24-6515

No._____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOESEPH SHINE-JOHNSON-PETITIONER

vs.

STATE OF OHIO-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTORARI

TENTH APPELLATE DISTRICT COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

JOESEPH SHINE-JOHNSON

P.O. BOX 540

ST. CLAIRSVILLE OH, 43950

QUESTION(S) PRESENTED

1. Can a petitioner use the 60(b) Rule to gain Relief of Judgment from a legal error that precluded a merits review, when habeas relief was denied by the district court on flawed procedural grounds, after he properly exhausted all available appellate remedies pursuant to 2254 or does the prior COA determination creates a binding legal decision, thus thwarting 60(b) in the interest of finality?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

LIST OF PROCEEDINGS

1. *State v Shine-Johnson* Franklin County Court of Common Pleas. (C.P.C. No. 15CR-4596
2. *State v. Shine-Johnson*, 2018-Ohio-3347, 2018 Ohio App. LEXIS 3621, 117 N.E.3d 986, 2018 WL 4006358 (Ohio Ct. App., Franklin County, Aug. 21, 2018)
3. *State v. Shine-Johnson*, 2019-Ohio-1707, 2019 Ohio LEXIS 934, 122 N.E.3d 207, 2019 WL 2017515 (Ohio, May 8, 2019)
4. *State v. Shine-Johnson*, 155 Ohio St. 3d 1439, 2019-Ohio-1536, 2019 Ohio LEXIS 828, 121 N.E.3d 410, 2019 WL 1931712 (May 1, 2019)
5. *State v. Shine-Johnson*, 156 Ohio St. 3d 1456, 2019-Ohio-2780, 2019 Ohio LEXIS 1376, 125 N.E.3d 946, 2019 WL 2997988 (July 10, 2019)
6. *State v. Shine-Johnson,* 156 Ohio St. 3d 1476, 2019-Ohio-3148, 2019 Ohio LEXIS 1614, 128 N.E.3d 238, 2019 WL 3558844 (Aug. 6, 2019)
7. *State v. Shine-Johnson,* 157 Ohio St. 3d 1443, 2019-Ohio-4211, 2019 Ohio LEXIS 2103, 132 N.E.3d 711, 2019 WL 5151783 (Oct. 15, 2019)
8. *State v. Shine-Johnson,* 2020-Ohio-4711, 2020 Ohio App. LEXIS 3563 (Ohio Ct. App., Franklin County, Sept. 30, 2020)
9. *State v. Shine-Johnson,* 160 Ohio St. 3d 1498, 2020-Ohio-5634, 2020 Ohio LEXIS 2775, 159 N.E.3d 289, 2020 WL 7348903 (Dec. 15, 2020)
10. *Shine-Johnson v. Warden,* 2021 U.S. Dist. LEXIS 59808, 2021 WL 1172229 (S.D. Ohio, Mar. 29, 2021)

11. *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 124984 (S.D. Ohio, July 6, 2021)

12. *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 17736, 2022 WL 17572189 (6th Cir., June 27, 2022)

13. *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 27526 (6th Cir., Sept. 30, 2022)

14. *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 221609, 2021 WL 5354704 (S.D. Ohio, Nov. 17, 2021)

15. *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 17736, 2022 WL 17572189 (6th Cir., June 27, 2022)

16. *Shine-Johnson v. Gray*, 143 S. Ct. 841, 215 L. Ed. 2d 79, 2023 U.S. LEXIS 922, 2023 WL 2124162 (U.S., Feb. 21, 2023)

17. US Supreme Court rehearing denied by *Shine-Johnson v. Gray,* 2023 U.S. LEXIS 1857 (U.S., May 1, 2023)

18. *Shine-Johnson v. Gray*, 2024 U.S. App. LEXIS 14842 (6th Cir., June 18, 2024)

19. *Shine-Johnson v. Warden*, 2023 U.S. Dist. LEXIS 194386, 2023 WL 7128678 (S.D. Ohio, Oct. 30, 2023)

20. *Shine-Johnson v. Gray*, 2024 U.S. App. LEXIS 25728 (6th Cir., Oct. 11, 2024)

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgements below.

OPINION BELOW

1. The Opinion of the Sixth Circuit Court of Appeal denial of the 60 (B) C.O.A. appears at **Appendix A** to this petition. The court's opinion is reported at LEXIS 14842.
2. The Opinion of the Sixth Circuit Court of Appeal appears *En Banc* denial at **Appendix B** to this petition. The court's opinion is reported at LEXIS 25728.
3. The Opinion of the U.S. District Court Southern District of Ohio appears at **Appendix C** to this petition. The court's opinion is reported at LEXIS 194386.

JURISDICTION

The Sixth Circuit Court of Appeals entered final judgment on the appeal on June 27, 2022. A copy is attached at appendix A. A timely petition for rehearing was denied October 11, 2024. A copy of the judgment is attached at appendix B. The jurisdiction of this court is invoked under 28 U.S.C. §1254(a).

CONSTITUTIONAL PROVISIONS

This case involves a state criminal defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments. See, Appendix G. The Fifth Amendment provides in relevant part:

> No person shall be... be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense.

The Fourteenth amendment provides in relevant parts:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the applications of 28 U.S.C. §2253(c), which states:

1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
    a. The final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a state court;
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.

STATEMENT OF THE CASE

A. State Trial Proceedings

In 2015 Shine-Johnson was charged with aggravated murder, murder and tampering with evidence for the shooting death of his father in Columbus, Ohio. Shine-Johnson claimed Self-Defense. Shine-Johnson was acquitted of aggravated murder and found guilty by a jury of Murder and tampering w/evidence each with a gun specification.

B. State Appellate Proceedings

The Tenth Appellate District Court by a *divided* panel to affirmed the conviction. *State v. Shine-Johnson,* 2018-Ohio-3347.(I would find that repeated prosecutorial error damaged the integrity of the fact-finding in the trial. I would therefore vacate the conviction for murder and remand the case for a new trial. The Supreme Court denied review by a *divided* panel. *State v. Shine-Johnson,* 2019-Ohio-1707, 2019 Ohio LEXIS 934. Shine-Johnson filed a delayed appeal because his counsel refused his instructions to raise more than one proposition law. It was denied by a divided panel. *State v. Shine-Johnson,* 156 Ohio St. 3d 1476. Shine-Johnson filed a pro se motion for ineffective assistance of counsel 26(B) was denied and challenged to the supreme court of Ohio which were both denied review by *divided* panels. *State v. Shine-Johnson,* 155 Ohio St. 3d 1439, 2019-Ohio-1536, 2019 Ohio LEXIS 828.

C. 2254Habeas proceedings

The Southern district court of Ohio dismissed the petition. *Shine-Johnson v. Warden,* 2021 U.S. Dist. LEXIS 124984. Shine-Johnson filed a 59(e) he was denied.

U.S. District Court Southern District of Ohio. *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 221609. Shine-Johnson timely sought a certificate of appealability to the Sixth Circuit court of Appeal on all seven grounds on his petition. *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 17736. The Petitioner the sought *En Banc* Rehearing and was denied.

D. Rule 60(b) Proceedings

Petitioner filed a Motion for Relief from Judgment under Fed.R.Civ.P. 60(b)(ECF No. 110). The motion was unopposed by the State Respondent. The U.S. district Court denied that Motion as being untimely on May 22, 2023 (ECF No. 122), After 10 months of his arguments the Magistrate judge withdrew his recommendation to deny the 60(b) motion as untimely on July 20, 2023. Shine-Johnson argued the U.S. Southern District court of Ohio should grant 60(b) relief of judgment for. The District court denied the 60(b). *Shine-Johnson v. Warden*, 2023 U.S. Dist. LEXIS 194386, (S.D. Ohio October 30, 2023). The court denied En Banc *Shine-Johnson v. Gray*, 2024 U.S. App. LEXIS 14842 (6th Cir., June 18, 2024).

REASON FOR GRANTING THE WRIT

This case is extraordinary and of national importance in regards to the role and operation of the 60(b) Rule, the uniform application and its availability to 2254 litigants when the 2254 habeas litigant has been denied habeas relief on flawed procedural grounds, where subsequent 59(e) has also been denied, and petitioner has gone through the complete appellate procedure, and the obvious errors were left uncorrected denied a certificate of appealability by the United States Court of

Appeals, and denied Certiorari by this court, and denied equities and the interest of justice to correct unconstitutional convictions.

The United State court of appeals has applied a flawed and unduly burdensome standard denying the request for COA, and decided an important federal question in regards to the procedural mechanism of the 60(b) that would allow prior denials of a COA request, made by a single judge to become final and legally binding decisions to bar 2254 Habeas litigants who timely file 60(b)(1) relief of judgment motions and from utilizing the 60(b) procedural mechanism. Thus the lower court has misapplied this courts precedent(s), creating a multi-circuit split, enforcing an insurmountable procedural mechanism to bar 60(b) litigations in 2254 where petitioner was denied issuance of a COA in the first instance on flawed procedural grounds of a valid constitutional claim that was divided on the merits in the State appellate courts and Supreme Courts, and not heard on the merits during the habeas proceeding.

The Sixth Circuit decision in this case sets new precedent in regards to "finality, and "the law of the case doctrine" contravening this courts relevant authoritative decisions in *Buck v. Davis*, 580 U.S. 100; *Gonzalez v. Crosby*, 545 U.S. 524;; *United States v. Hatter*, 532 U.S. 557; *Dobbs v. Zant*, 506 U.S. 357, and has entered a decision in conflict with the decision of several other United States court of appeals on the same important matter, and has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

The Sixth Circuit decision allows for the COA determination to become a legally binding final decison that forecloses a petitioners use of the 60(b) mechanism creating

a "Eleven circuit split'" conflicting with the authoritative decisions with other United States Courts of Appeals the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh, Circuit Appellate Courts in regards to the 60(b) Rule and "Finality" being the ultimate determination to deny 60(b). Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions especially in regards to the uniform application of AEDPA and the Actual Innocence Standard and Procedural default and the standard of granting Certificates of appealability. It calls for this court to settle this important question...

1. **Can a petitioner use the 60(b) Rule to gain Relief of Judgment from a legal error that precluded a merits review, when habeas relief was denied by the district court on flawed procedural grounds, after he properly exhausted all available appellate remedies pursuant to 2254 or does the prior COA determination creates a binding legal decision thus thwarting 60(b) in the interest of finality,?**

The Sixth Circuit Court of Appeals used the prior single judge COA determinations as legally binding to assert interest of finality, res judicata, and/or Law of the case doctrine, to bar 60(b)(1) motions or construe them as a substitute for appeal. Thus thwarting 60(b) mechanism. This court may review the denial of a COA by the lower courts. See, *e.g., Miller-El* v. *Cockrell*, 537 U. S. 322, 326-327 (2003). "When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied." See *Slack* v. *McDaniel*, 529 U. S. 473, 485-486, 489-490, (2000).

The delicate principles of comity governing the interaction between coordinate sovereign judicial systems do not require federal courts to abdicate their role as vigilant protectors of federal rights. To the contrary, as the Supreme Court has made

clear, "in enacting [the *habeas* statute], Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights to protect the people from unconstitutional action.'" *Reed v. Ross*, 468 U.S. 1, 10, (1984). See also, *Robb v. Connolly*, 111 U.S. 624, 637, (1884); *Tafflin v. Levitt*, 493 U.S. 455, 458, (1990). Even after the enactment of AEDPA, "the writ of *habeas corpus* plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483, (2000). The two mechanisms available that would allow a party to undo a final judgment include motions to alter or amend judgment and motions for relief from judgment. *See* Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 60.

This court has held that dismissal 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." *Lonchar v. Thomas*, 517 U.S. 314, 324, (1996). The lower court's decision in this case creates new precedent, undermining this court's precedents and concept of uniformity in regards to the application of Federal Civil procedure, also the uniform application of AEDPA, the Actual Innocence Standard, Procedural default doctrine, and the standard of granting Certificates of appealability.

Accordingly, in applying Rule 60(b) to habeas corpus petitions, Shine-Johnson contends and believes that a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard and that he has standing to utilize the 60(b). see, Restat 2d of Judgments, § 64, 71.

The Sixth Circuit found that Shine-Johnson's Rule 60(b) motion in part attacked some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. The court also found that they should deny the COA request in this case adopting the lower court's decision based on finality of a previously denied COA request on his initial 2254 petition. See, *Shine-Johnson v. Gray,* 2024 U.S. App. LEXIS 14842 (6th Cir. June 18, 2024)

a) District Courts Ruling has so far departed from the accepted and usual course of judicial proceedings.

U.S. District Court Southern District of Ohio Denied the 60(b) relief of judgment, motion ultimately reaching the merits of the claim that the court held to be untimely, but refused to reach the merits of the timely portions of the 60(B) concluding: "Conversely, treating a circuit court's COA decision as conclusive on the issues actually raised promotes finality, a key aim of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA")." See, *Shine-Johnson v. Warden,* 2023 U.S. Dist. LEXIS 194386, (S.D. Ohio October 30, 2023).

However, 60(b) in its main application is to those cases in which the true merits of a case might never be considered because of technical error, or fraud or concealment by the opposing party, or the court's inability to consider fresh evidence. *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007) (quoting *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977).The single Judge deciding the prior COA does not make binding legal determinations. See, Rule 27(c) of the Federal Rules of Appellate Procedure; See, *Keahey v. Marquis*, 978 F.3d 474, 481 (6th Cir. 2020); *Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086, 1095 (11th Cir. 2015); *Gonzalez v. Thaler*,

565 U.S. 134, 145, (2012). The lower courts conclusion using the COA to promote finality clearly undermines the purpose and functionality of the 60(b) rule and contravenes *Buck v. Davis*, 580 U.S. 100, at 126, which held the "whole purpose" of Rule 60(b) "is to make an exception to finality." *Gonzalez,* 545 U. S., at 529.

It appears that the U.S. District court has denied the 60(b) motion because of the prior determination of the COA seeming to apply a combination of different factors of, "law of the case doctrine," "res judicata,"" collateral estoppel" and mere "finality." However, the law of the case doctrine presumes a hearing on the merits. *United States v. Hatter*, 532 U.S. 557, See, *e.g.*, *Quern* v. *Jordan,* 440 U.S. 332, 347, n. 18. Shine-Johnson claims were not heard on the merits and he has argued that the U.S. district court denied his habeas petition on flawed procedural grounds and Shine-Johnson 60(b) was properly used as it is clearly attacking substantive mistake of law or fact in the final judgment or order, based on some defect in the integrity of the federal habeas proceedings. See, *Penney v. United States, 870 F.3d 459, 461.*

Shine-Johnson in his 60(b) has squarely presented the clear substantive error in the lower courts judgment and the lower courts unduly burdensome application of the procedural default doctrine, the AEDPA 2254(d)(1) Standard, and the Actual Innocent Standard, and COA standard to preclude hearing the merits of 22554 petition claims ground One through Four. Even the Sixth Circuit recognizes that the law of the case doctrine may not preclude reconsideration of a ruling. *See, Moore v. Mitchell,* 848 F.3d 774, 776 (6th Cir. 2017). Shine-Johnson has shown a manifest injustice exist in this case. *Dobbs v. Zant,* 506 U.S. 357,363 (1993).Thus, an actual-

innocence claim may be considered on the merits even though it would otherwise be barred by an untimely Rule 60(b). *Penney v. United States, 870 F.3d 459, 463.*

The application of the law-of-the-case doctrine has been historically limited to fully briefed "questions necessarily decided" in an earlier appeal. *Burley v. Gagacki,* 834 F.3d 606, 618 (6th Cir. 2016) and has traditionally been used to "enforce a district court's adherence to an appellate court's judgment," *Miller v. Maddox,* 866 F.3d 386, 390 (6th Cir. 2017). It does not apply to a certificate of appealability, which screens out claims "unworthy of judicial time and attention," ensures "that frivolous claims are not assigned to merits panels," and identifies only questions that warrant the resources deployed for full-briefing and argument. See, *Keahey v. Marquis,* 978 F.3d 474, 481 (6th Cir. 2020). Shine-Johnson never had an appeal that was heard on the merits. Therefore, the prior single judge COA determination is wholly irrelevant if the petitioner has shown a cognizable error under the 60(b) rule.

b) Sixth Circuit Ruling sanction such a departure by its lower court as to call for this court exercises its supervisory powers.

Shine-Johnson filed a request for COA for the denial of his 60(b) motion and the Sixth Circuit denied the COA relying on a case that deals with strictly 60(b)(6) concluding:

> "But these procedural arguments were or could have been presented to this court in Shine-Johnson's prior application for a certificate of appealability. Rule 60(b) is not a substitute or alternative for an appeal; thus, "arguments that were, or *should have been*, presented on appeal are generally unreviewable on a Rule 60(b)(6) motion." *FCA US, LLC v. Spitzer Autoworld Akron, LLC,* 887 F.3d 278, 286-87 (6th Cir. 2018) (quoting *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007))."

see, *Shine-Johnson v. Gray,* 2024 U.S. App. LEXIS 14842 (6th Cir. June 18, 2024). Despite the procedural history Shine-Johnson never had the opportunity to litigate his underlying claims on the merits in a federal habeas proceeding, and the state never expended resources disputing them. *See Miller*, 879 F.3d at 701.

The Sixth Circuit is unclear on how Shine-Johnson used the 60(b) outside of its intended purpose, or how his 60(b) motion was used as a substitute for appeal. Shine-Johnson has simply addressed error(s) that were obvious and left uncorrected. The Sixth Circuit court attempts to insulate the U.S. district court erroneous rulings from review where the habeas petition was dismissed on flawed procedural grounds, "there are no 'past effects' of the judgment that would be disturbed" if the habeas proceeding were reopened for further consideration. See, *Phelps*, 569 F.3d at 1138. Thus, the State courts were divided on multiple occasions at every level in regards to prosecutorial misconduct in this case and the state's interest in finality "deserves little weight," *Buck*, 137 S. Ct. at 779.

The Sixth Circuit erroneously denied the petitioner's COA request where a reasonable jurist could debate that the U.S. district court was wrong. Thus, even Sixth Circuit Court's belief in the correctness of its single judge COA decision, should not insulate that decision from further review. See, e.g., *Taylor v. Howes*, 26 Fed. Appx. 397, 399 (6th Cir. 2001); *Bradley v. Birkett*, 156 Fed. Appx. 771, (6th Cir. 2005); *Gray-Bey v. United States*, 209 F.3d 986, 989-90 (7th Cir. 2000). Shine-Johnson is entitled to a decision in the regular course - a decision by the district court, followed by appellate review, and the opportunity to seek Supreme Court review

especially where the 60(b) has shown that the lower court made a clear error that the Appellate court left uncorrected on issues that were debatable and the state courts were divided on whether constitutional error existed.

Lastly, in *Boag v. MacDougall*, 454 U.S. 364, the Supreme court concluded "Federal courts must construe inartful pleading liberally in *pro se* actions, reversing a lower court's ruling for failing to liberally construing a *pro se* litigants pleadings." Shine-Johnson contends that his pleadings have sufficiently informed the lower courts of the factual and legal basis to grant habeas relief and to overcome the erroneous procedural rulings, and to be given a COA, but The Sixth circuit court of appeals as well as the lower courts failed to liberally construe the petitioner pleadings as *Haines* v. *Kerner*, 404 U.S. 519 (1972), instructs the federal courts to do in *pro se* actions, and therefore states a cause of action. See *Wolff* v. *McDonnell*, 418 U.S. 539, 555-572 (1974).

c) The decision Contravenes Clearly Established Federal Law

The Sixth Circuit court of appeals panel's decision contravenes with the U.S. Supreme Court decision in *Buck v. Davis,* 580 U.S. 100, at 126, the "whole purpose" of Rule 60(b) ***"is to make an exception to finality."*** *Gonzalez*, 545 U. S., at 529. Rule 60(b)(1) permits a district court to reopen a judgment for "mistake, inadvertence, surprise, or excusable neglect," so long as the motion is filed "within a reasonable time," and, at most, one year after the entry of the order under review. See, Fed. Rules Civ. Proc. 60(b)(1), *(c)(1). Kemp v. United States, 596 U.S. 528.*

In the denial of the COA, the Sixth circuit court relied on a non-habeas case that was remanded, *FCA US, LLC v. Spitzer Autoworld Akron*, ante, quoting *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007). Both of these cases are clearly factually distinguishable from Shine-Johnson's habeas case on the simple fact that both cases were heard on the merits by a full panel. Also, those decisions were a published unlike Shine-Johnson decision(s). Therefore, those cases are subject to the law-of the case doctrine and Shine-Johnson's COA decision is not. Shine-Johnsons decision was a denial of a COA by a single judge that was non-binding and the decision was unpublished. Also, the *GenCorp* ruling pre-dates the U.S. Supreme Court decision in the *Buck Supra, Gonzalez v. Thaler*, 565 U.S. 134, and the Sixth Circuit Appeals court's decision in *Keahey v. Marquis supra,* and is misplaced, misinterpreted, misconstrued, and conflicts with the U.S. Supreme court in regards to similarly situated petitioners.

The procedural sequence in *Buck Supra*, defies the logic of the Sixth Circuit that a prior non-binding decision defeats the 60(b) motion especially the COA determination. The District Court rejected Buck's miscarriage of justice argument and held that, because of his procedural default, his ineffective assistance claim was unreviewable. *Buck* v. *Dretke*, 2006 U.S. Dist. LEXIS 101377 at *8. Buck unsuccessfully sought review of the District Court's ruling. See, *Buck* v. *Thaler*, 345 Fed. Appx. 923 (CA5 2009) (*per curiam*) (denying application for a COA), cert. denied, 559 U.S. 1072, 130 S. Ct. 2096, 176 L. Ed. 2d 730 (2010). Buck then Sought a 60(b).

Shine-Johnson's case is procedurally similar to *Buck* in regards to the fact that they rejected his Miscarriage of justice claim and erroneously applied a procedural default and claimed that several of his Prosecutorial misconduct claims were unreviewable. *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 59808, *27 (S.D. Ohio March 29, 2021); *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 124984, (S.D. Ohio July 6, 2021). Shine-Johnson sought to appeal his case and he was denied the COA. *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 17736, (6th Cir. June 27, 2022). There are no grounds to bar his case based upon the prior non-binding COA determination. The Petitioner utilized the 60(b) timely to collaterally attack the procedural errors that precluded the review of the merits of the only court rendering a final judgement as allowed. See, *Gonzalez*, 545 U. S., at 529.

However, the Sixth Circuits courts single judge relied on *FCA US, LLC v. Spitzer Autoworld Akron*, Supra , quoting *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007) However, even the outdated *GenCorp supra*; held "Even after a judgment has become final and even ***after an appeal has been lost***, Civil Rule 60(b) gives losing parties additional, narrow grounds for vacating the judgment." *GenCorp, Inc v. Olin Corporation,* 477 F.3d 368, id at 372 (6th Cir. 2007). Shine-Johnson 60(b) was timely filed and *unopposed* and the court erroneously denied the *COA.*

Further, Shine-Johnson did not file a previous 60(b) motion and this 60(b)(1) pleadings were not heard on the merits. Therefore Res judicata and collateral estoppel does not bar Rule 60(b) motions. *In re Jerome Duncan, Inc.,* 333 F. App'x. 14, 15 (6th Cir. 2009); *See Johnson v. Hudson*, 421 F. App'x 568, 572 (6th Cir. 2011). The

Sixth Circuit Court is in conflict with its own ruling in *Johnson v. Hudson,* 421 F. App'x 568, 572 concluding "Habeas petitioners who have already sought and obtained appellate review of their habeas denials are nonetheless entitled to rely on Rule 60(b) motions in seeking to correct "some defect in the integrity of the federal habeas proceedings." (quoting) *Gonzalez v. Crosby,* 545 U.S. 524, 531,(2005), which is exactly what Shine-Johnson sought to do in this case.

In spite of the law-of-the-case doctrine, a lower court may reopen an issue already ruled upon by a controlling authority in limited circumstances, including where that authority has taken "a subsequent contrary view of the law." *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir. 1994) (internal citations admitted); *see also Mitchell v. Rees,* 261 F. App'x 825, 828 (6th Cir. 2008) (applying this exception in the habeas context). The lower court(s) decision in this case was contrary to law and a reasonable jurist would debate that the lower courts determination was incorrect and presented that a colorable constitutional error exists and deserve encouragement to proceed further.

The lower court's decision conflicts with a decision of the United States Supreme Court or of the court to which the petitioner's cases filed a 60(b) after they were denied appellate review. See, *Buck v. Davis*, 580 U.S. 100,; *Banister v. Davis*, 140 S. Ct. 1698, 207 L. Ed. 2d 58; *Gonzalez v. Crosby*, 545 U.S. 524,; *Kemp v. United States*, 596 U.S. 528. The granting of Certiorari is therefore necessary to secure and maintain uniformity of this court's decisions.

d) Decision Conflicts with other Circuit Appellate Circuits Courts.

In the Eleventh Circuit the courts held "if simple finality were sufficient to overcome a Rule 60(b) motion then no such motions would ever be granted." *Ritter v. Smith*, 811 F.2d 1398,1402. Speaking to the language of Rule 60(b), the Supreme Court has stated the "appeal to the virtues of finality. . . . standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality. *Flexiteek Ams., Inc. v. Plasteak, Inc.*, 2012 U.S. Dist. LEXIS 156286; *FTC v. Ross*, 74 F.4th 186 (4th Cir.) It is clearly established federal law that the Rule 60(b) provides an exception to judgment finality when warranted by the equities and the interests of justice. See *United Student Aid Funds,* 130 S. Ct. at 1376.

The First Circuit court of appeals in *Ungar v. PLO,* 599 F.3d 79, 2010 U.S. App. LEXIS 6156, acknowledged that finality "standing alone, is unpersuasive in the interpretation of a provision Rule 60(b) whose whole purpose is to make an exception to finality" Quoting, *Gonzalez v. Crosby*, 545 U.S. 524, 529, (2005). Same in the Second Circuit. See, *Mandala v. NTT Data, Inc.,* 88 F.4th 353, (2d Cir.2023). Same in the Tenth circuit. See, *Johnson v. Spencer*, 950 F.3d 680, (10th Cir. 2020).

The Fifth Circuit in *Haynes v. Davis*, 733 Fed. Appx. 766, recognized the Supreme Court's rejection of the notion that finality is the overriding concern when assessing Rule 60(b) motions in habeas cases. *Buck*, 137 S. Ct. at 779; *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007). The Ninth Circuit in *Bynoe v. Baca,* 966 F.3d 972,985, acknowledged that when a habeas petition is dismissed on flawed procedural grounds, "there are no 'past effects' of the judgment that would be

disturbed" if the habeas proceeding were reopened for further consideration, and the state's interest in finality "deserves little weight." Id. A central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard. *Phelps v. Alameida*, 569 F.3d 1120, 1140.

The Sixth Circuit has simply disregarded the law handed down from this court and went against its own circuit precedents and is in conflict with several other circuits in regards to the application of the COA and 60(b) procedure, law of the case doctrine and finality to defeat the 60(b).

e) Lower court's decision is wrong and applied unduly burdensome COA procedure and 60(b) procedure, thus creating a Multi-Circuit Split. Shine-Johnson's 60(b) raised articulable errors to justify granting relief of judgment and overcomes finality and reasonable jurist would disagree with the lower courts finding.

i. Six Circuit split on application of Actual innocence Schlup standard and what type of evidence suffices to pass through the gateway.

A testifying witness Alexis Quinn, wrote an affidavit affirming to facts not presented at trial that suffices to make it through the gateway of the actual innocence standard, which highlighted the states misconduct and use of false evidence, undue influence, and was presented to overcome a miscarriage of justice. (ECF No. 81, PAGEID 6306-11). Shine-Johnson argued that the sworn affidavit presented new evidence sufficient to make it through the gateway as the evidence is credible and reliable because it fundamentally calls into question the reliability of the conviction.

At the time of Shine-Johnson's first COA determination *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 124984; *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 221609, the lower court did not clearly opinion that it did not weigh the petitioner's new evidence pursuant to *Schlup* standard because the court wrongfully misconstrued "***ALL***" of the new information contained within the new evidence, in its totality, as solely "character evidence." It's clearly obvious that the on the face of the affidavit, that it contains not only character evidence but also impeaching evidence, Brady violations and evidence of prosecutorial misconduct, for the use of false evidence that in this particular case suffices to make it through the gateway under *Schlup,* showing a juror would more than likely believe Shine-Johnson acted in self-defense. *Jaramillo v. Stewart,* 340 F.3d 877,883 (9th Cir. 2003). The court ignored all the relevant evidence Shine-Johnson presented and created a new and unduly burdensome standard of review, failing to conduct the *Schlup* analysis. In the 60(b) proceeding *Shine-Johnson v. Warden*, 2023 U.S. Dist. LEXIS 194386, [*6], the court overruling his objections to the Magistrate Judge concluded that:

> "However, new evidence of the bad character of a victim is not the type of evidence of actual innocence required by *Schlup v. Delo*, 513 U.S. 298, 319, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). "A court only engages in the weighing of new versus old evidence in actual innocence claims if the new evidence first qualifies under *Schlup*, so Petitioner's objection to the lack of such a weighing process is misplaced."

However, Shine-Johnson argued to the court that "The habeas court is not limited to only exculpatory scientific evidence, trust worthy eyewitness accounts, or critical physical evidence." See *House v. Bell* at 537. It was not testified to at trial, that key witness Alexis Quinn "knew and witnessed that Bythewood was waiting for his son

Shine-Johnson to come home from work to confront him over money, and that Bythewood was upset because Shine-Johnson requested Maureen to repay the loan he had given her, or that Bythewood was on *edge* waiting for Shine-Johnson to arrive while having the shotgun out. (ECF No. 81, PAGEID 6306-07). Shine-Johnson argued that this New evidence is not solely bad character evidence, and suffices to make it through the gateway. This is a trust worthy eyewitness account of the premeditation of Bythewood to cause the affray while wielding a weapon that was not offered at trial. The new evidence undermines a substantial aspect of the state's central theme of its case, that was used as an inference to guilt.

Further, Alexis in the affidavit also gives a firsthand *eyewitness* account that her and her mother both came downstairs ***after*** the shooting which was not elicited at trial. (ECF No. 81, PAGEID 6306-11). Shine-Johnson argued that the new evidence presented squarely undermines the credibility of Maureen's testimony of the eyewitness account, central and material to the entire state's case which challenges the veracity of the State's key witness Maureen Quinn's material testimony in this case and the state's theory. See, *Banks v. Dretke,* 540 U.S. 668, 700. (holding that impeachment evidence was material where it pertained to a witness whose testimony was "crucial to the prosecution" and who was, in the prosecution's own judgment, "of the utmost significance" to its case) The new evidence attacks "the strongest evidence presented against him and does contradict evidence that directly proves guilt. See, *Keith v. Bobby*, 551 F.3d 555, 558 (6th Cir. 2009); *Silva v. Brown,* 416 F.3d 980, (9th Cir. 2005); *East v. Johnson*, 123 F.3d 235, 239 (5th Cir. 1997)

Shine-Johnson showed the court that the affidavit gives an eyewitness account from Alexis Quinn who provided new evidence that her mother, the key witness, Maureen Quinn, did not come downstairs until after the shooting. Therefore, Maureen would not be an eyewitness. See, *House v. Bell*, 547 U.S. 518, 541 (When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime.) Maureen Quinn's testimony was the only testimony used to counter the claim of self-defense. Shine-Johnson argued that in general, impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime," *United States v. Payne,* 63 F.3d 1200, 1210 (2d Cir. 1995) (quoting *United States v. Petrillo,* 821 F.2d 85, 90 (2d Cir.1987)). *United States v. Avellino,* 136 F.3d 249, 256 (2nd Cir. 1998);*United States v. Robinson,* 583 F.3d 1265, (10th Cir. 2009); *United States v. Bartko,* 728 F.3d 327, (4th Cir. 2013); *United States v. Pridgen,* 518 F.3d 87, (1st Cir. 2008). Without Maureen's testimony Shine-Johnson self-defense claim is unrebutted. Maureen Quinn was the only State witness who claimed that she was an eyewitness, to establish that Bythewood was unarmed at the time he was shot. It is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *House* supra, *Id.* at 327.

The Ninth Circuit has held that "new evidence that undermines the credibility of the prosecution's case *may* alone suffice to get an otherwise barred petitioner through the *Schlup* gateway." *Gandarela v. Johnson,* 286 F.3d 1080. (9th Cir. 2001) Impeachment evidence, by itself, can demonstrate actual innocence, where it gives

rise to "sufficient doubt about the validity of [the] conviction." *Carriger v. Stewart,* 132 F.3d at 478; *see also Schlup,* 513 U.S. at 330 ("Under the gateway standard . . ., the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial."); *Sistrunk v. Armenakis,* 292 F.3d 669,678-677. The new evidence in this case raises sufficient doubt about the validity of the conviction.

Shine-Johnson also showed the court that it is well settled that evidence is material if it might have been used to impeach a government witness, because "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley,* 473 U.S. at 676, 105 S. Ct. at 3380; *accord Giglio,* 405 U.S. at 154, 92 S. Ct. at 766; *Napue v. Illinois,* 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . ."); *Kyles, 514 U.S. 419* At 444-445 (the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before.); *Agurs,* 427 U.S. at 112-113, n. 21.

Shine-Johnson also showed the court that Alexis in the affidavit provided new evidence that was not presented at trial, that she specifically heard Shine-Johnson holler out "are you going to shoot me" Then moments later heard the back door open and shots were fired. (ECF No. 81, PAGEID 6307). This is also not character evidence but impeachment evidence. This challenges the veracity of Maureen's testimony where she testified that she was an eyewitness to Bythewood saying "so you're just going to shoot your dad" and heard Shine-Johnson say "yep" and fired a shot and Joe fell immediately. (Tr. Doc No. 45-2 PAGEID 4665) Given the direct impeachment

value of the new evidence in light of the old evidence the Jury would give great weight to this evidence as a deciding factor of guilt or innocence. *Napue v. Illinois*, 360 U.S. 264, 269.Shine-Johnson argued the evidence is not solely character evidence and should not be excluded from entry through the gateway. The petitioner also argued that this new evidence requires the court to hold an evidentiary hearing and to make credibility determinations. *House v. Bell*, 547 U.S. 518, 538-539. The court was obligated to fully conduct the *Schlup* standard and it did not.

ii. Unduly burdensome application of fair presentation and application of procedural default doctrine.

Shine-Johnson requested a COA where District Court Acted with Confirmation Bias and in a manner inconsistent with due process when it misapplied the procedural default doctrine to the petitioner's claims on grounds One, Two, Three, Four of the habeas petition. In deciding the procedural default, the district court held that the denial of Shine-Johnson's motion for a delayed appeal is a procedural ruling, *"not a ruling on the merits"* and does not fairly present his claims. See, *Bonilla v. Hurley*, 370 F.3d 494,497 (6th Cir.) Shine-Johnson in his 60(b) showed the court its error that all fair presentation requires is that the state courts be given the opportunity to see both the factual and legal basis for each claim." *Wagner v. Smith*, 581 F.3d 410, 414-15 (6th Cir. 2009); *Nian v. Warden, N. Cent. Corr. Inst.*, 994 F.3d 746; *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842.(1999).

Shine-Johnson showed that the Supreme court of Ohio under S. Ct. Prac. R. 7.01. requires an affidavit with supporting facts to be attached to support to a motion for

leave to file a delayed appeal the motion included the legal arguments he wanted to raise. (Affidavit, Doc No. 45-PAGEID 3706-3710). Shine-Johnson further argued that the decision on whether to accept jurisdiction is essentially a procedural ruling as well. If the distinction between a procedural ruling and a ruling on the merits is critical to whether or not a habeas petitioner to establish "fair presentation" in state court, this acts as a legitimate bar to preclude habeas review for all petitioners in Ohio. Based on the *Bonilla* line of logic petitioners seeking discretionary review to the Ohio Supreme court will have never fairly presented any argument to the court if jurisdiction is not accepted to hear the cause on the merits. The Supreme court of Ohio does not allow filing of a full merits brief *unless* jurisdiction is granted. *See,* S. Ct. Prac. R. 7.08.

This court previously deciding this issue made it undeniable, it is well settled and clearly established federal law that a state's highest court's discretionary denial of leave to appeal does not typically entail an "adjudication" of the underlying claim's "merits" under AEDPA's terms. The denial instead, usually represents "a decision by the state supreme court not to hear the appeal that is, not to decide at all." *Greene v Fisher*, 565 U. S., at 40.;cf. *Ylst* v. *Nunnemaker*, 501 U. S. 797, 805-806, 111 S. (1991) ("[T]he discretionary denial of review on direct appeal by the California Supreme Court is not even a 'judgment'"); *Brown v. Davenport*, 142 S. Ct. 1510, 1529.

In light of *Bradshaw v. Richey*, 546 U.S. 74, 79–80, this court is bound by the fact that the refusal of the Ohio Supreme Court to accept ***any*** case for review shall not be considered a statement of opinion as to ***the merits*** of the law stated by the trial or

appellate court from which review is sought." See " Ohio Sup. Ct. Rep. R. 4.1; *State v. Davis*, 119 Ohio St. 3d 422, 427; *Williamson v. Rubich*, 171 Ohio St. 253, 168 N.E.2d 876 (1960). Therefore, whether the delayed appeal is a procedural ruling and not a ruling on the merits is irrelevant to fair presentation where the discretionary appeal is not a ruling on the merits either.

The district court created a two circuit split in the application of Procedural default with the Eighth Circuit. Shine-Johnson filing a delayed appeal the petitioner essentially complied with the state procedural rule in question, or made a reasonable and good faith effort to do so, there is no justification for federal abstention, and most federal courts will not find a default. See, *Clemmons v. Delo*, 124 F.3d 944,948-949. (although *Brady* claim was omitted from counsel's brief on appeal of denial of state post-conviction relief, petitioner himself "fairly presented" claim to state supreme court by filing *pro se* motion containing claim and stating that counsel omitted it against client's wishes). Shine-Johnson wrote his attorney requested him to preserve all his direct appeal claims for Federal habeas review. Counsel responded the he was not mandated by the state court to preserve the claims the petitioner requested, and that the petitioner could argue to this court the claims from his direct appeal were fairly represented under one proposition of law and the various claims from his direct appeal were fairly represented under one proposition of law. (Letter, Doc No. 45-PAGEID 3712-3713) Shine-Johnson filed a delayed appeal to the Ohio Supreme Court in regards to the other claims. Therefore, no procedural default has occurred.

The district court decision is an act inconsistent with due process regards with the uniformity of the application of the procedural default doctrine in a habeas proceeding. The court did not articulate what else Shine-Johnson could have possibly done given his circumstances. Shine-Johnson should have not been procedurally barred. Therefore, whether the delayed appeal is a procedural ruling or a ruling on the merits is irrelevant to the doctrine of fair presentation, especially where the decision to accept discretionary appeal is not a ruling on the merits either. The delayed appeal gave the State court the opportunity to see both the factual and legal basis for each claim. The S.Ct. Prac.R. 7.01. Requires an affidavit with supporting facts to be attached to support and Shine-Johnson squarely complied with the rule and fair representation was achieved in this case.

iii. The Court Failed to Comply with own circuit precedent and *improperly revived* a waived Procedural defense.

Shine-Johnson showed the court that Procedural default, like other affirmative defenses, can be *waived* if it is not properly asserted. See, e.g., *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006); *Wood v. Milyard*, 566 U.S. 463, and *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002)(statute of limitations); *Abshear v. Moore*, 546 F. Supp. 2d 530. Shine-Johnson argued the state respondent did not specifically state which of the various twenty plus instances of prosecutorial misconduct were procedurally defaulted in the prosecutorial misconduct claim(s) under Ground(s) one, two, three, four that were allegedly defaulted in the Supreme Court of Ohio. (ROW, Doc No. 46 PAGEID 5765-66). There is a multi-circuit split on forfeiture and waiver.

Shine-Johnson showed the court that in *Slagle v. Bagley*, 457 F.3d 501, the Sixth Circuit made it clear that "procedural default does not preclude our review of claim's for prosecutorial misconduct." *Slagle v. Bagley*, 457 F.3d 501, 514. The Sixth circuit court "review claims of prosecutorial misconduct that were objected to in the trial court de novo." *United States v. Boyd*, 640 F.3d 657, 669 (6th Cir. 2011); *United States v. Henry*, 545 F.3d 367, 376 (6th Cir. 2008). There was no reason to preclude the COA or a review of the merits. Shine-Johnsons direct appeal panel was divided two to one on the issue of prosecutorial misconduct. See, *State v. Shine-Johnson*, 2018-Ohio-3347, 117 N.E.3d 986.

The respondent's objection in her brief to the lower court was insufficient because the warden has not identified with specificity which of the twenty plus statements cited by Shine-Johnson are defaulted." *Slagle v. Bagley*, 457 F.3d 501 514,(quoting, *Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004)) The same reasoning applies here in this case in regards to any alleged default. The court abused its discretion by excusing the state's insufficiency and imposing the default on Shine-Johnson. Like in *Slagle supra* id at 514-515, "federal review is not barred because the State appellate court is unclear because it failed to specify exactly the number of statements not objected too." The court also did not identify the statements to which it referred, and never specifically identified which of the additional misstatements of the law were actually adjudicated or if it applied the *Darden, Donnelly* standard to each of the additional misstatements of the law.

The additional misstatements of the law were not exactly the same in context or argument but diametrically different in argument and in context. Since the court does not indicate which of the prosecutorial misstatements of the law it is referring to, this court cannot identify which instances were actually adjudicated on the merits. *See Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009). Instead, de novo review applies. *Id.*; *see Jackson v. Smith*, 745 F.3d 206, 209 (6th Cir. 2014)

The State Appellate court just concluded "We find the prosecutor's statements regarding the "duty to avoid" to be proper, the jury was properly instructed as to the elements of self-defense, and there is no indication the jury failed to follow the instructions." *State v. Shine-Johnson*, 2018-Ohio-3347, 117 N.E.3d 986, ¶ 103. In this case no curative instructions were given. The Sixth Circuit has found that curative instructions can often significantly minimize the prejudice from an improper comment. See, e.g., *Slagle v. Bagley*, 457 F.3d 501, 524 (6th Cir. 2006) (explaining that the trial court's curative instructions "mitigated much of the prejudice" from the prosecutor's improper comments). *United States v. Hall*, 979 F.3d 1107, 1120 (6th Cir. 2020) (explaining that "general curative instructions given after closings . . . might not cure" prejudice, and that whether "the curative instructions single out specific comments made by the prosecution is relevant" (citing cases))

However, "some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect." *Donnelly v. DeChristoforo*, 416 U.S. 637, 644. (1974). No curative instructions were given in this case. In this case the jury was given the impression of the courts approval state's prosecutor's several

misstatements and assertion(s) of law was the correct interpretation of the law. *State v. Keenan*, 66 Ohio St.3d 402, 410, (1993) quoting *Donnelly v. DeChristoforo, supra*, 416 U.S. at 645. The district court abused its discretion for precluding the review of the merits. There was no reason to preclude Shine-Johnson from an obtaining a C.O.A. or using a procedural default to preclude the merits, especially where the state courts were divided om the prosecutorial misconduct claims.

Lastly, Shine-Johnson argued the court failed to apply *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), where the Sixth Circuit Court of Appeals set out the analytical framework for determining claims of procedural default. "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court ***must*** go through a ***complicated*** [four-prong] analysis." *Id.* at 138. The Court did not actually conduct the analysis and never identified any prong that applied to Shine-Johnson's case. The lower court has not identified any independent state procedural rule that Shine-Johnson has failed to follow its circuit precedent and conduct the four prong analysis specificity. see, *Maupin v. Smith*, 785 F.2d 135,138 (6th Cir. 1986). Therefore, a merit determination is warranted because the state failed to assert its defenses and is waived. *Kontrick* v. *Ryan*, 540 U.S. 443, 458, n. 13, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004);

iv. Grounds one through four of the habeas petition were fairly presented in the state's highest court using phrasing that was similar to language used in prior Sixth Circuit case law.

The district court held Shine-Johnson failed to fairly present his claims in the Ohio Supreme Court because a delayed appeal was procedural ruling and not a ruling

on the merits. see, *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 124984. In light of *O'Sullivan v. Boerckel*, 526 U.S. 838, 846, Shine-Johnson showed the court that his defense counsel in the memorandum in support of jurisdiction to the Ohio Supreme Court made sufficient factual allegations that fall within the factual matrix within the mainstream of due process and fair trial, and structural error adjudication, using similar language used in the Sixth Circuit. Counsel raised on proposition of law and the various claims from his direct appeal were fairly represented under one proposition of law. (Letter, Doc No. 45-PAGEID 3712-3713)

Shine-Johnson's brief cited multiple instances of prosecutorial misconduct and the trial court's erroneous jury instruction that constitutes a structural error that was also a misstatement of the law, along with the context of the arguments. Counsel also informed the Supreme Court of Ohio that the petitioner specifically raised a prosecutorial misconduct claim on direct appeal because the state prosecutor "misstated the law on the duty to avoid." (State Record, Doc No. 45 Page ID 3631-3633). A prosecutorial misconduct claim is in the mainstream of fair trial and due process claim. *Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir. 2006); *United States v. Leon*, 534 F.2d 667, 678, 1976; *Houston v. Waller* 420 Fed. Appx 501, 510; *West v. Bell*, 550 F.3d 542, 564 (6th Cir. 2008)(we held that a claim was fairly presented when the petitioner used phrasing that was similar to language used in prior Sixth Circuit case law). *Daye v. Attorney Gen. of New York*, 696 F.2d 186, (2d Cir. 1982) Quoting " *Johnson v. Metz,* 609 F.2d 1052 at 1057 (Newman, J., concurring); *see also id.* at 1056 n.5.; *Dougan v. Ponte*, 727 F.2d 199,201 (1st Cir. 1984); *Evans v. Court*

of Common Pleas, 959 F.2d 1227,1233 (3rd Cir. 1992);*Verdin v. O'Leary*, 972 F.2d 1467,1474 (7th Cir. 1992); *Peterson v. Lampert*, 319 F.3d 1153,1158 (9th Cir. 2003)

Shine-Johnson has phrased the factual allegation and legal allegations using language in prior sixth circuit case law within the mainstream of due process and fair trial claims. The Sixth Circuit has also found that, "repeating the wrong instruction on duty of retreat and again placing upon the defendant the burden of establishing his claim of self-defense is an error. This removes any possibility that the error could be considered harmless beyond a reasonable doubt." *See Berrier v. Egeler*, 428 F. Supp. 750,754 quoting *Mullaney*, 421 U.S. at 705, 95 S. Ct. 1881 (Rehnquist, J., concurring)

Further, In Ohio Self-Defense is an inalienable and fundamental right. See, The 2003 provisions of § 6, H.B. 12 (150 v 12), SECTION 6; Ohio. Const. Art. I, § 1; Under the Ohio Const. Art. I, § 4. The Ohio. Const. Art. I, § 10 &16. Counsel in the memorandum for jurisdiction alerted the Ohio Supreme court that the State Appellate court's decision eliminates "the right to assert self-defense." (State Record, Doc No. 45 Page ID 3626) Shine-Johnson has phrased the factual and legal allegations using language in prior sixth circuit case law which is in the factual matrix of fundamental right to fair trial and due process claim.

Shine-Johnson showed the court that the duty to retreat directly affects Shine-Johnson's burden of proof on self-defense. The burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it. *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20-21. The

imposition of the burden of proof upon [a defendant] is a substantial interference with the exercise of that right, it is a denial of a substantial right guaranteed by the Constitution." see, *In re Joint Cty. Ditch No. 1*, 122 Ohio St. 226, 231-232, (1930). This resulted in a structural error.

The United State Supreme court has recognized the "fundamental" *right* of self-defense [is] guaranteed by the [Ohio] Constitution. *See, District of Columbia v. Heller,* 554 U.S. at 585. Substantive due process protects his fundamental right to Personal security and bodily integrity. *Kallstrom v. city of Columbus*, 136 F. 3d 1055, 1063. Murder is the ultimate threat to bodily integrity. *Kaur v. Wilkinson*, 986 F.3d 1216,1223. Therefore, Shine-Johnsons self-dense argument is within the factual matrix of constitutional ligation. The language used in Shine-Johnson's brief which clearly implicates the petitioner's right to a fair trial, complete defense and procedural and substantive due process properly alerting the Ohio Supreme Court giving the court the proper analysis to view his memorandum. See, *Franklin v. Rose*, 811 F.2d at 326, quoting *Daye v. Attorney General*, 696 F.2d 186, 193-94 (2d Cir. 1982).

Further, the Sixth circuit has held "the right to assert self-defense" at trial is fundamental. See, *Barker v. Yukins*, 199 F.3d 867, 872-73 (6th Cir. 1999); *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2002)(The Sixth circuit has made clear that its relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent. *See Williams*, 529 U.S. at 407); *Martin v. Warden*, London Corr. Inst., 2020 U.S. Dist. LEXIS 59449 (S.D. Ohio 2020); *Moore v.*

Curley, 2011 U.S. Dist. LEXIS 96447, (W.D. Mich. 2011) *Bates v. Bauman,* 2015 U.S. Dist. LEXIS 91174 (W.D. Mich. 2015).

The Sixth Circuit has also ruled that "failure to instruct a jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge violates a criminal defendant's rights under the due process clause." *Newton v. Million*, 349 F.3d 873, 878 (6th Cir. 2003) Also, the right to assert self-defense is protected by the fundamental right to personal security especially from the state, which is perhaps the pinnacle of an individual's interests in life and liberty. See *Youngberg*, 457 U.S. at 315. In the past, this Court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause. See, *Ingraham v. Wright*, 430 U.S. 651, 673; *United States v. Lanier*, 520 U.S. 259, 262. Every violation of a person's bodily integrity is an invasion of his or her liberty." *Washington* v. *Harper*, 494 U.S. 210, 237, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990).

v. Misapplied AEDPA (d)(1) has decided an important federal question in a way that conflicts with a decision by the Ohio state court of last resort.

Shine-Johnson requested a COA because the lower court acted in a manner inconsistent with due process and Misapplied the Standard of AEDPA (d)(1). Shine-Johnson has fulfilled his 2254(d)(1) obligation by supporting his claims grounds one through four with the U.S. Supreme Court precedent of *Beard V. United States,* 158 U.S. 550, 15 S. Ct. 962, 39 L. Ed. 1086 (1895) that was adopted and followed by the Ohio Supreme Court and satisfied AEDPA(d)(1). The lower federal courts ignored

that clearly established law is found solely in decisions of the Supreme Court existing at the time of the state court decision. *See Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013). A petitioner need not identify a Supreme Court case with identical facts to his own in order to receive habeas relief. *See White v. Woodall*, 572 U.S. 415, 427(2014).

The State appellate court was divided on the merits of the prosecutorial misconduct claim. (Dissenting Opinion, Doc No. 45 PAGEID 3676-3677). Shine-Johnson fulfilled his 2254 (d)(1) obligation by supporting his misconduct claim with the U.S. Supreme Court precedent of *Beard V. United States,* 158 U.S. 550,560, (1895) (The court below *erred* in holding that the accused, while on his *premises, outside* of his *dwelling-house*, was under a legal duty to get out of the way.) The district court refused to acknowledge the applicable Ohio Common law rule in regards to self-defense as adopted by the U.S. Supreme Court's holdings in *Beard.* in *Beard V. United States*, 158 U.S. 550, *560-561.* See, *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 149564, *11-12, 2021 (S.D. Ohio 2021) (federal courts have been much less likely to look to the common law in defining federal crimes and defenses. And in any event this is not a federal criminal case like Beard, but an Ohio criminal case in which the Ohio courts are authorized to say what Ohio law requires.")

The district court in deciding the habeas petition relied heavily relied upon *Martin v. Ohio ante*, The Supreme Court of the United States made it clear that Ohio Self-defense law still operates under *common law.* See, *Martin v. Ohio,* 480 U.S. 228, (1987). The *Beard* court adopted *Erwin* v. *State*, 29 Ohio St., 186. In *Kimbell Foods,*

440 U.S. at 728-730 the court acknowledge that federal courts applying federal common law frequently adopt, or borrow, state common law "as the federal rule of decision to fill gaps for which a developed body of common law does not exist." ; *see also Kamen*, 500 U.S. at 98; *Boyle*, 487 U.S. at 507; *United States v. Little Lake Misere Land Co..*, 412 U.S. 580, 594, (1973).

The Ohio Supreme court in *Graham v. State*, 98 Ohio St. 77(1918) re-adopted the holdings of *Beard v. United States*, 158 U.S. 550 as ruling case law. According to the *Graham supra,* "if the defendant did not provoke the assault, while in the lawful pursuit of his business was suddenly and violently assaulted with a deadly weapon and placed in danger of loss of life or great bodily harm, under the current of modern authority he was not required to retreat. Ruling Case Law, 826; *Erwin* v. *State*, 29 Ohio St., 186; *Beard* v. *United States*, 158 U.S., 550." *Id.* at 79.

Shine-Johnson provided the court with further evidence that the *Beard* precedent was adopted by Ohio courts. In *State v. Blanton,* 111 Ohio App. 111, at 116, the explains Judge McIlvaine was quoted at great length by Mr. Justice Harlan of the United States Supreme Court in the case of *Beard* v. *United States*, 158 U.S., 550, 560-561, 39 L. Ed., 1086, 15 S. Ct., 962. The Sixth Circuit has also recognized under Ohio law "a person who is *where he has a right to be may stand his ground* and resist force with force, but a person who is where he has *no* right to be must follow the common law rule and "retreat to the wall." *Melchior v. Jago,* 723 F.2d 486, 493. This common law is still the governing law in Ohio to date. At the time Shine-Johnson's case became final Ohio operated under common law also as announced in *Erwin,*

Graham, and Beard. Again, Shine-Johnson cited *Marts ante,* and *Graham supra,* in his reconsideration of his direct appeal and were properly before the court to recognize their error. (Brief, Doc No. 45 PAGEID3568-3572.)

The Ohio Supreme court in *Graham v. State,* 98 Ohio St. 77, 79, (1918) adopted the holdings of *Beard v. United States,* 158 U.S. 550, to make its determination on the duty to retreat issue under Ohio law. *Graham* is stilled valid authority relied on by the Ohio Supreme Court in *State v. Robbins,* 58 Ohio St.2d 74, which followed and approved of *State v. Melchior,* 56 Ohio St. 2d 15 also citing *State* v. *Peacock* (1883), 40 Ohio St. 333, 334 and *Graham supra,* to establish the third element that a person could not violate a duty to retreat. Because of the third element, in most cases, "a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation." *Williford,* 49 Ohio St. 3d at 250, citing *Robbins,* 58 Ohio St. 2d at 79-81; *Marts v. State* (1875), 26 Ohio St. 162, 167-168.

The Ohio General assembly has never expressly abrogated the common law stand your ground known as the "True Man doctrine," *Erwin, peacock, Graham, Stewart, Champion. See,* 27 Ohio Jur. 2d 636, Homicide, Section 95. The statutory laws R.C. 2901.05 and 2901.09 did not abrogate common law but expanded the common law. In Ohio, the "True Man Doctrine" is the law of self-defense in this state. *State v. Blanton,* 111 Ohio App. 111, 116, 170 N.E.2d 754, 758. (With it we must also consider the cases of *Marts* v. *State,* 26 Ohio St., 162; *Napier* v. *State,* 90 Ohio St., 276, 107 N. E., 535; and *Graham* v. *State,* 98 Ohio St., 77.); *State v. Hughes,* 1988 Ohio App. LEXIS 4786, *15. (The "true man doctrine", however, remains viable tenets of Ohio law.)

Shine-Johnson argued that while common-law rights and common-law principles have to a very large extent been either modified, or enacted in the form of statutes, where unmodified or unabrogated by statute *they have the same force and effect as a statute,* and, while there perhaps is no restraining hand which may prevent a court of last resort from abrogating or modifying a common-law principle, yet *no power has been vested* in the courts so to do, such power being vested in the legislative branch alone. *Schwindt v. Graeff,* 109 Ohio St. 404, 407. Therefore, *Beard* is controlling in this particular matter and Shine-Johnson satisfies AEDPA(d)(1) that shows that the petitioner was under no obligation to retreat from his home, or while in his yard, or from a potential trouble. The district court abused its discretion and misapplied the AEDPA standard creating a split amongst all the federal appellate circuits.

vi. Three circuit Split on issuance of a C.O.A. when State Appellate Court held a divided panel and the dissenting justice is a reasonable jurist.

Shine-Johnson's direct appeal was decided by a divided panel by the Tenth Appellate District Court in which one reasonable jurist found a constitutional violation that prosecutorial misconduct tainted the case. See, *State v. Shine-Johnson,* 2018-Ohio-3347. The Supreme Court denied review by a *divided* panel. *State v. Shine-Johnson,* 2019-Ohio-1707, 2019 Ohio LEXIS 934. Shine-Johnson filed a delayed appeal because his counsel refused his instructions to raise more than one proposition law and requested him to raise all the grounds raised in the petition. It was denied by a divided panel. *State v. Shine-Johnson,* 156 Ohio St. 3d 1476. The 26(B) which was denied by a divided panel and challenged to the Supreme Court of

Ohio which also was denied by a *divided* panel. *State v. Shine-Johnson*, 155 Ohio St. 3d 1439, 2019-Ohio-1536, 2019 Ohio LEXIS 828.

Shine-Johnson argued that the District courts should have granted him a C.O.A. and its denial created a split between the Sixth, Seventh and the Fifth circuit courts. See e.g., *Acheson Hotels, LLC v. Laufer*, 2023 U.S. LEXIS 4657 the decision also creates a split amongst district courts within the Sixth Circuit. The Seventh Circuit Court of appeals in *Jones v. Basinger*, 635 F.3d 1030, found when a state appellate court is *divided* on the merits of the constitutional question, issuance of a certificate of appealability *should* ordinarily be *routine*. A district court could deny a certificate of appealability on the issue that divided the state court *only* in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable debate. Id; See also, the Fifth circuit in *Rhoades v. Davis*, 852 F.3d 422,429; *Jordan v. Fisher*, 576 U.S. 1071, 1076. ("If any judge on the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. §2253, the certificate will issue") (dissenting opinion of Sotomayor, joined by Justice Ginsburg and Justice Kagan). The state appellate court in this case was divided on the merits of the prosecutorial misconduct claim.

The Michigan district courts following the Seventh Circuit have granted COA's in *Williams v. Baumer*, 2011 U.S. Dist. LEXIS 111601; *Smith v. Winn*, 2017 U.S. Dist. LEXIS 82742 (reported); *Robinson v. Stegall*, 157 F. Supp. 2d 802, 820, fn. 7 & 824 (E.D. Mich. 2001); *Frazier v. Bell*, 2013 U.S. Dist. LEXIS 156483; *Galvan v. Stewart*, 2016 U.S. Dist. LEXIS 35907; *McMullan v. Booker*, 2012 U.S. Dist. LEXIS 23603;

Metcalfe v. Howard, 2022 U.S. Dist. LEXIS 61217. (The fact that three Michigan Supreme Court justices dissented in the *Plunkett* case...shows that jurists of reason could decide petitioner's sufficiency of evidence differently or that the issues deserve encouragement to proceed further); *Davidson v. Skipper,* 2022 U.S. Dist. LEXIS 160310. (The fact that Judge Gleicher would have granted reconsideration from the Michigan Court of Appeals' decision to affirm the conviction shows that jurists of reason could decide Petitioner's claim differently or that the issues deserve encouragement to proceed further.) The dissenting justices are reasonable jurist.

The district court after Shine-Johnson habeas proceeding created a conflict within the lower court on dissenting justices being reasonable jurist. The lower courts treated the eight dissenting justices in the State court as if they were wholly irrelevant and denied the COA, The Southern District court decided *Widmer v. Warden,* 2023 U.S. Dist. LEXIS 230874, (S.D. Ohio December 29, 2023) at ¶*68, concluding that because the petitioner had Supreme Court of Ohio justices dissented when denying certiorari of the direct and post-conviction appellate court decisions...Widmer has demonstrated that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327, (2003) (citing *Slack v. McDaniel,* 529 U.S. 473, (2000)). Id at 68. Shine-Johnson has done the same. Shine-Johnson has overcome every independent reason to deny the certificate of Appelability in the

district court and the *Widmer* decision creates a split within the Southern District Court.

The Sixth Circuit accepted review of those cases that held divided panels at the state appellate level. See, *McMullan v. Booker*, 761 F.3d 662; *Smith v. Winn*, 714 Fed. Appx. 577; *Galvan v. Stewart*, 705 Fed. Appx. 392: *Metcalfe v. Howard*, 2023 U.S. App. LEXIS 11065; *Davidson v. Artis*, 2023 U.S. App. LEXIS 20654, 2023 FED App. 0362N (6th Cir.); *Robinson v. Stegall,* 48 Fed. Appx. 111, 2002 U.S. App. LEXIS 19194. The Sixth Circuit denying Shine-Johnson's COA created a conflict within the district courts in Sixth Circuit and a conflict with the Fifth and Seventh Appellate Circuits.

Conclusion

This case is an ideal vehicle to review the lower court's denial of a COA that is debatable and erroneous to prevent the continuing departure from the accepted and usual course of the 2254 judicial proceedings where the Sixth Circuit Court of Appeals continues to sanction such a departure by its lower court on the issuance of COA as to call for this court exercises its supervisory powers. Therefore, for the above stated reasons this court should grant Certiorari.

Respectfully Submitted,

Joeseph Shine-Johnson, *Pro Se*,