiedeman*, the Court of Appeals noted that, in certain circumstances a defective COA process in the court below would require a remand to the district court for corrective action. *Id.* at 522.

There are also two other important and problematic issues arising from the Eighth Circuit's blanket denial of a COA. First, although the panel indicated it had reviewed the entire district court record, neither the district court's nor the Eighth Circuit's docket sheets in this case indicate that the voluminous district court and state court record was ever transmitted to the Court of Appeals prior to its order and judgment. Thus, it simply is not supported by the record and is undermined by the identical language appearing in three other denials.

Article III review should mean something, especially to this Branch of the Government. A troubling issue arising from this *pro forma* blanket denial practice that the Eighth Circuit routinely employs in capital cases, is the inescapable fact that a summary denial of the COA without the issuance of a reasoned opinion analyzing the threshold merits of any of Petitioner's constitutional claims leaves nothing of constitutional substance to permit meaningful discretionary review before by the Court of Appeals en banc or this Court. *See Hohn.* In light of this Court's repeated statements that "death is different" and that a heightened standard of review should be adhered to in capital cases, *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and that a "greater degree of accuracy" is required in death cases, *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993), *Barefoot* requires a court of appeals to provide

analysis regarding the merits of constitutional claims and procedural issues presented when it denies a COA in a **first** capital habeas appeal. The Eighth Circuit is the only circuit failing in this regard.

Pursuant to *Lonchar v. Thomas*, 517 U.S. 314 (1996), Petitioner has an absolute right to have his conviction and death sentence to be reviewed by the federal courts. *Lonchar's* holding is rooted in the full and fair consideration of the merits of first habeas petitions. Otherwise, as noted in *Lonchar*, "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the Petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324 (citing *Ex parte Yerger*, 75 U.S. 85, 8 Wall. 85, 95, 19 L. Ed. 332 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal freedom")) (emphasis in the original).

Discretionary review and condemnation of this Eighth Circuit *pro forma* practice is long overdue because the Eighth Circuit continuously fails to give meaningful effect to this Court's *Barefoot*, *Miller-El I*, and *Slack* decisions. Thus, the Eighth Circuit's summary denial without any reasoning fundamentally contradicts this Court's authority. Pursuant to Sup. Ct. R. 10(c), this Court should grant Petitioner's Writ of Certiorari. Alternatively, this Court can remand to the Eighth Circuit with directions to properly entertain Petitioner's COA request.

II.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE EIGHTH CIRCUIT'S DENIAL OF A COA ON PETITIONER'S CONFRONTATION CLAUSE VIOLATION CLAIM PREMISED UPON THIS COURT'S *GILES V. CALIFORNIA*, 554 U.S. 353, 358-59 (2008) CONFLICTS WITH *BAREFOOT*.

The admission into evidence of statements made to law enforcement by Ms. Beverly Guenther violated the Confrontation Clause of the Sixth Amendment, and the Missouri Supreme Court's contrary determination falls short under § 2254(d).[3]

The Sixth Amendment's Confrontation Clause gives a criminal defendant "the right...to be confronted with the witnesses against him." U.S. Const. amend. VI. This "bedrock procedural guarantee," *Crawford v. Washington*, 541 U.S. 36, 42 (2004), prohibits the admission of out-of-court, testimonial statements when the accused has no opportunity for cross examination, *id.* at 59, 68. It admits of only two exceptions: one for dying declarations and one for forfeiture by wrongdoing. *Giles v. California*, 554 U.S. 353, 358–59 (2008). The latter applies only in cases where the defendant rendered the declarant unavailable "*in order to prevent [the declarant] from giving evidence against [the accused].*" *Id.* at 361 (emphasis in original) (quoting Powell, *The Practice of the Law of Evidence* 166 (1858)).

No party or court disputes that the statements made by Ms. Guenther to law

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[3] While Petitioner maintained below that this claim should be analyzed *de novo*, citing *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007), the claim also easily withstands § 2254(d) analysis. By analyzing the claim under the latter, Petitioner does not concede the higher standard of review but merely demonstrates that the constitutional deprivation surpasses either standard, and at a minimum easily satisfies the *Barefoot* standard.

enforcement come under the ambit of the Confrontation Clause. *See McLaughlin*, 173 F. Supp. 3d at 900–01; Dist. Ct. Doc. 38 (Warden's Response) 64–65; *McLaughlin*, 265 S.W.3d at 271–72 (Mo. banc 2008). Nor could they: "Statements taken by police officers in the course of interrogations are...testimonial under even a narrow standard," *Crawford*, 541 U.S. at 52, since they are one of "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed," *id.* at 68. And Ms. Guenther's statements were made out of court and were not subject to cross examination.

Instead, the Missouri Supreme Court found that the statements fell under the "forfeiture by wrongdoing" exception. *McLaughlin*, 265 S.W.3d at 271–73. This conclusion was based on two unreasonable errors.

First, the Missouri Supreme Court's analysis "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). The Missouri Supreme Court accepted, without independent inquiry, the trial court's finding "that the defendant intended to make Ms. Guenther unavailable as a witness, both in the burglary and in the abuse cases." *McLaughlin*, 265 S.W.3d at 272 (quoting the trial court). An independent investigation of this crucial element of the constitutional inquiry would have revealed that, in fact, there was insufficient evidence of such an intent. The issue was briefed extensively in the trial court, such that the sum total of the State's evidence of a supposed intent to prevent Ms. Guenther from testifying was collected in its submissions to the trial court on the evidentiary issue.

There was ample reason for the Missouri Supreme Court to look beyond the trial court's statement regarding the record below. By the time the case reached that court, the jury had made two separate findings during the penalty phase that the State had not established beyond a reasonable doubt that the murder had been committed for the purpose of preventing Ms. Guenther from testifying in *either* the burglary *or* the adult abuse prosecutions. L.F. 856–57; 865–66; Tr. 1999–2000. While, of course, the trial court did not have the benefit of this jury finding at the time of the admissibility determination, *cf. McLaughlin*, 173 F. Supp. 3d at 901, the Missouri Supreme Court did have the benefit of it at the time it reviewed the trial court's conclusory determination that the murder had occurred for the purpose of preventing Ms. Guenther's testimony. Moreover, both the Missouri Supreme Court and the trial court had the benefit of (1) the defense's theory that Petitioner had committed the murder because he could not cope with his break up with Ms. Guenther, Tr. 1970–75; and (2) the prosecution's theory that Petitioner had committed the murder in order to have sex with Ms. Guenther, *id.* at 789, 795.

Had the Missouri Supreme Court instead heeded the many signs that the trial court's admissibility determination had been erroneous and thus made its own evaluation of the record, it would have found that the evidence did not support a theory of forfeiture by wrongdoing. Of the 103 pages attached to the State's trial court notice regarding the matter, only three exhibits make brief mention of Petitioner expressing any interest in the court cases against him. State's 9/12/05 Notice of Intent to Rely on Forfeiture by Wrongdoing and Residual Hearsay. Two of these exhibits

are identical statements from Ms. Guenther describing the same incident, in which Petitioner inquiring about the court case is only one of several events described and is overshadowed by statements indicating that, as the defense posited, Petitioner could not handle the break up with Ms. Guenther. (Exs. A and E to State's Notice).

The third is an interview with Petitioner's brother, Billy McLaughlin. (Ex. N to State's Notice). The interview is, to say the least, not compelling evidence of an intent to prevent Ms. Guenther from testifying. The part of the interview that comes closest to saying anything like this is the following statement by Billy McLaughlin:

> [BILLY] MCLAUGHLIN: And then he, yeah. He says, uh, if, uh, she don't show up at court that the judge would throw it out, and I tell him, well then, show up. And he's like, well, I don't want to show up. And then I was like, well, then don't. And he was like, well, I'm out on bond. I was like, well then, do what you want to do anyway...

Id. at 6. Billy McLaughlin goes on to explain to the detective that their mother had posted bond for Petitioner, so Petitioner didn't want to fail to appear in court and thus "screw [their] mom over." *Id.* Viewed in this context, Billy McLaughlin's half-statement about *Ms. Guenther* not showing up seems confused, at best.

Moreover, this answer only materialized after a series of leading questions by the detective:

> [DETECTIVE] MORROW: Okay. So he starts talking about Beverly, and, I guess things aren't...things not going well, is that what he tells you?
>
> [BILLY] MCLAUGHLIN: Exactly. And, and he said, he tells me that he's looking at three years, and he don't tell me why he's looking at three years.
>
> MORROW: Meaning three years in prison?

MCLAUGHLIN: Exactly.

MORROW: Okay. And, and, he's looking at this because of something she did or that he's involved in with her or...

MCLAUGHLIN: Yeah, something that, he thinks that she did it to him...for him to be put away three years in prison.

MORROW: Okay. Okay. Well what...can you tell me what his demeanor was like or what, what his attitude towards her was like at this time?

MCLAUGHLIN: Pissed.

MORROW: Was he, was, he was pissed?

MCLAUGHLIN: Mad, angry...

MORROW: Not, okay...

MCLAUGHLIN: ...belligerent.

MORROW: Okay. So while he's talking about all this to you, he's not very happy, obviously.

MCLAUGHLIN: Uh ah. Right.

MORROW: Okay. Uh, so he's, he's talking about, you know, uh, Beverly, the fact that he's got a court date coming up with her...

MCLAUGHLIN: Yes.

MORROW: ...and that he's not too thrilled about the whole thing.

MCLAUGHLIN: Right.

MORROW: Is that true? Okay.

MCLAUGHLIN: Right.

MORROW: Okay. And he tells you, of course, that's because he might go to jail over it.

MCLAUGHLIN: Right.

> MORROW: Okay.
>
> MCLAUGHLIN: And then he, yeah. He says, uh, if, uh, she don't show up at court that the judge would throw it out, and I tell him, well then, show up. And he's like, well, I don't want to show up. And then I was like, well, then don't. And he was like, well, I'm out on bond. I was like, well then, do what you want to do anyway...

Id. at 5–6. Even without the benefit of later DNA evidence and statements suggesting that Billy McLaughlin may have been involved in the crime, the trial court should have easily been able to appreciate Billy McLaughlin's incentive to make his statement as helpful to the detective as possible.

During the interview, Billy McLaughlin confirms that it was his own knife that was used to kill Ms. Guenther, *see id.* at 12, and he talks at length about suggestions he made to Petitioner for how to carry through with any plan to harm Ms. Guenther, *id.* at 12–13. He went on to take pains to emphasize his noninvolvement with the crime from that point forward:

> MCLAUGHLIN: ...yeah, since then I ain't heard from him, but it was like, you know, after getting done talking to him, it was like, man, you're stupid. You're a moron, you know. Why would you come to me and talk this shit, you know, and I ain't believed you in the past, why should I believe you now.

Id. at 15. All of these facts were available to the trial court and seriously brought into question the credibility of Petitioner's one partial and confused statement connecting Petitioner's open cases to the crime.

Any other such connections were made by the detective and not by Billy McLaughlin. After Billy McLaughlin recounted his own various suggestions for ways to dispose of a body, the detective asked:

> MORROW: Okay. And is that what, and he's, he's saying this, because he's angry at her about the what...the court date?

Id. at 9. It is only long after this that Billy McLaughlin gives the confused statement about not showing up for court.

In sum, a close analysis of the interview with Billy McLaughlin shows that it does not provide plausible evidence of any intent on the part of Petitioner to prevent Ms. Guenther from testifying. So the only plausible such evidence is, as noted above, a brief mention by Ms. Guenther in a statement about an encounter with Petitioner that, overall, leaned much more heavily toward supporting the defense's theory of the case. The Missouri Supreme Court, by not making its own evaluation of this evidence and instead deferring to a trial court finding that had been thrown into doubt by later evidence, constituted "a decision that was based on an unreasonable determination of the facts," § 2254(d)(2).

The second way in which the Missouri Supreme Court's erred as to this issue was by misapplying this Court's Confrontation Clause jurisprudence. In *Giles*, this Court reversed the California Supreme Court's holding "that *Giles* had forfeited his right to confront [the victim] because he had committed the murder for which he was on trial, and because his intentional criminal act made [the victim] unavailable to testify." 554 U.S. at 357; *see also id.* at 377. Rejecting unequivocally the idea that guilt of the charged crime was evidence of forfeiture by wrongdoing, the *Giles* Court emphasized repeatedly that such a showing must be made by evidence of the defendant's specific intent to make a witness unavailable for ongoing proceedings. *E.g.*, *id.* at 367 ("Every commentator we are aware of has concluded the requirement

of intent means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.") (internal quotation marks omitted).

The *Giles* majority also rejected an exception to the Confrontation Clause for domestic violence cases:

> [W]e are puzzled by the dissent's decision to devote its peroration to domestic-abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

554 U.S. at 376. Crucially, it was *within this context* that this Court went on to say:

> The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include *conduct designed to prevent testimony* to police officers or cooperation in criminal prosecutions. Where *such an abusive relationship* culminates in murder, the evidence *may* support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, *intended to dissuade the victim from resorting to outside help* would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Id. (emphases added).

In the above-quoted passages, this Court carefully and emphatically rejects a blanket exception to the Confrontation Clause for domestic violence cases. In cases of

domestic violence, as in all cases, commission of the charged crime is not enough to satisfy forfeiture by wrongdoing. So domestic violence itself does not create a presumption of the requisite intent. Instead, because abusive relationships "often... include conduct designed to prevent testimony," this Court acknowledged that "such an abusive relationship" — that is, one that includes conduct designed to prevent testimony — would be a situation in which "the evidence may support" the requisite finding. But there must still be evidence: not only evidence showing that the relationship was one that included conduct designed to prevent testimony but also evidence that the defendant had the specific intent to prevent testimony. As an example of the latter, this Court listed "abuse...intended to dissuade the victim from resorting to outside help." This Court's other example, ongoing criminal proceedings, cannot possibly be sufficient evidence on its own to find the needed intent, for that would be akin to adopting the blanket domestic violence exception that *Giles* so forcefully rejects. Nor can evidence of any abusive relationship, for the same reason: domestic violence *qua* domestic violence is not an exception to the Confrontation Clause. Only "such an abusive relationship," i.e., a relationship "that includes conduct designed to prevent testimony," will do, and even then the evidence must still show the requisite intent.

The evidence in the instant case falls short on both counts, and the Missouri Supreme Court erred in finding otherwise. As an initial matter, *Giles* was decided while Petitioner's case was pending on direct appeal. The trial court's finding was made without the benefit of this Court's careful delineation of the forfeiture by

wrongdoing exception. Thus the Missouri Supreme Court should have made an independent evaluation of the evidence, not only because of the many warning signs listed above, but also because the trial court finding was made before the applicable law existed from this Court.

In addition to the many shortcomings of the State's evidence of forfeiture by wrongdoing discussed above, it was also insufficient to satisfy *Giles*. First, the evidence did not establish the type of abusive relationship that "include[s] conduct designed to prevent testimony." Of all the evidence about Petitioner's and Ms. Guenther's relationship, one brief mention of Petitioner's inquiry into his case does not constitute conduct *designed to prevent testimony*.

Second, even if it had established "such" a relationship, the evidence did not "support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse." As shown above, Billy McLaughlin's interview with the detective, in addition to being testimonial itself, was highly unreliable. There was much more credible, admissible, and admitted evidence that Petitioner was not concerned with his ongoing court cases but instead with his failed relationship with Ms. Guenther.

It is simply baffling that the Eighth Circuit summarily denied a COA on this compelling *Giles* claim. Particularly in light of the fact that the Missouri Supreme Court so obviously unreasonably considered *Giles*. At a minimum, whether the Missouri Supreme Court reasonably applied *Giles* satisfies the *Barefoot* standard.

The Eighth Circuit failed to give meaningful effect to *Giles*, and thus, the Eighth Circuit's summary denial without any reasoning fundamentally conflicts with this Court's authority. This Court should grant Petitioner's Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court grant, vacate and remand with instructions to the Eighth Circuit for a proper and full consideration of Petitioner's COA request in accordance with this Court's precedent.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

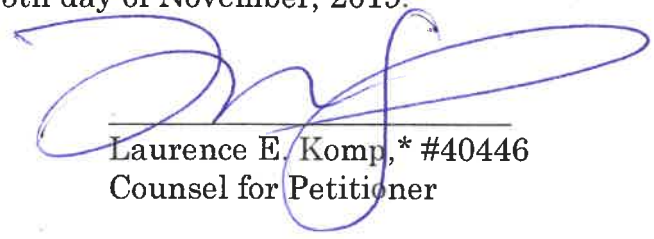
I hereby certify that I am a member in good standing of the bar of this Court and that two true and correct copies of Petitioner's "Petition for Writ of Certiorari" on petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and the appendix thereto in the case of *McLaughlin v. Precythe*, No. _____ were forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 15th day of November, 2019, to:

Ms. Caroline Marie Coulter
Assistant Attorney General
P.O.Box 899
Jefferson City, MO 65102

Ten copies of Petitioner's "Petition for Writ of Certiorari" and the appendix thereto were forwarded to:

William Suter, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543

pursuant to Supreme Court Rule 39.5, this 15th day of November, 2019.



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