Capital Case – Execution May 3, 2022 at 6:00 p.m. Central

No. 21-7542

In The Supreme Court Of The United States

CARMAN DECK,

Petitioner,

v.

PAUL BLAIR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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*ELIZABETH UNGER CARLYLE
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, Missouri 64113
(816) 525-6540 - telephone
elizabeth@carlyleparishlaw.com - e-mail
Missouri Bar No. 41930

KEVIN LOUIS SCHRIENER, 35490MO
Law & Schriener, LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105
(314) 721-7095 - telephone
kschriener@SchrienerLaw.com - e-mail

COUNSEL FOR PETITIONER
**Counsel of Record*

INTRODUCTORY STATEMENT

Capital resentencings are a fairly common occurrence. What is less common is the situation present here – where the state gets not one, not two, but three chances, over the course of twelve years, to attempt to obtain a death sentence. Mr. Deck offered to plead to a sentence less than death during his final resentencing, but this offer was rejected, after a family member of the victim who was employed by the prosecutor's office, was involved in the meeting at which this offer was made. *See Deck v. Steele*, 249 F.Supp.3d 991, 1077 (E.D. Mo. 2017), *rev'd by Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2021). After Mr. Deck was in prison and isolated from family members for over a decade, it is no wonder that live mitigating witnesses were reluctant to come forward and testify for yet a *third time* in an attempt to spare Mr. Deck's life. As the years pass, it gets more difficult to build a mitigation case based upon the background of a capital defendant, as they will have diminished contact with family members and friends, and those who bore witness to the upbringing of the defendant will become ill or infirm, deceased, or simply exasperated at having to show up in court over and over again to recount the same information.

Missouri is uniquely stubborn in its zeal to obtain death sentences. Of the last three executions carried out by Missouri, two of the men had multiple capital sentencing proceedings: Walter Barton was tried five times and Ernest Johnson had three capital sentencing proceedings. *See Barton v. Strange*, 959 F.3d 867, 869 (8th Cir. 2020) ("Barton was convicted after his fifth trial for murder in the first degree.");

State ex rel. Johnson, 628 S.W.3d 375, 380 (Mo. 2021) (noting that Mr. Johnson had three capital sentencing proceedings). Rather than settle for a life sentence, the State gets to bungle the process repeatedly, either through their own constitutional errors or the failings of court-appointed counsel, and then claim victory when there is no one left to show up for the defendant after they have spent decades on death row.

REPLY TO THE STATE'S ARGUMENTS

I. THE MISSOURI SUPREME COURT DENIED THE CLAIM ON THE MERITS

The state argues (BIO pp, 8-11), that the Missouri Supreme Court did not make a merits ruling but rather found the issue procedurally defaulted. This contention is incorrect and should be rejected by this Court. To accord the respect to Missouri precedent that it deserves, the Missouri Supreme Court's unexplained denial of the petition can only be read as a merits review.

In *State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 381 (Mo. banc 2021), Ernest Johnson, like Mr. Deck, presented a claim under Mo. Sup. Ct. R. 91. The State argued that the claim was procedurally barred and even asked the court to reconsider prior precedent which held that there was no absolute procedural bar against successive state habeas petitions. Ex. A (*State ex. rel. Johnson v. Blair,* Case. No. SC99176, Suggestions in Opposition to Petition for Writ of Habeas Corpus" pp. 1-5.)[1] The Missouri Supreme Court declined to do so, and reiterated

[1] The entire 38 page document will be provided upon request. The attached pages deal with the argument at issue here.

that for claims not previously litigated in state court, "[t]here is no absolute procedural bar to . . . seeking habeas relief. Successive *habeas corpus* petitions are, as such, not barred'" *Id.* at 381 (citation omitted) (emphasis in original). Procedural bars exist in Missouri state habeas actions only if the claim has already been litigated. *Id.* Consequently, the state's request that this Court ignore the requirements of Missouri law should be rejected.

Consistent with Missouri's law, this Court's precedent also establishes that the silent denial of the Missouri Supreme Court was a denial on the merits.

> When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.

Harrington v. Richter, 562 U.S. 86, 784-85 (2011). As noted in *Johnson*, state law procedural principles would only bar Mr. Deck's claim if he had litigated it before in state court and received a merits ruling or dismissal with prejudice.. He did not and the state cannot get around the rule of *Harrington* and *Johnson.*

The state's reliance on *Byrd v. Delo*, 942 F.2d 1226 (8th Cir. 1991) is misplaced for three main reasons. First, in *Byrd*, the Missouri Supreme Court did not issue a silent denial. The state sought clarification of the state court's order and they obtained an order which stated the claims were procedurally barred. *Byrd*, 942 F.2d at 1229. There was no such clarification in this case. Thus, the state's argument is not only misplaced – but may also be a mischaracterization of what actually occurred in *Byrd*.

Second, *Byrd* itself treated the unexplained denial as a merits ruling until there was a clarification that the ruling was premised on a state procedural rule. Consequently, absent the clarification order *Byrd* supports that the unexplained entry without clarification is a merits ruling.

Finally and setting aside the substantial procedural difference, *Byrd* predates *Harrington* and *Harrington* is controlling. Under *Harrington,* the unexplained order must be construed as a merits ruling. This Court dictates the parameters of the law to the Eighth Circuit, not vice versa.

II. *BARKER V. WINGO* AND *BETTERMAN V. MONTANA* LEFT OPEN IMPORTANT FEDERAL QUESTIONS REGARDING THE ANALYSIS AND REMEDY FOR INORDINATE DELAYS IN CAPITAL SENTENCINGS WHICH SHOULD BE ADDRESSED BY THIS COURT NOW.

Half a century ago, in *Barker v. Wingo*, this Court laid down its four-factor test for denial of the right to a speedy trial. *Barker*, 407 U.S. 514 (1972). However, the test laid down in *Barker* has not yet been determined to apply to inordinate delays in sentencing. *Betterman v. Montana*, 578 US. 437 (2016), noted that the right to a speedy trial may in fact be implicated in the sentencing phase of a capital case. 578 U.S. 437, 451 n.2 (2016) ("We reserve the question whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined (e.g. capital cases in which eligibility for the death penalty hinges on aggravating factor findings)"; *see also id*. at 449 (Thomas, J., concurring) ("I agree with the Court that

the Sixth Amendment's Speedy Trial Clause does not apply to sentencing proceedings, except perhaps to bifurcated sentencing proceedings where sentencing enhancements operate as functional elements of a greater offense.").

While the concurring opinion of Justice Sotomayor argued for adoption of the *Barker* four-factor test in the delayed sentencing context, *see id.* at 451 (Sotomayor, J., concurring), Justice Thomas' concurrence, joined by Justice Alito, noted that "[t]he factors listed in *Barker* may not necessarily translate to the delayed sentencing context." *Id.* at 449 (Thomas, J., concurring).

The question of remedy is also an important federal question that has yet to be determined. The *Barker* remedy of dismissal of all charges is obviously unworkable where the defendant has been convicted of capital murder. *See Strunk v. United States*, 412 U.S. 434, 440 (1973) ("dismissal [is] . . . the only possible remedy" for a violation of the right to a speedy trial). Likewise, the release of the defendant from custody is also unworkable in the capital sentencing context. *Cf. United States v. Ray*, 578 F.3d 184 (2nd Cir. 2009) (concluding that 15-year delay between remand and resentencing violated due process and choosing as a remedy, the vacatur of the unserved remainder of the non-capital sentence). Mr. Deck proposes that the remedy in his case be a sentence of life imprisonment without parole, the other sentence provided by Missouri law for the offense of capital murder. This remedy both protects the interests of the victims and the public-at-large, as well as the constitutional rights of Mr. Deck.

Contrary to the assertion of the state, the analysis in the lower courts of sentencing delay, even in the non-capital context, has not been uniform or consistent. The opinion in *United States v. Ray*, 578 F.3d 184 (2nd Cir. 2009), sets forth in great detail the myriad unanswered questions that the lower courts are struggling with. First, prior to the dicta in *Betterman*, it was an unanswered question whether the Speedy Trial Clause applied to the sentencing context and this question is still unanswered after *Betterman* when it comes to capital sentencings. *Ray*, 578 F.3d at 191-92 ("Most other courts of appeals have adopted the same approach to the question – assuming the existence of the right before denying the claim on the merits."); *Betterman*, 578 U.S. at 451 n.2 (leaving open the question of whether the right to a Speedy Trial applies to bifurcated proceedings where aggravating factors increase the sentencing range, as in capital cases). *Ray* succinctly outlines the unanswered questions which have plagued courts in the context of inordinate delays in sentencing:

> This appeal requires us to answer this question directly. In doing so, we first consider the precedents which bind us as an intermediate appellate court-namely, the holdings of the Supreme Court and those of prior panels of this Court. Insofar as those precedents fail to provide an answer to this question, we examine the original meaning of the Speedy Trial Clause and consider contemporary criminal procedure in light of the original understanding of the Clause. Finally, we consider the interests protected by the Speedy Trial Clause and whether they exist with equal force in sentencing proceedings.

Ray, 578 F.3d at 193.

Commentators have expressly noted, in spite of the state's protestations to the contrary, "that as a result of this circuit split, defendants suffering delays in

sentencing are afforded drastically different remedies depending on which state or federal circuit presides over their case." Kristin Saetveit, *Beyond Pollard: Applying the Sixth Amendment's Speedy Trial Right to Sentencing*, 68 Stan. L. Rev. 481, 495 (2016). The split is not new, it has existed for decades: "This circuit conflict has resulted in decades-long confusion and inconsistencies among jurisdictions. . . ." *Id.* at 484. It is time for this Court to step into the breach and clarify the analysis, especially in the context of capital sentencings.

III. MR. DECK WAS PREJUDICED IN HIS ABILITY TO PRESENT MITIGATION DUE TO THE PASSAGE OF TIME

Mr. Deck was prejudiced in his ability to mount an effective mitigation case due to the passage of time. The state's arguments to the contrary are belied by the findings of the district court, granting federal habeas relief on this basis. *See Deck*, 249 F.Supp.3d at 1076-87. Although the state was able to present live testimony from thirteen witnesses at the third resentencing,[2] Mr. Deck was only able to present live testimony from two hired experts. *Id.* at 1077. At the first penalty phase, Mr. Deck was able to present live testimony from his stepmother, aunt, foster father, and his brother. *Id.* at 1078. The Missouri Supreme Court found this testimony to present a mitigation case that was "substantial." *Id.* At the second penalty phase, Mr. Deck presented essentially the same live testimony with the addition of another aunt, his brother's testimony via video deposition only, and the

[2] As noted by the district court, live testimony was so important to the state it moved for a continuance to ensure the availability of a witness. *Id.* at 1077.

testimony of a hired expert. *Id.* However, by the time of the third penalty phase, counsel's attempt to obtain these same witnesses fell flat. *Id.* Counsel testified in post-conviction that "because of changed circumstances *given the passage of time*, these persons could not be located or were no longer willing or able to participate. '[A] lot of time has passed . . . . [T]here were so few and so scarce of live family members who would come and say anything on Mr. Deck's behalf, that we would try to grasp anybody that we could'" *Id.* (emphasis added). Contrary to the state's suggestion that it was strategy to only present live testimony from expert witnesses, counsel testified "that if they could have found any person who could have helped to spare Mr. Deck's life, they would have presented them at trial." *Id.*

> These changed circumstances lead the district court to find
>
> > that the ten-and-a-half year delay between Deck's conviction and his final penalty-phase trial triggers the remainder of the due process analysis, especially given the negative implications such a delay could have on a capital defendant's constitutionally protected right to adequately provide the sentencing jury with mitigating evidence.

Id. at 1080.

The district court also analyzed the reasons for the delay. Because the time between the first and second resentencing was due to constitutionally ineffective assistance of counsel, "that error is imputed to the State." *Id.* at 1081. Similarly, although counsel requested that Mr. Deck appear shackle free before his second penalty phase jury, this request was denied, causing this Court to reverse his second death sentence due to a violation of "a basic element of constitutional due process." *Id.*, citing *Deck v. Missouri*, 544 U.S. 622 (2005).

The district court then analyzed at length the delay between the Supreme Court's reversal of the second death sentence and the final resentencing, noting the State's requests for continuances and the "undisclosed conflict of interest" in the local prosecutor's office involving the employment of the victims' family member and the resulting ten-month delay for that reason alone. *Deck*, 249 F.Supp.3d at 1081. Finally, the trial court itself "repeatedly continued the trial for several months at a time, with such continuances greatly exceeding the time requested by the respective party. While these delays may have been for a neutral reason, such as a crowded docket, they nevertheless cannot be weighed against Deck." *Id.* The district court also noted that it could not be said that Deck "passively acquiesced in delayed proceedings," as he objected to some of the State's requested continuances and only "sought one limited continuance so that his counsel could secure mitigation witnesses and prepare documents to be reviewed by their expert." *Id.* at 1082. The district court found this limited continuance to be reasonable and not proof of a "lack of diligence." *Id.*

The district court explicitly found that Mr. Deck was prejudiced in his ability to present mitigation due to delay:

> Here, prejudice resulting from the delay weighs heavily in favor of Deck. As described above, *his inability to present substantial mitigation evidence at his third-penalty phase trial was directly attributable to the passage of many years' time.* Witnesses who previously cooperated and provided favorable testimony were no longer available, either because of their unknown location, changed and hostile attitudes, illness, or even death. These witnesses provided mitigation testimony at earlier trials that the Missouri Supreme Court itself found 'substantial' ---- indeed to the extent it found that without

> constitutional error, a reasonable probability existed that the jury would not have voted for death.

Id. at 1082 (emphasis added). The State's argument that Mr. Deck received two death sentences previously is not a valid reason to discount the power of the mitigating evidence, given that counsel was found ineffective for failing to request the proper instruction on mitigating evidence at the first trial, and this Court found that his second sentencing was fundamentally flawed due to the negative influence of shackles upon his second sentencing jury.

Not only was prejudice shown, the district court found that "[w]ith the demonstrated unavailability of mitigation evidence (previously found to be substantial)," the prejudice suffered by Mr. Deck due to the "significant passage of time," was "obvious." *Id.* at 1082. The stunted mitigation presentation counsel was forced to put on "prevented the jury from adequately considering compassionate or mitigating factors that might have warranted mercy." *Id.* at 1082. Deck went into the third resentencing and "proceeded through a death penalty trial that was fundamentally unfair from even before it began." *Id.* at 1086.

The state complains that Mr. Deck failed to provide any precedent which indicates a preference for live testimony over that of video depositions or written transcripts. However, this proposition is elemental and obvious. Mr. Deck did cite to *Crawford v. Washington*, 541 U.S. 36, 43, 61 (2004), which states that the tradition in common-law "is one of live testimony," because it ensures the "ultimate goal" of the "reliability of evidence." *See also, Maryland v. Craig,* 497 U.S. 836, 849 (1990) ("In sum, our precedents establish that "the Confrontation Clause reflects a

preference for face-to-face confrontation at trial. . .*"*); *McDowell v. Blankenship*, 759 F.3d 847, 852 (8th Cir. 2014) (noting that "live witness testimony is axiomatically preferred to depositions, particularly where credibility is a central issue . . ."). The power of live witness testimony is especially crucial when it comes to the emotional nature of mitigating testimony, delivered from friends and family that personally know the defendant and personally witnessed the extensive abuse that Mr. Deck was subjected to throughout his life. The fact that counsel was able to present some of this testimony in the form of deposition transcripts does not take away from the fact that the jury could not personally judge the witnesses' credibility live, from the witness chair.

The most important factor in determining whether a constitutional delay occurred is prejudice to the defendant. *Barker*, 407 U.S. at 532. The most serious of these concerns is the impact of the delay upon the defendant's "ability to adequately prepare his case," with emphasis upon the loss of witnesses. *Id.* The state points to the inability of his final resentencing counsel to obtain cooperation from some of the family members as a reason unrelated to the delay. However, the inordinate delay cases explain how time institutionalized "disrupts family life," and time spent incarcerated is "simply dead time." *Id.* at 532-33. By the time the third resentencing occurred, Mr. Deck had been on death row for twelve years and obviously his ability to prevail on mitigating witnesses for help was hindered: "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Id.* at 533. The longer someone is in

prison, the more relationships with family and other mitigating witnesses becomes diminished. This is a function of both time and incarceration. These witnesses were present and accounted for at the first two resentencings, however by the time of the final resentencing, Deck was simply incapable to assist counsel in this effort given the obvious limitations placed upon his ability to communicate with witnesses from the confines of prison.

IV. *TEAGUE* DOES NOT BAR RELIEF

The state makes a passing reference to *Teague v. Lane*, 489 U.S. 288 (1989), for the proposition that "A new constitutional rule of criminal procedure is not applicable to a case that has become final before the new rule is announced." BIO, p. 20. This assertion is incorrect, and vastly overstates the ruling in *Teague*. Taken on its face, it would mean that this Court could never implement a new rule of criminal procedure, because any case that gets to this Court is final until this Court rules to the contrary.

Rather, this Court in *Teague* held that subject to certain exceptions, "*habeas corpus* cannot be used as a vehicle to create new constitutional rules of criminal procedure. . . ." *Teague* at 316. *Teague,* then, restricts this Court in reviewing decisions of lower federal courts in habeas corpus cases. But this is not such a case. In Mr. Deck's procedural posture, the state's highest court has made a merits decision on a principle of constitutional law in a non-federal habeas proceeding, and this Court is reviewing it directly. Neither *Teague* nor any other precedent

constrains this Court's statutory ability under 28 U.S.C. § 1257(a) to review this decision.

CONCLUSION

This court should grant certiorari, vacate the lower court's opinion, and remand the case remanded for further proceedings consistent with the Right to a Speedy Trial and due process. Alternatively, the Court should enter a stay of execution to permit due consideration of Mr. Deck's petition.

/s/ Elizabeth Unger Carlyle

*ELIZABETH UNGER CARLYLE
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, Missouri 64113
(816) 525-6540 - telephone
elizabeth@carlyleparishlaw.com - e-mail
Missouri Bar No. 41930

KEVIN LOUIS SCHRIENER, 35490MO
Law & Schriener, LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105
(314) 721-7095 - telephone
kschriener@SchrienerLaw.com - e-mail

COUNSEL FOR PETITIONER

**Counsel of Record*

IN THE SUPREME COURT OF MISSOURI

ERNEST JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. SC99176
	)	
	)	
ANNE PRECYTHE,	)	
	)	
Respondent.	)	

Suggestions in Opposition to Petition for Writ of Habeas Corpus

Ernest Johnson has filed his third habeas petition in this Court alleging that he is ineligible for the death penalty because he is mentally retarded.[1] In connection with this, Johnson has alleged for a third time that his jury instructions were unconstitutional. And Johnson claims that Missouri's lethal injection protocol will violate his Eighth Amendment rights. Johnson's claims are procedurally infirm because they are barred by *Strong v. Griffith*, 462 S.W.3d 732 (Mo. 2015), and because his method of execution claim is not properly brought under Rule 91. Moreover, Johnson's claims are substantively meritless because he has not proven he is mentally retarded and he has not

[1] Mental Retardation is the term used by the prior decisions at issue in this case, as well as the prior United States Supreme Court. Although Johnson uses a different term in his petition, Respondent uses the term employed by prior courts deciding this issue.

shown that Missouri's execution protocol will violate his Eighth Amendment rights. The Court should deny his petition without further proceedings.

Summary of the Petition and Procedural History

Johnson's petition raises three claims. Johnson claims that he is mentally retarded and therefore not eligible for the death penalty. (Pet. at 5–44). Johnson next claims that the jury instructions used at his third sentencing are unconstitutional. (Pet. at 44–60). Johnson's final claim is that Missouri's method of execution will violate Johnson's Eighth Amendment rights. (Pet. at 60–71).

Johnson's first claim is barred by *Strong v. Griffith* because the claim has been raised and rejected five times before. Johnson raised the claim that he is mentally retarded on direct appeal from his sentencing. *State v. Johnson*, 244 S.W.3d 144, 156 (Mo. 2008). It was rejected. Johnson raised the claim on federal habeas review. *Johnson v. Steele*, No. 11-8001-CV-W-DGK, 2013 WL 625318, slip op. at 4–7 (W.D. Mo. Feb. 20, 2013). It was rejected. Johnson raised the claim in a motion to recall the mandate. *State v. Johnson*, SC87825 (Mo.). It was rejected. Johnson raised the claim in a state habeas petition. *State ex rel. Johnson v. Griffith*, SC95316 (Mo.). It was rejected. Johnson raised the claim in petition for certiorari to the United States Supreme Court. *Johnson v. Griffith*, No. 15-6782. It was rejected. Under this Court's precedent, it cannot be raised again.

Johnson's second claim is procedurally defaulted in part because it was not raised in its entirety in his direct appeal. *State v. Johnson*, 244 S.W.3d at 150. But Johnson raised part of the claim in his direct appeal, and it has been rejected on the merits. *State ex rel. Johnson v. Griffith*, SC95316 (Mo.). So, the claim is in part barred by *Strong v. Griffith* because that part of the claim has been raised and rejected before.

Johnson's third claim does not sound in habeas corpus. Johnson's challenge to Missouri's method of execution properly sounds in declaratory judgment; no prisoner has ever used Rule 91 to challenge a method of execution in state court. In declaratory judgment, Johnson's claim cannot survive a motion to dismiss *and* is barred by the one-year statute of limitations. But even if Johnson's claim could be brought in habeas—which it cannot—Johnson's claim fails because he has not pleaded an Eighth Amendment violation. Assuming, *arguendo*, his claim sounds in habeas and it has been properly pleaded, Johnson still cannot receive relief because the claim is meritless.

In sum, Johnson most recent habeas petition is nothing more than a repackaged collection of the same claims that he has raised unsuccessfully for the last decade. He is not entitled to relief or further proceedings, and the Court should deny his petition without delay.

Argument

I. Johnson's mental retardation claim is *Strong* barred and meritless.

Johnson has, for years, argued that he is mentally retarded and therefore not eligible for the death penalty. This Court has rejected that argument time and time again. Johnson brings the claim again, but because nothing has meaningfully changed, the claim is barred by *Strong* and the general principles of finality. Assuming, *arguendo*, Johnson can bring the claim yet another time, this Court should reject his efforts to inject so-called new evidence into the record because the evidence could have been presented to this Court years ago. And Johnson is still not entitled to relief because the claim is meritless.

A. Johnson's mental retardation claim is *Strong* barred because he has raised the claim many times before.

The general rule in Missouri is that state habeas cannot be used for duplicative and unending challenges to the finality of state court judgments. *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993). Twenty years ago, this Court explained there is an "extremely limited" opportunity to re-litigate claims brought in a prior habeas petition. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (2001). Even within that "extremely limited" exception to the general rule, this Court held that there is a "strong presumption . . . against claims that already have once been litigated." *Id.*

In *Strong*, this Court further clarified the general rule and its exception by providing that a claim that had been, or could have been, litigated in the ordinary course of review is not "a legally cognizable claim for habeas relief. . . ." *Strong*, 462 S.W.3d at 734. The reason is that "habeas review does not provide 'duplicative and unending challenges to the finality of a judgment.'" *Id*, *quoting State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. 2013).

In sum, the synthesis of *Simmons*, *Jaynes*, and *Strong*, is that while there is currently no absolute bar to successive habeas petitions, there is a strong presumption against successive petitions, and a successive petition that raises the same claim that was or could have been raised during the ordinary course of review does not raise a legally cognizable claim for relief.[2]

Johnson brought his mental retardation claim on direct appeal. *Johnson*, 244 S.W.3d at 152. Now, Johnson is claiming that he is bringing a different claim than the one raised on direct appeal. (Pet. at 4 n. 1). But under either scenario, Johnson's claim is not legally cognizable and is, therefore, *Strong* barred.

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[2] This Court should reconsider its holding in *Jaynes* that "[t]here is no absolute procedural bar" against successive habeas petitions. Johnson's litigation history provides a perfect example of the threat that unrestricted successive habeas petitions present to finality and conservation of judicial resources. As a result of these negative effects, federal courts adopted the abuse-of-the-writ standard. *See, e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 488 (1991).