No. 06-313

In The Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

WILLIAM WEAVER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL's more than 12,500 direct members – and 90 state, local, and international affiliate organizations with another 35,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges. NACDL is committed to preserving fairness within America's criminal justice system, including on matters related to the writ of habeas corpus and the application of the restrictions on habeas in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

SUMMARY OF ARGUMENT

Whatever the merits of Petitioner's contention that a federal court exceeds the bounds of AEDPA in overturning a capital sentence on the grounds that the prosecutor's penalty phase closing argument violated due process, this case is an inappropriate vehicle for resolving it for two reasons.

[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amicus* has made a monetary contribution to the preparation and submission of the brief.

First, the Eighth Circuit overturned Respondent's capital sentence in large part because the prosecutor's penalty phase closing argument violated the Eighth Amendment. However, Petitioner does not challenge the Eighth Amendment basis for the Eighth Circuit's decision – its challenge is limited to the due process issue. The Eighth Amendment thus furnishes a separate and independent ground for the Eighth Circuit's decision, and it will not be disturbed no matter the resolution of the due process question. Significantly, the Eighth Circuit's disposition of Respondent's Eighth Amendment challenge to the prosecutor's penalty phase close was not constrained by AEDPA, because the Missouri Supreme Court did not adjudicate that claim on the merits within the meaning of AEDPA. Even if Petitioner is correct on the due process question, the inapplicability of AEDPA to the Eighth Amendment claim further underscores the distinction between the Eighth Amendment and due process grounds on which the Eighth Circuit's decision rests.

Second, as suggested by this Court's decision just last week in *Lawrence v. Florida,* No. 05-8820, 2007 WL 505972 (U.S. Feb. 20, 2007), the district court erred when it dismissed Respondent's initial, pre-AEDPA habeas petition. Had the district court retained jurisdiction over that petition, AEDPA would not have applied to any of the claims in it, and there would have been no occasion for this Court to consider whether AEDPA barred the Eighth Circuit from overturning Respondent's death sentence.

For these reasons, the Court should dismiss the Petition as improvidently granted.

ARGUMENT

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE DUE PROCESS-RELATED QUESTION PRESENTED BECAUSE THE EIGHTH AMENDMENT FURNISHES A SEPARATE AND INDEPENDENT GROUND, UNCONSTRAINED BY AEDPA, FOR THE EIGHTH CIRCUIT'S DECISION.

This Court will dismiss a petition for certiorari as improvidently granted when it becomes apparent that "[d]ecision of the question upon which certiorari was granted may prove unnecessary because the judgment below was clearly correct on another ground." Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* 330 (8th ed. 2002); *see also The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). The Court should dismiss the Petition in this case as improvidently granted because the Eighth Amendment furnishes an alternative ground for the Eighth Circuit's decision, separate and independent from the due process question that is before this Court. Even if Petitioner is correct that the Eighth Circuit exceeded the confines of AEDPA in overturning Respondent's sentence on the grounds that the prosecutor's penalty phase closing argument violated due process, the decision's distinct Eighth Amendment predicate, which is not subject to AEDPA, would still stand.

A. The Eighth Circuit Affirmed The District Court's Grant Of Habeas Relief On Both Due Process And Eighth Amendment Grounds.

The Eighth Circuit held that the Missouri Supreme Court's conclusion that arguments made by the prosecutor

in his penalty phase close were "reasonable" was itself "unreasonable under existing United States Supreme Court precedents." Pet. App. A-15. The Eighth Circuit's decision makes clear that "the various applicable United States Supreme Court precedents" on which it relied, *id.* A-16, included both due process and Eighth Amendment precedents.

To be sure, the Eighth Circuit began its analysis by setting forth the relevant due process standard. It cited *Darden v. Wainwright*, 477 U.S. 168 (1986), for the proposition that "[a] prosecutor's argument violates due process if it 'infects[s] the trial with unfairness.'" Pet. App. A-12 (quoting *Darden*, 477 U.S. at 181). The Eighth Circuit went on, however, to apply not only the due process standard, but also this Court's Eighth Amendment standard requiring juries in capital cases to exercise discretion and make individualized determinations in deciding whether a particular defendant should be sentenced to death.

In structuring its analysis, the Eighth Circuit grouped the prosecutor's penalty phase arguments into the following five categories: "(1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs'; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')." Pet. App. A-13.

Applying this Court's precedents, the Eighth Circuit held that category (1), the soldier analogy argument, violated the Eighth Amendment. Citing *Zant v. Stephens*, 462 U.S. 862 (1983), the Eighth Circuit stated that "[d]escribing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment." *Id.* And citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Eighth Circuit stated that the soldier analogy "diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment. . . ." *Id.* (internal quotation marks omitted).

The Eighth Amendment also formed a critical foundation of the Eighth Circuit's conclusion that the category (3) arguments, which included the prosecutor's statement that "executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs,' " were unconstitutional. Pet. App. A-14-15. Here, the Eighth Circuit stated that the generalized "war on drugs" arguments were improper because "[t]he controlling Supreme Court precedent is well-settled and longstanding: the Eighth Amendment requires capital sentencing to be an individualized decision-making process." *Id.* (citing *Jones v. United States*, 527 U.S. 373, 381 (1999); *Buchanan v. Angelone*, 522 U.S. 269, 274-75 (1998); *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994); *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991); *Zant*, 462 U.S. at 879). This Eighth Amendment analysis of those arguments furnishes a stand-alone ground for the decision below holding them unconstitutional.[2]

[2] The Eighth Amendment also may have factored into the Eighth Circuit's holding that categories (2), (4), and (5) – statements about the prosecutor's personal belief in the death penalty, assertions that the

(Continued on following page)

B. Petitioner Seeks Review Of Only The Due Process Aspect Of The Eighth Circuit's Decision.

Even though the Eighth Circuit expressly relied on both due process and Eighth Amendment grounds throughout its opinion, Petitioner sought a writ of certiorari on the following question presented:

> Since this court has neither held a prosecutor's penalty phase closing argument to violate *due process*, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory"?

Pet. i (emphasis added). While the Petition listed the Eighth Amendment, as well as the Fourteenth Amendment, as a constitutional provision involved, Pet. 1, and noted that the Eighth Circuit cited Eighth Amendment precedents, *id*. 11, Petitioner's merits brief unambiguously argues only the due process question and dispenses with any challenge to the Eighth Amendment portion of the Eighth Circuit's decision. The Table of Authorities to that brief does not even list the Eighth Amendment as a

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prosecutor had a special position of authority, and arguments designed to appeal to the jury's emotions, respectively – were unconstitutional. Pet. App. A-14. The Eighth Circuit did not specify the nature of the constitutional violation worked by those statements. However, some of the language it used to describe the constitutional problem with categories (2), (4), and (5) – "contrary to a reasoned opinion by the jury," and "against a rational decision by the jury" – connotes Eighth Amendment principles. *Id.*

relevant constitutional provision. Pet. Br. at v. Further, Petitioner's merits brief characterized this case as implicating only due process: "[w]hen the court of appeals did refer to this Court's cases, it frequently referred to cases that did not address *due process claims like Weaver's, but Eighth Amendment precedent not directly on point*." Pet. Br. at 28-29 (emphasis added).

In fact, Petitioner even faulted the Eighth Circuit for relying on "United States Supreme Court decisions construing the Eighth Amendment Cruel and Unusual Punishments Clause, not the Fourteenth Amendment's Due Process Clause." Pet. 11; *see also id.* 12 (arguing that *Caldwell* is inapposite because it "involved an Eighth Amendment challenge to a prosecutor's penalty phase closing argument, not a Fourteenth Amendment due process challenge to the penalty phase closing argument"). Petitioner's criticism is misplaced. The Eighth Circuit relied on the Eighth Amendment because Respondent advanced an Eighth Amendment challenge, in addition to his due process challenge, to the prosecutor's penalty phase close in briefing before the Missouri Supreme Court. *See infra* pages 10-11. In short, Eighth Amendment claims were very much a part of this case. Thus, it was entirely appropriate for the Eighth Circuit to address them.[3]

[3] The amicus brief of Criminal Justice Legal Foundation in support of Petitioner also wrongly upbraids the Eighth Circuit for considering Eighth Amendment issues. CJLF Br. at 19 (Eighth Amendment was "of no relevance to Weaver's due process claim respecting the prosecutor's penalty phase remarks").

C. The Eighth Amendment Question, Which Is Not Fairly Included In The Due Process Question Presented In This Case, Provides An Independent Rationale For The Eighth Circuit's Decision.

Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. Rule 14.1(a). To be "fairly included" in a petition for certiorari, a question must be more than merely "related" or "complementary" to the main issue raised. *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992). Even if two questions "might be subsidiary to a question embracing both," a question is not "fairly included" in another if the two issues "exist side by side, neither encompassing the other." *Id.* That is the case here.

As indicated above, a prosecutor's closing argument in a capital case violates due process if it "infect[s] the trial with unfairness." *Darden*, 477 U.S. at 181. A closing argument also violates the Eighth Amendment if, as indicated above, it eliminates "the responsible and reliable exercise of sentencing discretion" by relieving the jury of responsibility for its decision, *Caldwell*, 472 U.S. at 328-29, or preventing the jury from giving individualized consideration to the particular circumstances of the case, *Romano*, 512 U.S. at 7. Those are distinct standards, and while due process and Eighth Amendment attacks on a prosecutor's closing argument may be related in a given case, they also can stand alone. *See, e.g.*, *Newlon v. Armontrout*, 885 F.2d 1328, 1336 n.9 (8th Cir. 1989) ("Because we find the closing argument, when viewed in its entirety, violates due process, we need not address Newlon's eighth amendment *Caldwell* claims. . . ."). Simply put, a closing argument that violates due process does not necessarily violate the Eighth Amendment, and vice-versa. Indeed,

Petitioner has conceded that Respondent's Eighth Amendment claims are distinct from the due process claims. *See, e.g.*, Pet. 13 ("The scope of review for an Eighth Amendment claim under *Caldwell* is separate from the concerns of the due process clause.").

This Court has admonished that "faithful application of Rule 14.1(a) . . . helps ensure that [it is] not tempted to engage in ill-considered decisions of questions not presented in the petition." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). Avoiding Rule 14.1(a) limitations, Petitioners in similar capital sentencing cases have explicitly raised both due process and Eighth Amendment claims in the question presented. For instance, in *Darden*, the question presented asked: "Did the prosecution's calculated, unprofessional and inflamatory [sic] closing argument rob the determination of petitioner's guilt of the fundamental fairness required by due process and deprive the determination of his sentence of the reliability required by the eighth amendment?" Pet. Br., 1985 WL 669179 (Oct. 28, 1985). The question presented in *Romano* was similarly comprehensive: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?" Pet. Br., 1993 WL 638239 (Dec. 22, 1993), at *i.

Here, by contrast, Petitioner has disavowed any challenge to the court of appeals' rulings that the prosecutor's "soldier" analogy and "war on drugs" arguments violated the Eighth Amendment. Those rulings thus would be unaffected by this Court's resolution of the due process question presented in the Petition.

D. Because The Missouri Supreme Court Did Not Adjudicate Weaver's Eighth Amendment Claims On The Merits, AEDPA's Standard Of Review Does Not Apply To Those Claims.

Under AEDPA, a federal court may issue a writ of habeas corpus where the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). However, the AEDPA standard applies only when the claim in question "was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). When a state court did not adjudicate a claim on the merits, the federal court applies the general, less deferential habeas standard in 28 U.S.C. § 2243. *Muth v. Frank*, 412 F.3d 808, 814 (7th Cir. 2005). Here, the AEDPA standard does not apply to Weaver's Eighth Amendment claims because the Missouri Supreme Court did not adjudicate them on the merits.

After being convicted of first-degree murder and sentenced to death in Missouri state court, Weaver raised 21 claims of error on appeal to the Missouri Supreme Court. *State v. Weaver*, 912 S.W.2d 499, 507 (Mo. 1995). Claim IV argued that the prosecutor's improper arguments during the guilt and penalty phases deprived Respondent "of his rights to due process and freedom from cruel and unusual punishment, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 10 and 21 of the Missouri Constitution." Defendant's Brief to the Missouri Supreme Court at 17 ["Mo. Br."]; *see also id.* at 59 (prosecutorial arguments "deprived Mr. Weaver of his Federal and State Constitutional rights to due process and freedom

from cruel and unusual punishment"). In summarizing this argument in his brief to the Missouri Supreme Court, Respondent identified four categories of improper comments made by the prosecutor: (1) expressions of personal opinion that, as the elected prosecuting attorney, he would not have sought the death penalty unless it were warranted; (2) personal attacks on defense counsel; (3) appeals to the jurors' personal fears; and (4) suggestions of the prosecutor's knowledge of matters outside the record. *Id.* at 17, 59.

In the body of the brief, Respondent provided separate sections and headings marked "A. Position As The Elected Prosecutor" and "B. Attacks On Defense Counsel." *Id.* at 60, 64. Section A included Respondent's objection to the prosecutor's analogy of jurors to soldiers and references to graphic scenes in the movie *Patton*. *Id.* at 62. Section B discussed prosecutorial arguments implying that defense counsel had suborned perjury and fabricated Respondent's defense. *Id.* at 64-67.

Respondent addressed the remaining prosecutorial comments in a section titled "C. Other Improper Arguments." *Id.* at 67. These remaining prosecutorial statements, Respondent argued, "continued to remove reason from the sentencing decision." *Id.* at 67. They encompass matters lacking evidentiary support, including the prosecutor's arguments that Respondent would have shot a police officer or witness if he had the opportunity, that the death penalty is a deterrent, and that the prosecutor could have presented victim impact evidence. *Id.* at 67-68. Respondent also argued that the prosecutor impermissibly urged jurors to vote for death to advance the "War on Drugs" and help protect the community. *Id.* at 68.

The Missouri Supreme Court's treatment of Respondent's challenges to the prosecutor's argument mirrored the organization of Respondent's brief. Section IV.A of the Missouri Supreme Court's opinion discussed the prosecutor's comments about his elected position as it affected his decision to seek the death penalty. 912 S.W.2d at 512-13. Section IV.B of the opinion addressed the prosecutor's remarks about defense counsel. *Id.* at 513-14. Finally, in Section IV.C, the Missouri Supreme Court addressed the prosecutor's remaining penalty phase arguments. *Id*. at 514.

Nowhere did the Missouri Supreme Court address Respondent's Eighth Amendment claim, or even indicate that it recognized that Respondent had raised *any* constitutional claims. For instance, in Section IV.A, without mentioning Respondent's soldier analogy argument, the Missouri Supreme Court simply concluded that the trial court's rulings on the prosecutor's remarks were not an abuse of discretion. 912 S.W.2d at 513. The state court did not rely on or cite any Eighth Amendment cases. Nor did it invoke any Eighth Amendment concerns such as the need for reliability and individualized determinations in sentencing. *Id.* at 512-14.

Similarly, in Section IV.C, the Missouri Supreme Court addressed only "the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support." 912 S.W.2d at 514. The Missouri Supreme Court explicitly referred to the prosecutor's arguments that Respondent would have shot the arresting officer and a prosecution witness if he had the opportunity. The Court then stated: "Finally, he argued that the death penalty would be a deterrent." *Id.* It mentioned no other arguments. *Id.* It concluded that "these arguments are reasonable" because "[t]he fact that the crime had been planned

for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future." *Id.* Thus, the Missouri Supreme Court directly addressed and rejected Respondent's contention that the prosecutor argued matters lacking evidentiary support.

By contrast, the Missouri Supreme Court gave no indication that it considered, even in passing, whether the prosecutor's arguments on furthering the "war on drugs" and protecting the community violated either due process or the Eighth Amendment. It therefore failed to adjudicate what Judge Bye, in his concurrence below, deemed "Weaver's most compelling constitutional claim." Pet. App. A-19 (Bye, J., concurring in the result). As the Eighth Circuit observed, "[i]t is unclear which precedents the Missouri Supreme Court applied." *Id*. at A-15-16. What is clear, however, is that the Missouri Supreme Court did *not* apply any Eighth Amendment precedents or reasoning.

Because the Missouri Supreme Court apparently failed to recognize the nature of Respondent's constitutional challenge to the prosecutor's closing argument, it did not adjudicate the Eighth Amendment claim on the merits. *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003) (AEDPA standard of review does not apply where "the state court misunderstood the nature of the claim, and therefore did not adjudicate that particular claim on the merits"). Although even an unreasoned, summary disposition may constitute an "adjudication on the merits," "[i]f a state court specifically identifies a claim it must identify and review the correct claim," in order for the state court's action to reflect an adjudication on the merits for AEDPA purposes. *Muth*, 412 F.3d at 815 n.5; *see also Billings v.*

Polk, 441 F.3d 238, 252 (4th Cir. 2006) (no adjudication on the merits where North Carolina Supreme Court "did not consider – or at least there is no indication that it considered" petitioner's Sixth Amendment claim); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (no adjudication on the merits because Pennsylvania Supreme Court "recharacterized" petitioner's constructive denial of counsel claim as ineffective assistance of counsel claim); *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) (no adjudication on the merits where Delaware court "did not pass on [petitioner's] Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so"). Accordingly, AEDPA's standard of review does not apply to the Eighth Amendment predicate for the Eighth Circuit's decision overturning Respondent's death sentence.

In the end, Petitioner's effort to dodge the substantial Eighth Amendment issues percolating throughout this case is unavailing. To determine whether the death sentence should stand, a meaningful review of the Missouri Supreme Court's decision would require this Court to do what the Eighth Circuit did: consider both the due process and Eighth Amendment challenges made by Respondent to each of the prosecutorial statements at issue, after determining the proper standard of review applicable to each constitutional challenge to each statement, as well as the possible interaction between the two constitutional provisions. The pre-AEDPA standard of review applicable to Respondent's Eighth Amendment claims would greatly complicate this task, even if Petitioner is right and AEDPA applies to the due process claims.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING WHETHER THE EIGHTH CIRCUIT EXCEEDED AEDPA BOUNDS BECAUSE TO THE EXTENT THAT AEDPA EVEN APPLIES, IT DOES SO AS A RESULT OF THE DISTRICT COURT'S IMPROPER DISMISSAL OF RESPONDENT'S INITIAL, PRE-AEDPA HABEAS PETITION.

This Court has held that "whether AEDPA applies to a state prisoner turns on what was before a federal court on the date AEDPA became effective. If, on that date, the state prisoner had before a federal court an application for habeas relief seeking an adjudication on the *merits* of the petitioner's claims, then amended § 2254(d) does not apply." *Woodford v. Garceau*, 538 U.S. 202, 207 (2003). Here, on AEDPA's effective date, Respondent already had before the district court a habeas petition containing fully exhausted state court claims. The district court wrongly dismissed that initial petition, however, instead of staying it, pending the filing and disposition of a petition for a writ of certiorari in this Court. Had the district court retained jurisdiction pending certiorari proceedings, AEDPA would not have applied to any of Respondent's claims. Under these circumstances, this case is an inappropriate vehicle to resolve whether a federal court exceeds AEDPA's strictures when it overturns a capital sentence on the grounds that the prosecutor's penalty phase closing argument violated due process (or the Eighth Amendment for that matter).

A. Respondent's Pre-AEDPA Habeas Petition.

Respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the district court for the Eastern

District of Missouri on April 18, 1996, six days before AEDPA's effective date. NACDL App. 1-2. Before filing the petition, Respondent had received an extension of time, until June 21, 1996, to file a petition for writ of certiorari in this Court, and he indicated in the petition that he intended to do so. *Id*. at 14.

On May 3, 1996, the district court *sua sponte* stayed the habeas proceedings "pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver can file a petition for writ of certiorari." NACDL App. 16. Observing that the exhaustion doctrine does not require a prisoner to seek a writ of certiorari from the United States Supreme Court, *id.* at 15, the district court reasoned that "until Weaver actually files a petition for writ of certiorari, *his state claims are exhausted as they have been ruled upon by Missouri's highest court*." *Id.* at 16 (emphasis added). However, the district court also concluded that if Respondent filed a petition for certiorari, his § 2254 petition would be "premature" and would therefore be dismissed without prejudice. *Id.*

Respondent moved for reconsideration of the May 3 Order, requesting that the district court allow his § 2254 petition to remain pending while Respondent pursued a writ of certiorari. NACDL App. 9. The district court denied the motion because it thought "it lack[ed] jurisdiction of the instant action until the Supreme Court has had an opportunity to pass upon the matter, assuming that Weaver files a petition for writ of certiorari as he has indicated." *Id.* at 10. Respondent also moved for immediate appointment of counsel, which the district court denied without prejudice because the habeas proceedings had been stayed. *Id.*

On July 1, 1996, after being informed that Respondent had filed a petition for a writ of certiorari in the Supreme Court, the district court dismissed Respondent's § 2254 petition without prejudice. NACDL App. 13. Respondent filed a notice of appeal on July 29, 1996, as well as a motion for a certificate of probable cause, or in the alternative, a certificate of appealability. *Id.* at 1. Respondent sought to appeal the district court's dismissal of his habeas petition and denial of his request for appointed counsel. *Id.* In an order filed on August 1, 1996, the district court stated that the question before it was "whether the certificate of appealability provision of the AEDPA applies to a habeas petition *filed before its effective date*." *Id.* at 3 (emphasis added). It held that AEDPA's certificate of appealability requirement did apply, and denied Respondent's motion for a certificate of appealability. *Id.* at 5.

B. The District Court Abused Its Discretion In Dismissing Respondent's Pre-AEDPA Habeas Petition.

The district court's dismissal of Respondent's pre-AEDPA petition was an abuse of discretion. This Court has held that state petitioners "need not petition for certiorari to exhaust state remedies." *Lawrence*, 2007 WL 505972, at *4; *see also Fay v. Noia*, 372 U.S. 391, 435-438 (1963), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977). Instead of putting Respondent (whom it knew was not represented by habeas counsel) to the Hobson's choice of either pursuing a writ of certiorari or preserving his right to pre-AEDPA review, the district court should have stayed the habeas petition while Respondent's petition for certiorari was pending.

In the analogous context of tolling AEDPA's one-year statute of limitations for seeking federal habeas relief from a state-court judgment, this Court has indicated that district courts should stay federal habeas petitions while petitions for certiorari are pending. Just last week in *Lawrence*, for instance, this Court concluded that "few practical problems" would result from requiring a state prisoner to file a federal habeas petition while a certiorari petition is pending. 2007 WL 505972, at *5. This Court reasoned that, because it rarely grants review from state postconviction proceedings, "the likelihood that the District Court will duplicate work or analysis that might be done by this Court if we granted certiorari to review the state postconviction proceeding is quite small." *Id*. Most fundamentally for the purposes of this case, "*a district court concerned about duplicative work can stay the habeas application until this Court resolves the case, or, more likely, denies the petition for certiorari.*" *Id.* (emphasis added).

Similarly, in *Rhines v. Weber*, 544 U.S. 269 (2005), this Court approved district courts' limited use of "stay and abeyance" procedures when confronted with a "mixed" habeas petition containing both exhausted and unexhausted claims. *Id.* at 277. The *Rhines* Court held that a district court likely abuses its discretion by dismissing a mixed petition "if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that [the petitioner] engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition." *Id.* at 278; *see also Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Stevens, J., concurring

in part and concurring in the judgment) ("[I]n our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies."). Stay and abeyance was even more warranted here because Respondent had already exhausted his state remedies, and no comity reasons prevented the district court from retaining jurisdiction over a properly filed petition.

This Court should dismiss the Petition as improvidently granted because the district court's procedural error in dismissing the pre-AEDPA habeas petition is potentially outcome-determinative. Indeed, as Judge Bowman recognized in his dissent below, the possible application of AEDPA is the only factor that distinguishes Respondent's case from prior Eighth Circuit cases (one of which involved Respondent's co-defendant) where habeas relief was granted on the grounds of improper closing argument by the same prosecutor whose close is at issue here. As Judge Bowman put it:

> Were it not for the AEDPA standard of review, I might agree with the result reached by the Court today. Indeed, the outcome was different – where we did not apply the AEDPA standard – in our § 2254 review of Weaver's co-defendant's death sentence on grounds of improper prosecutorial closing argument in the penalty phase. *Shurn v. Delo*, 177 F.3d 662, 665-67 (8th Cir.), *cert. denied*, 528 U.S. 1010, 120 S.Ct. 510, 145 L.Ed.2d 395 (1999); *see also Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989) (affirming pre-AEDPA grant of the writ on grounds of improper prosecutorial argument), *cert. denied*, 497 U.S. 1038, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990). But under AEDPA,

> we are not empowered to grant the writ even though we may believe that the state court got it wrong.

Pet. App. A-21 (Bowman, J., concurring in part and dissenting in part).

In sum, on AEDPA's effective date, Respondent had before the federal district court a habeas petition containing only exhausted claims that were virtually identical to the claims the Eighth Circuit found meritorious in *Shurn* and *Newlon*. The imposition of a death sentence on Respondent – and the creation of precedent from this Court governing future post-AEDPA challenges to prosecutorial closing argument – should not turn on the fortuity that the district court erred in denying a stay and dismissing Respondent's pre-AEDPA petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be dismissed as improvidently granted.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER, Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX, Respondent.	)	

ORDER

(Filed Aug. 1, 1996)

This matter is before the Court on petitioner William Weaver's ("Weaver") motion for leave to proceed *in forma pauperis* on appeal and motion for a certificate of probable cause, or in the alternative, certificate of appealability, filed on July 29, 1996. Weaver also filed a notice of appeal on July 29, 1996.

Weaver seeks to appeal this Court's July 1, 1996 Order, which dismissed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 without prejudice, as premature. Weaver contends the Court's dismissal of his petition as premature violated his constitutional rights. Weaver also contends that this Court erred in denying his motion for appointment of counsel without prejudice. Weaver asserts the Court was required to appoint him counsel pursuant to 21 U.S.C. § 848(q) (4) (B) and that the denial of his motion for counsel was a constitutional violation.

On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C.

§ 2254. Weaver indicated in his petition for writ of habeas corpus that he intended to pursue writ of certiorari to the United States Supreme Court concerning his adverse state court decision. Weaver also indicated that he had received an extension of time from United States Supreme Court Justice Clarence Thomas to file a petition for writ of certiorari to the United States Supreme Court on or before June 21, 1996. As a result, on May 3, 1996 this Court stayed the instant action pending either (i) Weaver's filing of a petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver could file a petition for writ of certiorari. Because the action was stayed the Court found Weaver did not require immediate legal counsel. The Court therefore denied Weaver's motion for appointment of counsel without prejudice.[1] *See* Order, June 11, 1996.

On June 28, 1996 the Court received a letter from Weaver's counsel in his state court proceedings, which stated that Weaver had filed a petition for writ of certiorari with the United States Supreme Court. Consequently, the Court dismissed Weaver's § 2254 petition without prejudice. The Court recognized that in the event a state prisoner chooses to pursue writ of certiorari to the United States Supreme Court, he must first exhaust that remedy before filing a federal habeas corpus petition. *Thomas v.*

[1] The Court notes that on June 3, 1996 Weaver filed an Application for Writ of Prohibition or Mandamus with the United States Court of Appeals for the Eighth Circuit, asserting that this Court erred in not appointing him counsel. On the same date Weaver also filed motions with the Court of Appeals to proceed *in forma pauperis* and for appointment of counsel. On June 25, 1996 the Court of Appeals denied Weaver's petition for writ of mandamus and his motions to proceed *in forma pauperis* and for appointment of counsel.

Howard, 303 F. Supp. 1385, 1386 (E.D. Ky. 1969). Moreover, a federal habeas corpus petition which contains claims that have not been fully exhausted must be dismissed. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982) (discussing requirement that district court dismiss habeas petition which contains unexhausted state claims); *see also Thomas,* 303 F. Supp. at 1386 (denial of federal habeas petition because a petition for writ of certiorari pending before the United States Supreme Court). Accordingly, the Court dismissed Weaver's petition without prejudice to refiling.

Weaver now moves the Court for a certificate of probable cause for appeal, or in the alternative, a certificate of appealability in connection with this Court's dismissal of his habeas petition without prejudice. Recently, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended the procedures by which habeas petitioners must seek appellate review of district court decisions. Section 102 of the AEDPA amends 28 U.S.C. § 2253, which had required a certificate of probable cause to appeal the denial of a habeas petition. Now, petitioners must request a "certificate of appealability." Weaver filed his habeas petition on April 18, 1996, before the AEDPA's effective date of April 24, 1996. Thus, the threshold issue before the Court is whether the certificate of appealability provision of the AEDPA applies to a habeas petition filed before its effective date.

This Court concludes that the AEDPA does apply to Weaver's petition and will review Weaver's alternative motion for a certificate of appealability. Although the title of the required certificate has been changed, the statutory standard for issuing a certificate of appealability is

phrased in the identical language previously used to determine whether to issue a certificate of probable cause. *See Reyes v. Keane,* ___ F.3d ___ 1996 WL 420347 at *4 (2d Cir. July 29, 1996) (noting that both a certificate of probable cause and certificate of appealability require a "substantial showing"); *Lennox v. Evans,* 87 F.3d 431, 434 (10th Cir. 1996) (same); *United States v. Campos,* ___ F. Supp. ___ 1996 WL 363105 at *5 (W.D. Tenn. June 19, 1996). Thus, because the same standard applies, application of § 102 of the Act to Weaver's request for a certificate of probable case is not a retroactive application of the statue. *Lennox,* 87 F.3d at 434.

28 U.S.C. § 2253(c), which formerly required a certificate of probable cause, now requires a certificate of appealability. The new section provides:

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

28 U.S.C. § 2253(c)(1)(A).

The new section further provides:

> A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c)(1)(B).

This statutory language requiring a "substantial showing" simply incorporates the language used by the Supreme Court in *Barefoot v. Estelle,* 463 U.S. 880 1983), which articulated the standard for determining whether to

issue a certificate of probable cause. *United States v. Campos,* 1996 WL 363105 at *5.

The Supreme Court stated that "probable cause requires something more than the absence of frivolity and that the standard is a higher one than the 'good faith' requirement of § 1915." *Barefoot v. Estelle,* 463 U.S. at 893. "A certificate of probable cause requires petitioner to make a showing of the denial of a federal right." *Id.* A "substantial showing" of the denial of a federal right does not require the petitioner to show that he should prevail on the merits. *Id.* at n.4. Rather, the petitioner must demonstrate that (i) the issues are debatable among jurists of reason; (ii) a court could resolve the issues in a different manner; or (iii) the questions are "adequate to deserve encouragement to proceed further." *Id.* (citations omitted).

In this case, Weaver cannot establish the denial of federal right. Weaver's petition for writ of habeas corpus was properly dismissed without prejudice to permit him to fully exhaust his state remedies. Weaver has made no showing that a reasonable jurist could disagree with the Court's conclusions or that the Court could have resolved the issues in a different manner. To the contrary, the issues which Weaver seeks to appeal in connection with the dismissal of his habeas petition are well established against his position. *See Rose v. Lundy,* 455 U.S. at 510 (discussing requirement of district court to dismiss habeas petition which contains unexhausted state claims); *Victor v. Hopkins,* ___ F.3d ___ No. 95-2801, slip. op. at 11 (8th Cir. July 19, 1996). The Court therefore finds that Weaver's claims are without merit and his motion for certificate of appealability should be denied.

The Court notes that 28 U.S.C. § 2253(c)(1), which addresses the issuance of a certificate of appealability, refers to a "circuit justice or judge", while the accompanying amendment to Rule 22 of the Federal Rules of Appellate Procedure refers to action by the district court. Consequently, confusion surrounds the issue whether Congress intended that only the federal appellate courts issue a certificate of appealability. *See, e.g., United States v. Campos,* 1996 WL 363105 at *5 (noting that it is not entirely clear whether a circuit judge or district judge should address the appealability of a habeas petition); *Geiger v. Morton,* 1996 WL 361474 (D.N.J. June 24, 1996) (assuming that the phrase "circuit justice or judge" is intended to include district judges); *Houchin v. Zavaras,* 924 F. Supp. 115, 116 (D. Colo. 1996) (concluding that 28 U.S.C. § 2253 does not prohibit district judges from addressing the appealability of a habeas petition); *cf. Parker v. Norris,* ___ F. Supp. ___ 1996 WL 327488 (E.D. Ark. June 14, 1996) (concluding the district court lacked the ability to rule on petitioner's motion for certificate of appealability). Thus, to the extent a district court has the authority to rule on the issuance of a certificate of appealability, this Court will deny Weaver's motion as the Court concludes his claims are without merit. In addition, the Court will grant plaintiff's motion for leave to proceed *in forma pauperis* on appeal.

Accordingly,

IT IS HEREBY ORDERED that petitioner's alternative motion for a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that petitioner's motion for certificate of probable cause for appeal is **DENIED as moot.**

IT IS FURTHER ORDERED that plaintiff's motion for, leave to proceed *in forma pauperis* on appeal is **GRANTED.**

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 1st day of August, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER, Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX, Respondent.	)	

ORDER

(Filed Jun. 11, 1996)

This matter is before the Court on petitioner William Weaver's motion for reconsideration of the Court's May 3, 1996 Order and motion for appointment of counsel.

Petitioner William Weaver was convicted of first degree murder and sentenced to death. Weaver's conviction and death sentence were affirmed by the Supreme Court of Missouri on December 19, 1995. *State of Missouri v. Weaver,* 912 S.W.2d 499, 523 (Mo. banc 1995). On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Prior to Weaver's commencement of this action he received an extension of time from United States Supreme Court Justice Clarence Thomas to file a petition for writ of certiorari to the United States Supreme Court. Weaver's petition for writ of certiorari to the United States Supreme Court is due on or before June 21, 1996. Weaver indicates in his petition for writ of habeas corpus before this Court that he intends to pursue writ of certiorari to the United States Supreme Court.

On May 3, 1996 the Court stayed this case pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver can file a petition for writ of certiorari. Weaver was ordered to notify the Court in writing by June 28, 1996, whether he has filed a petition for writ of certiorari with the United States Supreme Court, or obtained a further extension of time in which to do so. The Court's May 3, 1996 Order explained that if Weaver files a petition for writ of certiorari with the United States Supreme Court, this case will be dismissed without prejudice to refiling, as Weaver must pursue his petition for writ of certiorari to completion before filing a habeas petition. *Thomas v. Howard,* 303 F. Supp. 1385, 1386 (E.D. Ky. 1969). If Weaver does not file a petition for writ of certiorari, the stay will be lifted and a briefing schedule will be established.

Weaver moves the Court to reconsider its May 3, 1996 Order and allow his § 2254 petition to remain pending before this Court while he pursues writ of certiorari in the United States Supreme Court.

As the Court previously noted in its May 3, 1996 Order, although a state prisoner is not required to apply for certiorari with the United States Supreme Court, he may nevertheless seek certiorari prior to filing a federal habeas corpus petition. In the event a state prisoner chooses to pursue writ of certiorari, he must first exhaust that remedy before filing a federal habeas corpus petition. *Thomas,* 303 F. Supp. at 1386. Moreover, a federal habeas corpus petition which contains claims that have not been fully exhausted must be dismissed without prejudice. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982) (discussing requirement of district court to dismiss habeas petition,

which contains unexhausted state claims); *see also, Thomas,* 303 F. Supp. at 1386 (denial of federal habeas petition because a petition for writ of certiorari pending before the United States Supreme Court). Thus, this Court concludes it lacks jurisdiction of the instant action until the Supreme Court has had an opportunity to pass upon the matter, assuming that Weaver files a petition for writ of certiorari as he has indicated. *See, e.g., Rose,* 455 U.S. at 518. The Court therefore will deny Weaver's motion for reconsideration.

Weaver also moves the Court to immediately appoint him counsel pursuant to 21 U.S.C. § 848(q) (4) (B).[1] In this instance, the Court finds that because proceedings in this action have been stayed Weaver does not require immediate legal counsel. The Court therefore will deny Weaver's motion without prejudice. However, if Weaver does not file a petition for writ of certiorari with the Supreme Court, the stay will be lifted and Weaver's motion for appointment of counsel will be promptly reconsidered on the Court's own motion.

Accordingly,

IT IS HEREBY ORDERED that Weaver's motion for reconsideration of the Court's Order of May 3, 1996 is **DENIED**. [Doc. 6]

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[1] 21 U.S.C. § 848(q)(4)(B) provides that, "In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation . . . shall be entitled to appointment of one or more attorneys. . . ."

IT IS FURTHER ORDERED that Weaver's motion for appointment of counsel is **DENIED without prejudice.** [Doc. 7]

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 11th day of June, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER, Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX, Respondent.	)	

ORDER

(Filed Jul. 1, 1996)

This matter is before the Court on petitioner William Weaver's response to the Court's May 3, 1996 Order.

On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On May 3, 1996 the Court stayed this case pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver could file a petition for writ of certiorari. Weaver was ordered to notify the Court in writing by June 28, 1996, whether he had filed a petition for writ of certiorari with the United States Supreme Court, or obtained a further extension of time in which to do so. The Court's May 3, 1996 Order explained that if Weaver filed a petition for writ of certiorari with the United States Supreme Court, this case would be dismissed without prejudice to refiling, as Weaver must pursue his petition for writ of certiorari to completion before filing a habeas petition. *Thomas v. Howard,* 303 F. Supp. 1385, 1386 (E.D. Ky. 1969); *see also Rose v. Lundy,* 455 U.S. 509, 510 (1982)

(discussing requirement of district court to dismiss habeas petition, which contains unexhausted state claims).

On June 28, 1996 the Court received a letter from Weaver's counsel in his state court proceedings, which stated Weaver had filed a petition for writ of certiorari with the United States Supreme Court. Weaver's petition for writ of certiorari is currently pending before the Supreme Court. Consequently the Court will dismiss Weaver's habeas petition without prejudice.[1] The Court notes that dismissal of this action without prejudice does not preclude Weaver from filing another petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 following exhaustion of his state proceedings. Accordingly,

IT IS HEREBY ORDERED that the Clerk of the Court receive and file petitioner William Weaver's Petition for Writ of Habeas Corpus without payment of the required filing fee. *See* 28 U.S.C. § 1915(a).

IT IS FURTHER ORDERED that petitioner William Weaver's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is **DISMISSED without prejudice** as premature.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 1st day of July, 1996.

[1] The Court will grant Weaver's motion to proceed *in forma pauperis*. Accordingly, the Clerk of the Court will be ordered to file Weaver's petition for writ of habeas corpus preceding the dismissal of the petition without prejudice.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX,	)	
Respondent.	)	

ORDER

(Filed May 3, 1996)

This matter is before the Court *sua sponte*.

Petitioner William Weaver was convicted of first degree murder and sentenced to death. Weaver's conviction and death sentence were affirmed by the Supreme Court of Missouri on December 19, 1995. *State of Missouri v. Weaver,* 912 S.W.2d 499, 523 (Mo. banc 1995). On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Prior to Weaver's commencement of this action he received an extension of time from United States Supreme Court Justice Clarence Thomas to file a petition for writ of certiorari to the United States Supreme Court. Weaver's petition for writ of certiorari to the United States Supreme Court is due on or before June 21, 1996. Weaver indicates in his petition for writ of habeas corpus before this Court that he intends to pursue writ of certiorari to the United States Supreme Court.

"The particular factual and legal basis for the claim asserted in a state prisoner's federal habeas petition must

have been brought to the attention of the state courts in order to satisfy the exhaustion of state remedies requirement of 28 U.S.C. § 2254(b)." *Forest v. Delo,* 52 F.3d 716, 719 (8th Cir. 1995) (citing *Vasquez v. Hillery,* 474 U.S. 254, 257 (1986)). The exhaustion doctrine, however, does not require a prisoner whose sentence has been affirmed by the highest state court to seek certiorari from the United States Supreme Court before seeking habeas corpus relief in federal district court. *Fay v. Noia,* 372 U.S. 391, 435-38 (1963); *Makarewicz v. Scafati,* 438 F.2d 474, 477 (1st Cir. 1971). Although a state prisoner is not required to apply for certiorari with the United States Supreme Court, he may nevertheless seek certiorari prior to filing a federal habeas corpus petition. In the event a state prisoner chooses to pursue writ of certiorari, he must first exhaust that remedy before filing a federal habeas corpus petition. *Thomas v. Howard,* 303 F. Supp. 1385, 1386 (E.D. Ky. 1969). Moreover, a federal habeas corpus petition which contains claims that have not been fully exhausted must be dismissed. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982) (discussing requirement of district court to dismiss habeas petition, which contains unexhausted state claims); *see also, Thomas,* 303 F. Supp. at 1386 (denial of federal habeas petition because a petition for writ of certiorari pending before the United States Supreme Court).

In the present case, Weaver has exhausted his state remedies and has received an adverse decision from the Supreme Court of the State of Missouri. Weaver has indicated, however, that he intends to file a petition for writ of certiorari with the United States Supreme Court. Weaver has received an extension of time to file a petition for writ of certiorari, which is due on or before June 21, 1996. The Court concludes that Weaver's petition for writ

of habeas corpus pursuant to 28 U.S.C. § 2254 is premature if Weaver chooses to pursue certiorari with the United States Supreme Court. *Thomas,* 303 F. Supp. at 1386. However, until Weaver actually files a petition for writ of certiorari, his state claims are exhausted as they have been ruled upon by Missouri's highest court.

Therefore, the Court on its own motion will stay the proceedings before this Court pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver can file a petition for writ of certiorari. The Court will order Weaver to notify the Court in writing by June 28, 1996, whether he has filed a petition for writ of certiorari with the United States Supreme Court, or obtained a further extension of time in which to do so. If Weaver files a petition for writ of certiorari with the United States Supreme Court, this Court will dismiss Weaver's instant petition without prejudice as Weaver must pursue his petition for writ of certiorari to completion before filing a habeas petition. *Thomas,* 303 F. Supp. at 1386. If Weaver does not file a petition for writ of certiorari, the Court will lift the stay and proceed to establish a briefing schedule on the instant petition.

Accordingly,

IT IS HEREBY ORDERED that this action is **STAYED** pending further order of the Court, for the reasons set forth herein.

IT IS FURTHER ORDERED that petitioner William Weaver shall notify the Court by written memorandum filed no later than June 28, 1996, whether he has filed a petition for writ of certiorari with the United States

Supreme Court, or obtained an extension of time in which to do so.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 3rd day of May, 1996.