No. 21-6580

IN THE SUPREME COURT OF THE UNITED STATES

Kevin Johnson,

Petitioner,

v.

Troy Steele, Warden,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Capital Case

Questions Presented

1. Should this Court require federal courts of appeal to issue written opinions when declining to issue a certificate of appealability even though no such requirement exists in statute or this Court's precedent?
2. Did the lower courts correctly decline to issue a certificate of appealability on Johnson's *Batson* claim that had been previously denied by the Missouri Supreme Court?
3. Did the lower courts correctly decline to issue a certificate of appealability on Johnson's procedurally defaulted claim that trial counsel was ineffective for failing to present additional evidence about the neighborhood Johnson lived in?

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Statutes Involved

28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Statement of the Case

Kevin Johnson ambushed and shot Sgt. William McEntee, an officer in the Kirkwood, Missouri Police Department. After Johnson's initial shots wounded Sgt. McEntee, leaving him kneeling and helpless, Johnson executed him. A St. Louis County jury found Johnson guilty of first-degree murder and sentenced him to death.

Around 5:20 p.m. on July 5, 2005, Kirkwood police began searching the Meacham Park neighborhood for Johnson or his vehicle because they were attempting to serve Johnson with an outstanding arrest warrant. App. 107; Tr. at 1220–21, 1225–27, 1272. The investigation was interrupted at 5:30 p.m. when Johnson's younger brother, Joseph Long, had a seizure in the house next door to where Johnson stayed. App. 107; Tr. at 1232–35. Long's family sought help from the police, who provided assistance until an ambulance and additional police, including Sgt. McEntee, arrived. App. 107; Tr. at 1184–85, 1190–91, 1232, 1240. Long was taken to the hospital, where he passed away from a preexisting heart condition. Tr. at 1197–99, 1780–83. Johnson was next door while police and paramedics tried to save Long's life. App. 107. The police did not see Johnson, suspended their search for him, and left the area. App. 107.

Despite police officers' efforts to save his brother's life, Johnson blamed the police for Long's death. App. 107; Tr. at 1424–26. After the police left,

Johnson told one of his friends that he believed the police were not trying to help Long and were too busy looking for Johnson. App. 107; Tr. 1424–26.

Later that evening, Sgt. McEntee responded to a call in his patrol car and was questioning three children about fireworks reported in the area. App. 107; Tr. at 1127–28, 1294–96, 1318–19, 1380–83. Without warning, Johnson approached Sgt. McEntee's patrol car, put his gun through the open passenger side window, and fired at Sgt. McEntee and the children. Johnson's shots injured one of the children and hit Sgt. McEntee in the leg, head and torso. App. 107; Tr. at 1299–1303, 1441–45; Johnson then got inside the patrol car and took Sgt. McEntee's gun. App. 107; Tr. at 1181–21.

Johnson walked down the street and spoke to his mother and her boyfriend. App. 107; Tr. at 1654. Johnson told his mother that Sgt. McEntee "let my brother die, he needs to see what it feel[s] like to die." App. 107; Tr. at 1654. Johnson's mother responded, "that's not true." App. 107; Tr. at 1654. Johnson left his mother, and eventually returned to the scene of the shooting. App. 107; Tr. at 1351–52, 1672–75.

While Johnson was gone, Sgt. McEntee's patrol car rolled down the street, hit a parked car, and then hit a tree before coming to rest. App. 107; Tr. at 1349, 1668–72. Sgt. McEntee got out of his patrol car and was alive and on his knees when Johnson returned. App. 107–08; Tr. at 1351–52, 1672–75. Sgt. McEntee was bleeding from the mouth and could not speak. App. 107; Tr. at

1673–74. Johnson approached Sgt. McEntee, who knelt helplessly in the street. App. 107–08; Tr. at 1353–54. Johnson then shot Sgt. McEntee in the head, killing him. App. 108.

The jury convicted Johnson of first-degree murder and found three statutory aggravating circumstances: 1) in killing Sgt. William McEntee, Johnson acted in a way that created a great risk of death to other individuals; 2) the murder of Sgt. William McEntee involved depravity of the mind making the murder wantonly vile, horrible, and inhumane; and 3) Sgt. William McEntee was a peace officer engaged in the performance of his official duties at the time of the murder. App. 108. The jury returned a verdict recommending a sentence of death. App. 108 The trial court agreed with the jury's recommendation and sentenced Johnson to death. App. 108.

Reasons for Denying the Petition

I. There is no support for Johnson's argument that a court of appeals must issue a reasoned opinion when it denies a certificate of appealability.

This Court should deny certiorari on Johnson's first question presented because no law supports Johnson's argument and there is no conflict worthy of this Court's review.

A. The well-established legal standards for reviewing a certificate of appealability do not require courts to issue a written statement of reasons.

In a habeas proceeding under 28 U.S.C. § 2244, state prisoners have no right to an automatic appeal from the denial of a federal habeas petition. 28 U.S.C. § 2253(c)(1). A petitioner may not appeal a district court's final order "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c). For a certificate to issue, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Additionally, a judge *issuing* a certificate must "indicate what specific issue or issues" are certified for appeal. 28 U.S.C. § 2253(c)(3). Yet nothing in the statute requires a court to explain why it has *declined* to issue a certificate.

Nor does this Court's precedent require such an explanation. The certificate-of-appealability requirement mandates "a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel,* 529

U.S. 473, 482 (2000). The certificate process "screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler,* 565 U.S. 134, 145 (2012). In this way, certification review serves an important gatekeeping function. *Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003).

The certificate analysis "is not coextensive with merits analysis." *Buck v. Davis,* 137 S. Ct. 759, 773 (2017). This Court has cautioned that the courts of appeals should not engage with the merits of a petitioner's claim in order to justify denying a certificate. *Id.* (quoting *Miller-El,* 537 U.S. at 337). Courts reviewing issues for certification conduct a limited review necessary to determine the need for a certificate instead of deciding the full merits of a petitioner's case.

To receive a certificate, a petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by "demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El,* 537 U.S. at 327. If the district court denies a petition on procedural grounds, a certificate is only appropriate if "jurists of reason" could disagree as to both "whether the petition states a valid claim of the denial of a constitutional right"

and "whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484.

Applying these standards, the district court and Eighth Circuit declined to issue a certificate of appealability on any of Johnson's claims for habeas relief. App. 8, 9–17. In his first question presented for this Court's review, Johnson does not challenge the decision to deny a certificate. Instead, he asks this Court to read *Miller-El* and *Slack* to require an additional procedural step not found in the text of section 2253. Nothing requires the courts of appeals to issue written opinions when denying a certificate of appealability.

B. There is no conflict of authority warranting this Court's review.

Johnson tries to manufacture a circuit split by arguing that the Eighth Circuit has a practice of declining to issue written opinions when denying a certificate of appealability that is unique among federal courts of appeal. Pet. at 13–14. But the only on-point case Johnson has identified undermines his position, and his review of court-of-appeals practice shows that federal courts have discretion in deciding whether to issue written findings denying a certificate of appealability. Pet. at 13–14.

Johnson cites only one case that is directly relevant to the question presented, *Dansby v. Hobbs,* 691 F.3d 934, 936 (8th Cir. 2012), and that case counsels against Johnson's argument. In *Dansby,* the Eighth Circuit found

that neither section 2253 nor this Court's cases "dictate that a court of appeals must or must not publish a statement of reasons when it denies an application for a certificate." *Id.* "Whether to issue a summary denial or an explanatory opinion," it continued, "is within the discretion of the court." *Id. Dansby* is the only case that Johnson cites concerning a court of appeals's authority or obligation to issue an opinion when denying a certificate. Pet. at 12–14. Thus, there is no conflicting authority for this Court to clarify.

Johnson's survey of court-of-appeals practice only supports the Eighth Circuit's analysis in *Dansby*. Johnson argues that the courts of appeals in other circuits more frequently issue written opinions when denying a certificate of appealability in capital cases. Pet. at 13. But, as Johnson admits, the courts of appeals exercise discretion in deciding whether to write a written opinion. Pet. at 13–14. Though the courts of appeals sometimes issue written explanations when denying a certificate, they also deny certificates in summary orders. Pet. at 13–14. As a result, there is no conflict in circuit practice. In this way, the courts of appeals follow this Court's example[1] of issuing summary denials when reviewing original applications for a certificate of appealability. *See e.g. Grayson v. Thomas*, 10A917 (August 15, 2011); *Milton v. Thaler*, 10A1246

[1] The provisions of § 2253(c) apply equally to a "circuit justice or judge" that issues, or in Johnson's view, denies a certificate of appealability.

(June 12, 2011) (denying application for certificate of appealability in a capital case); *Patrick v. United States*, 03A1020 (September 3, 2004). There is no basis for this Court to grant certiorari to examine the Eighth Circuit's discretionary decision in this case.

C. Even if federal law required written findings, this case is a poor vehicle for review because Johnson did not preserve this issue in the court of appeals and the record shows extensive review of Johnson's application.

Johnson did not preserve his claim that the Eighth Circuit violated federal law in failing to issue written reasons for denying a certificate of appealability. But even if he had preserved it, any error is harmless.

Johnson now alleges that "[t]he Eighth Circuit's practice [of denying a COA without explanation] is contrary to statute." Pet. 12. But he did not request that the administrative panel or even the merits panel provide reasons for the denial of the certificate. Pet. C.A. Br. at 11–53. Nor did he argue to the merits panel that the administrative panel erred in failing to give reasons. Pet. C.A. Br. at 11–53. Johnson raised this argument for the first time in his petition for rehearing en banc, and now raises it as his first argument for a writ of certiorari. "This Court normally proceeds as a 'court of review, not of first view.'" *United States* v. *Haymond*, 139 S. Ct. 2369, 2385 (2019) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Johnson cannot ask this

Court to convict the lower court of error that it did not have an opportunity to address.

Even if Johnson's claim were preserved, and written findings were required, any error committed is harmless because Johnson has not been prejudiced. The Eighth Circuit's decision not to issue reasons for denying the certificate does not "disable[] further proceedings," by failing to provide a basis for review on appeal. Pet. at 14. The administrative and merits panels had the benefit of, and reviewed, the district court's exhaustive sixty-page opinion explaining the reasons it denied relief on Johnson's claims. App. 18–77. The court of appeals panels were also able to review the district court's separate memorandum explaining the reasons it declined to certify the claims for which Johnson sought a certificate. App. 9–17. Unlike *Miller-El,* where this Court found that the district court had not "give[n] full consideration to the substantial evidence petitioner put forth," 537 U.S. at 341, the district court in this case clearly explained the reasons for denying Johnson's claims and for denying a certificate of appealability. App. 9–77.

On top of that, the Eighth Circuit reviewed Johnson's application for a certificate of appealability twice—once after briefing before an administrative panel and again during briefing and argument on appeal from the denial of Johnson's motion to disqualify the district court judge. App. 6, 8. Each panel (and now this Court) could review the district court's findings when deciding

Johnson's application for certification. Because the district court is already "deeply familiar with the claims raised by [a] petitioner," it is in a "far better position" to make written findings about which claims should be certified. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). The district court's thorough opinions conclusively show that Johnson's claims were not substantial, and no judge on either panel thought otherwise.

II. The lower courts correctly declined to certify Johnson's *Batson* claim.

Johnson also challenges the lower courts' decisions denying a certificate of appealability on Johnson's claim that the trial court erred in allowing the State to use a peremptory strike to remove venireperson Debra Cottman over Johnson's *Batson* objection. The district court and the Eighth Circuit properly declined to certify the claim because no reasonable jurist could disagree with the district court's decision to defer to the Missouri Supreme Court's factual and legal findings on this claim.

At trial, Johnson objected to the prosecutor's peremptory strike of Cottman. Tr. at 1049. The State offered two reasons for its strike of Cottman: 1) that she was hesitant to answer questions about capital punishment and 2) that Cottman worked for Annie Malone Children's Home, which had provided services to Johnson when he was a child. Tr. at 1051. When given a chance to show that the prosecutor's strikes were pretextual, defense counsel pointed out

that another juror had also worked for a foster care program at one time, though it was not a program directly associated with Johnson. Tr. at 1052. Johnson did not direct the court to any other evidence or arguments that he wished the Court to consider as to the *Batson* challenge. Tr. at 1052–53. Specifically, Johnson did not make any argument suggesting that the history of the prosecutor's office called into question the prosecutor's credibility in its reasons for striking Cottman. Tr. at 1052–53. The trial court found that there was a racially neutral basis for the strike and overruled the *Batson* challenge. Tr. at 1053.

On direct appeal, the Missouri Supreme Court found that the trial court did not err in accepting the State's racially neutral explanation for striking Cottman. App. 110–11. The Missouri Supreme Court found that the record shows that no other venire member was involved with Annie Malone Children's Home, and that the prosecution's decision to strike Cottman based on her involvement with Johnson's childhood foster service was race-neutral. App. 110–11. The Missouri Supreme Court found that "no evidence suggested the State engaged in improper behavior to constitute a *Batson* violation" involving Cottman. App. 111.

The Missouri Supreme Court also considered Johnson's argument that "the trial court's previous experience with the prosecutor's office" warranted an inference that the reasons for striking Cottman were pretextual even

though that argument was not presented to the trial court. App. 11; Tr. at 1052–53. The court found that Johnson's citations on direct appeal were not sufficient to show a *Batson* violation absent allegations relating to the prosecutor's behavior in Johnson's case. App. 111.

Under the applicable standards, no reasonable jurist could disagree with the district court's decision to defer to the Missouri Supreme Court and the state trial court. An adjudication of a *Batson* challenge is based in significant part on an "evaluation of credibility" which is entitled to great deference from a reviewing court. *Felkner v. Johnson,* 562 U.S. 594, 598 (2011); *Hernandez v. New York,* 500 U.S. 352, 364–69 (1991) (reviewing courts must accept credibility determinations made regarding a prosecutor's reasons for a peremptory strike unless they are clearly erroneous). On habeas review, federal courts follow a "highly deferential standard for evaluating state court rulings" which are to "be given the benefit of the doubt." *Id*. In reviewing Johnson's *Batson* challenge, the trial court found the prosecutor's race-neutral explanations for striking Cottman to be credible, and the Missouri Supreme Court carefully reviewed the record in upholding the trial court's decision to reject the *Batson* challenge. In reviewing a state-court finding, federal courts must give even greater deference to the trial court's credibility determinations. *Marshall v. Lonberger,* 459 U.S. 422, 435 (1983).

Johnson argues that his *Batson* claim is "at least debatable" because the state court did not consider historical evidence that the St. Louis County Prosecuting Attorney's office had engaged in racial discrimination, because the prosecutor did not ask Cottman additional questions about Annie Malone, and because many other jurors gave similarly hesitant answers about capital punishment. (Johnson Br. at pp. 23–26). None of these claims justify overturning the state court's credibility determinations. 28 U.S.C. § 2254(e).

Johnson's argument for certiorari review fails at the outset because his central premise—that the Missouri Supreme Court violated this Court's precedent by failing to consider his arguments about the history of the St. Louis County prosecutor's office—is false. The Missouri Supreme Court considered and rejected the arguments Johnson made on direct appeal, finding that his allegations and citations did not establish a *Batson* violation. App. 111.

Johnson correctly notes that this Court's precedents have long required courts reviewing *Batson* violations to consider "all evidence with a bearing" on the plausibility of the prosecutor's reason for striking a juror including historical evidence of a prosecutor's practice. *Miller–El,* 537 U.S. at 251–52; Pet. at 15 (citing, *inter alia, Batson v. Kentucky,* 476 U.S. 79, 96 (1986)). Contrary to Johnson's claims, the Missouri Supreme Court correctly identified and applied this Court's directives. On direct appeal, the court considered:

> a non-exclusive list of factors including: the explanation in light of the circumstances; similarly situated jurors not struck; the relevance between the explanation and the case; the demeanor of the state and excluded venire members; the court's prior experience with the prosecutor's office; and objective measures related to motive.

App. 111. Johnson really complains that the Missouri Supreme Court did not find his evidence and arguments about the prosecutor's historical practice—which he did not present to the state trial court—to be persuasive evidence of a *Batson* violation in his case. That claim is not worthy of this Court's review.

Johnson's argument that the St. Louis County Prosecutor's office has a history of racially discriminatory strikes does not support his claim here. In the federal courts below, Johnson cited to appellate cases and newspaper articles that were not before the state trial court, and many that were not in front of the state court on direct appeal. App. 13–14. Johnson presented no evidence to indicate a pattern of activity that affected jury selection in this case. App. 13–14, 46, 111. As the Missouri Supreme Court found, there is no evidence in the record to support a finding that the prosecution engaged in racially-motivated strikes in this case. App. 111. Johnson has done nothing to rebut that factual finding.

Johnson's citations to *Flowers v. Mississippi,* 139 S. Ct. 2228 (2019), *Miller–El,* and other cases do not help him. In those cases, this Court considered historical evidence of discrimination as part of a total set of

circumstances that showed discrimination in the defendant's case at trial. Here, unlike *Flowers* and *Miller-El*, the Missouri Supreme Court and the district court found no evidence of a discriminatory pattern in Johnson's case—and the state trial court could not have considered this argument because it was not presented to it.

The state courts found no evidence that the prosecutor's strike of Cottman was racially motivated. App. 111. Cottman's hesitance to answer questions about capital punishment and her direct connection to a foster home where Johnson spent time as a child are race-neutral reasons to strike Cottman. The trial court found the prosecutor's reasons to be credible, and the Missouri Supreme Court thoroughly reviewed the record and affirmed.

The remainder of Johnson's arguments for certiorari merely ask this Court to disagree with the Missouri Supreme Court's holding on direct appeal and instead agree with the dissenting opinion. Pet. at 17–21. Pointing to the direct-appeal dissent, Johnson argues that the issuance of a certificate of appealability should be "routine" when the state court is divided on a constitutional question. (Pet. at 18) (citing *Rhoades v. Davis,* 852 F.3d 422, 429 (5th Cir. 2017)). Johnson's argument ignores the applicable legal standard.

The standard is not whether reasonable jurists could disagree on the merits of a petitioner's claims when reviewing the claims *de novo*, but whether reasonable jurists could disagree with the district court's denial of claims

already decided by state courts under AEDPA's highly-deferential standard. *Miller-El*, 537 U.S. at 336. Even if this Court were inclined to relitigate Johnson's direct appeal, federal law forbids it. 28 U.S.C. § 2254(d). On federal habeas review, this Court will reverse a state-court merits decision only if the decision contradicted or unreasonably applied clearly-established federal law or was based on an unreasonable determination of the facts. *Id.* Johnson makes no argument that he could meet this standard. Pet. 17–21.

The Missouri Supreme Court applied this Court's precedent to the facts of Johnson's case and found that the prosecutor's reasons for striking Cottman were race-neutral. There is no room for jurists to disagree that the state-court decision was at least reasonable under 28 U.S.C. § 2254(d), so Johnson's claim does not warrant further appellate review.

III. The lower courts correctly declined to certify Johnson's defaulted claim that trial counsel was ineffective.

In his final question presented, Johnson argues that the lower courts should have certified his claim that his trial attorneys were ineffective for failing to discover and present evidence about the violent community where Johnson lived. Pet. at 23–31. Johnson makes no argument that this claim is worthy of certiorari review under this Court's rules. Sup. Ct. R. 10. Instead, Johnson simply asks this Court to disagree with the lower courts' conclusions and grant a certificate of appealability where they would not. This Court will

not normally grant review of a petition "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," as Johnson's claim does. *Id.* There is no reason to depart from that rule here.

Johnson's claim fails to warrant review because the lower courts correctly declined to certify Johnson's claim for appeal. Johnson admitted that he failed to raise this claim during state post-conviction review proceedings, but argued that the district court should review the claim under the exception announced in *Martinez v. Ryan,* 566 U.S. 1 (2012); Pet. at 29; App. 33. The district court found that *Martinez* review was unwarranted because Johnson's underlying claim was not substantial.

The district court's finding correctly applied this Court's case law to the facts of Johnson's case. To prove his counsel was ineffective, Johnson would be required to show that 1) his counsel's performance was objectively unreasonable, and 2) he was prejudiced as a result of his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). In his petition, Johnson argued that counsel should have presented a number of facts related to Johnson's friends, family, and other people living in his neighborhood but not necessarily related to Johnson's personal background. Dist. Dkt. 35 at 261–69.

At trial, Johnson called thirteen witnesses during the penalty phase. Tr. at 2080–2290. The theme of the penalty phase was set forth in the opening statement, which portrayed Johnson as the product of a family in which his father was in prison and his mother was incapable of raising her children due to her drug habit. Tr. at 2026–27. To flesh out the details of this view of Johnson as the victim of neglect, abuse, and a system incapable of solving his problems, Johnson called Ward (his grandmother) to testify about the family history, including the absence of Johnson's father due to a lengthy prison sentence, and Johnson's mother's drug use and abusive conduct. Tr. 2080–90. Trial counsel called additional family members, teachers, counselors, a caseworker, Johnson's friend, and a mental health professional to support Johnson's mitigation defense. Tr. at 2080–2290. Counsel argued that the childhood abuse and neglect Johnson suffered caused psychological scars that were reopened by the death of Johnson's brother. App. 86.

Even though counsel presented substantial mitigation evidence, counsel also had to limit cumulative evidence and evidence that did not fit the theme of Johnson's defense. App. 86. Counsel strategically limited testimony about specific instances of abuse and neglect that Johnson suffered in his preschool years because he believed he would lose the jury's attention and focus if he presented repetitive, cumulative evidence. App. 86. Counsel also limited

mental health testimony to avoid turning Johnson's defense into a battle of competing mental health experts. App. 86.

Counsel's decision to focus on Johnson's personal social history rather than the general violence in his community is presumed to be reasonable and Johnson failed to plead facts that could overcome that presumption. *Strickland*, 466 U.S. at 689. As the district court found, counsel presented "substantial evidence of [Johnson's] childhood abuse and neglect," and Johnson cannot state a claim under *Strickland* by arguing that counsel should have focused on different or additional details. App. 33–34 (citing *Ringo v. Roper,* 472 F.3d 1001, 1007 (8th Cir. 2007)).

None of this Court's decisions require a different result. While the Constitution requires counsel in a capital case to conduct an investigation for mitigating evidence, *Wiggins v. Smith,* 539 U.S. 510 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005), no case requires counsel to engage in unlimited investigations on the theoretical possibility that additional mitigation evidence might exist. This Court has granted relief where counsel failed to conduct any mitigation investigation beyond the presentencing report prepared by the state, *Wiggins*, 539 U.S. at 523–24, and where counsel failed to investigate the defendant's prior convictions that formed the basis for the State's case in aggravation. *Rompilla,* 545 U.S. at 383–84. Neither of these cases apply here.

Unlike *Wiggins* and *Rompilla,* counsel conducted a thorough mitigation investigation and presented numerous witnesses in mitigation according to a strategic theme. Johnson's assertions that counsel should have presented more or different evidence is not sufficient to state a claim under this Court's precedents. The district court correctly found that Johnson's claim is not substantial under *Martinez,* and thus remains procedurally defaulted and unworthy of further appellate review.

In addition, Johnson's procedural default of this claim makes it a poor vehicle for review. The district court found that *Martinez* review was unwarranted because Johnson's underlying claim was not substantial. App. 33. *See Martinez,* 566 U.S. at 14. Because the claim was not substantial, the district court found it did not need to consider "whether petitioner's initial post-conviction counsel were ineffective." App. 33. Even if this Court were inclined to grant further review of Johnson's claim, the question of post-conviction counsel's effectiveness would remain, and Johnson's claim would likely fail on that point.

To excuse his default under *Martinez,* Johnson must show that post-conviction counsel was ineffective under *Strickland's* standard. Post-conviction counsel need not, and should not, raise every non-frivolous claim. *Smith v. Robbins,* 528 U.S. 259, 288 (2000) (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). Rather, counsel should select from among potential issues in order to maximize

the likelihood of success. *Id*. "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance be overcome." *Id*. (citations omitted).

The record refutes Johnson's claim that post-conviction counsel was ineffective. The initial post-conviction motion raised fourteen claims for relief, containing approximately thirty sub-claims, supported by two hundred ninety three pages of allegations and argument. Dist. Dkt. #65-2 at 72–165, 65-3 at 166–363. At the evidentiary hearing held on Johnson's motion, post-conviction counsel presented nine witnesses across four days of testimony and presented sixty-four exhibits. Dist. Dkt. #65-1. These claims were not clearly weaker than Johnson's claim that trial counsel was ineffective for failing to present *additional* evidence or particular stories about the neighborhood where he grew up. In the district court, Johnson failed to plead any non-conclusory facts that could overcome the strong presumption that post-conviction counsel's representation was competent, so his claim could not justify *Martinez* review. *Strickland,* 466 U.S. at 689; Dist. Dkt. 35 at 273. There is no basis for certiorari review, so the Court should deny Johnson's claim.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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