No. _____

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON,

***Petitioner*,**

vs.

PAUL BLAIR, Superintendent,
Potosi Correctional Center

***Respondent*.**

On Petition For A Writ Of Certiorari
To The Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this Missouri capital habeas case, petitioner, Johnny Johnson, raised a multi-faceted claim of ineffective assistance of counsel at the penalty phase of trial under *Wiggins v. Smith*, 539 U.S. 510 (2003) in his state post-conviction proceeding and in his habeas corpus petition in the district court below. In denying relief, both the state courts and the district court reviewed each aspect of petitioner's *Wiggins* claim in isolation in assessing *Strickland* performance and prejudice. The district court also denied a certificate of appealability.

On appeal, petitioner filed an application for a certificate of appealability in the Eighth Circuit seeking plenary appellate review of his *Wiggins* claim. Under the Eighth Circuit's local rules, the application was assigned to a three judge administrative panel. By a two to one vote, the panel majority summarily denied a certificate of appealability without explanation and dismissed the appeal. Circuit Judge Jane Kelly dissented, expressing her view that a certificate should issue to review petitioner's *Wiggins* claim.

Based on the foregoing facts, this case presents the following questions:

1. Whether the Eighth Circuit's practice of issuing unexplained summary denials of certificates of appealability in capital cases conflicts with 28 U.S.C. § 2253 and this Court's decisions in *Barefoot v. Estelle*, 463 U.S. 889 (1983) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

2. Whether 28 U.S.C. § 2253 and this Court's decision in *Barefoot* and its progeny require a certificate of appealability to issue when one circuit judge of a court of appeals' administrative panel tasked with this decision, in dissent, finds that a certificate of appealability should issue.

3. Whether a reviewing court, in assessing trial counsel's overall performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), should consider the cumulative effect of multiple errors of counsel in determining whether a Sixth Amendment violation occurred.

4. Whether a state court decision that truncated a Sixth Amendment claim of ineffectiveness of counsel in the penalty phase under *Wiggins* into separate components in assessing deficient performance and prejudice is contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Johnny Johnson respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit that denied petitioner a certificate of appealability (COA) by a two to one vote and dismissed petitioner's appeal of the District Court's judgment denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The January 21, 2022, judgment of the Eighth Circuit Court of Appeals denying a COA and dismissing petitioner's appeal is unpublished and appears in the appendix as A-1. The District Court's order and judgment denying habeas relief to petitioner is unpublished and appears in the appendix at A-2-54. The Eighth Circuit's April 8, 2022, order denying rehearing and rehearing en banc is unpublished and published in the Appendix at A-55.

JURISDICTIONAL STATEMENT

The Eighth Circuit issued its judgment on January 21, 2022, and subsequently denied rehearing and rehearing en banc on April 8, 2022. Under 28 U.S.C. § 2201(c) and Rule 13.1, the present petition was required to be filed within ninety days. Upon application of petitioner under Rule 13, Associate Justice and Eighth Circuit Justice, Brett M. Kavanaugh, extended the time for filing a petition for a writ of certiorari in

this cause up to and including September 5, 2022[1]. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth Amendment to the United States Constitution that states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense."

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution which provides in pertinent part: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

This case also involves 28 U.S.C. § 2254, which provides, in pertinent part:

> (a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.
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> . . .
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> (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] Because September 5, 2022, is Labor Day, a federal holiday, this order effectively extended the due date until September 6, 2022. *See* Rule 30.1.

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district of place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

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

(A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Johnny Johnson, is a Missouri prisoner under a sentence of death who was convicted in 2005, in the Circuit Court of St. Louis County, Missouri of first degree murder and other charges involving the July 26, 2002 murder of Casey Williamson in Valley Park, Missouri. Petitioner is currently incarcerated at the Potosi Correctional Center in the custody of respondent, Superintendent Paul Blair.

On January 10, 2005, the case proceeded to trial before a St. Louis County jury and Judge Mark Seigel. Petitioner was represented by Public Defenders Bevy Beimdiek and Beth Kerry. On January 17, 2005, Petitioner was found guilty on all charges. (Tr. 1971-1972). On January 18, 2005, the jury returned its verdict after the penalty phase recommending a sentence of death. (*Id*. at 2318). On March 7, 2005, pursuant to the jury's recommendation, Petitioner was sentenced to death for murder in the first degree. The Court also imposed three consecutive sentences of life imprisonment for the offenses of armed criminal action, kidnapping and attempted forcible rape. (L.F. 884-888).

On November 7, 2006, Petitioner's conviction and sentence of death were affirmed on direct appeal by the Missouri Supreme Court in *State v. Johnson*, 207 S.W. 3d 24 (Mo. banc 2006). This Court, thereafter, denied certiorari on May 29, 2007. *Johnson v. Missouri*, 127 S. Ct. 2880 (2007). Petitioner, in the meantime, filed his *pro se* motion for post-conviction relief on March 16, 2007, under Missouri Supreme Court Rule 29.15 setting forth two (2) grounds for relief. (29.15 L.F. 7-12).

Counsel was then appointed for Petitioner, who filed an amended motion under Rule 29.15 that contained nine (9) grounds for relief and requested an evidentiary hearing. (*Id*. at 27-306). The motion court, Judge Seigel presiding, held an evidentiary hearing on November 30, 2009, December 1 and 2, 2009 and July 30, 2010.

At the Rule 29.15 hearing, the Court heard testimony from Petitioner's witnesses: Dr. Pablo Stewart, a psychiatrist from San Francisco, Pamela Strothkamp-Dapron, Petitioner's 6th grade special education teacher, social worker Vito Bono, Dr. Brook Kraushaar, a psychologist, and former Public Defender mitigation specialists Catherine Luebbering and Lisa McCulloch. (29.15 Tr. 7-578). Petitioner's counsel also presented the testimony of Dr. Craig Beaver, a neuropsychologist from Idaho. (29.15 Tr. 584-722). On January 14, 2011, Petitioner submitted the depositions of his trial counsel and then rested. (*Id*. at 359). The State submitted the deposition of Dr. Christopher Long and rested. (*Id*.). Petitioner did not take the stand during the post-conviction proceedings.

On April 5, 2011, the motion court issued its Findings of Fact, Conclusions of Law, Order, Judgment and Decree of Court denying all relief on Petitioner's 29.15 motion. (*Id*. at 608-655). The Circuit's Court's ruling was affirmed on appeal by the Missouri Supreme Court in *Johnson v. State*, 388 S.W.3d 159 (Mo. banc 2012). Thereafter, that court denied rehearing on January 29, 2013.

Petitioner initiated his federal habeas proceeding pursuant to 28 U.S.C. § 2254 by filing a motion for appointment of counsel on February 13, 2013, in the United States District Court for the Eastern District of Missouri. (Doc. 1). Thereafter, a

timely petition for a writ of habeas corpus was filed on petitioner's behalf by CJA appointed counsel on January 28, 2014. (Dist. Ct. Doc. 11). On February 28, 2020, Judge Henry Autrey denied petitioner federal habeas relief and ordered that a COA would not issue. (A-2-54).

On March 23, 2020, Petitioner filed a motion to alter amend the judgment pursuant to Rule 59(e). (Doc. 88). On September 28, 2020, Petitioner's 59(e) motion was denied and Judge Autrey reaffirmed his decision that a COA would not issue. (Doc. 90). Petitioner timely filed a notice of appeal on October 27, 2020. (Doc. 91).

After the case was docketed in the Eighth Circuit, petitioner filed an application for a certificate of appealability seeking appellate review of two of his claims he advanced in the District Court below: (1) a multi-faceted claim of ineffective assistance of counsel at the penalty phase under *Wiggins v. Smith*, 539 U.S. 510 (2003); and an equal protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). By a two to one vote, a three judge panel of the Eighth Circuit summarily denied petitioner's application for a COA and dismissed the appeal. (A-1). Circuit Judge Jane Kelly, in dissent, would have granted a COA on petitioner's *Wiggins* claim. Judge Kelly stated her view that a COA should be granted to address "whether *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Porter v. McCollum*, 558 U.S. 30 (2009), anticipate an aggregate, rather than a piecemeal approach to a claim of ineffective assistance of counsel for failure to investigate and present mitigating circumstances at the penalty phase." (*Id.*). Thereafter, the Eighth Circuit denied petitioner's motion for rehearing or rehearing en banc on April 8, 2022. (A-55).

B. Facts Pertaining to Petitioner's *Wiggins* Claim

Since petitioner confessed to the crime, trial counsel's investigation immediately focused upon petitioner's mental illnesses and intellectual functioning. At the guilt phase, trial counsel raised a diminished capacity defense and argued to the jury that petitioner's mental illness and mental limitations rendered him incapable of deliberation, which would have mitigated the crime from first degree to second degree murder.

After petitioner was convicted as charged, trial counsel's case for life at the penalty phase also focused upon petitioner's history of mental illness and intellectual disabilities. However, this effort was also unsuccessful, despite the fact that the jury, due to the length of their deliberations [2], obviously grappled with whether the death penalty was appropriate in this case. (Tr. 2314-2318).

Well in advance of trial, appointed trial counsel learned that petitioner was mentally slow and believed he was possibly mentally retarded. (29.15 L.F. 367-368). Trial counsel also learned, through school records, that petitioner failed kindergarten and first grade and was in special education classes until he dropped out of school in the eighth grade. (*Id*. 608-609). From petitioner's medical records, trial counsel also learned that petitioner suffered head injuries when he was two, three and four years old. (*Id*. 610).

[2] The jury deliberated for over seven hours before issuing its verdict. After five hours of deliberations, the jury indicated that it was dead-locked. (Tr. 2317-2318).

Prior to trial, the defense retained two expert witnesses. Trial counsel retained Dr. Delaney Dean, a psychologist from Kansas City to evaluate petitioner's mental state at the time of the crime. Trial counsel also hired Wanda Draper, a child development expert, to testify regarding petitioner's childhood. Both of these experts informed trial counsel that petitioner should be tested by a neuropsychologist to determine whether he suffered from brain damage. (29.15 L.F. 372-373, 517-518).

Dr. Dean went so far as to provide trial counsel with the name of a trial attorney she knew who was working with a neuropsychologist in a pending civil case. Trial counsel called this attorney and got the name and contact information for a neuropsychologist named Terry Price. However, trial counsel failed to contact Dr. Price or any other neuropsychologist and candidly admitted that they had no strategic reason for this failure. (*Id*. 372-373, 491, 498, 531). Based upon this failure, the first aspect of petitioner's multi-faceted *Wiggins* claim, initially raised in his 29.15 motion, was trial counsel's failure to investigate petitioner's brain damage and present testimony from a neuropsychologist.

In conjunction with petitioner's Rule 29.15 action, appointed counsel retained Dr. Craig Beaver, a neuropsychologist to evaluate and conduct neurological testing of petitioner. After interviewing relatives and teachers and reviewing voluminous background records, Dr. Beaver administered the following tests to petitioner:

Weschler Adult Intelligence Scale, Third Edition

Rey 15-Item Memory Test

Test of Memory Malingering (TOMM)

SIRS

Grooved Pegboard

Controlled Oral Word Fluency Test

Weschler Test of Adult Reading

Rey Complex Figure Test

Rey Auditory Verbal Learning Test

Weschler Memory Scales, Third Edition, Abbreviated Form

Stroop Test

Trail-Making Test

Consonant Trigrams

Categories Test

Wisconsin Card Sorting Test

(29.15 Tr. 606).

These test results provided clear evidence that petitioner suffered organic brain syndrome and also revealed significant difficulties in petitioner's thinking abilities. (*Id*. 607, 629). The tests Dr. Beaver administered to detect malingering also indicated that the results of these tests were reliable. (*Id*. 626).

Dr. Beaver found that petitioner suffered from numerous mental deficits. Petitioner's intellectual functioning was in the low average range, consistent with his prior IQ tests. (*Id*. 607). He was particularly weak in language areas. (*Id*. 608). However, Dr. Beaver explained that IQ scores in and of themselves are not a predictor

of brain damage. To detect brain damage, a number of specific, objective tests must be administered to the subject to accurately assess brain functioning. (*Id*. 626-627).

These neuropsychiatric tests revealed that petitioner had significant delays in motor development, coordination, attentional problems and auditory processing problems. (*Id*. 608). Petitioner also had a substantial auditory processing deficit. (*Id*. 612). His brain's ability to process information quickly and effectively was impaired. (*Id*.). As a result, he missed a lot of information. (*Id*.). Petitioner's test scores on instruments requiring intentional tasks, particularly if auditory information was involved, were extremely low. (*Id*. 628).

Petitioner had suffered repeated head injuries as a child and in early adulthood. (*Id*. 613-614, 615). When petitioner was only two years old, he fell out of a bunkbed and hit his head on a nightstand. (*Id*. 615). This injury required several stitches. (*Id*.). The following year petitioner fell down some concrete steps and appeared dazed afterwards. (*Id*.). After this fall, his mother was carrying petitioner down the stairs and dropped him. (*Id*.). Petitioner fell and hit the stairs and then a stove. (*Id*.). Like his two previous head injuries, this one required a number of stitches. (*Id*.). He was treated for this head injury at Meacham Clinic. (*Id*.). Petitioner also sustained other childhood injuries outside of the home. Once, he was kicked in the head until he was bleeding out of one of his ears. (*Id*.). On another occasion, he got in a fight and several boys slammed boards on his head and knocked him out. (*Id*.). During another fight when he was nineteen years old, petitioner was rendered unconscious. (*Id*.). Like NFL players who sustain many minor head

injuries, over time, these blows to the head have a cumulative adverse effect upon brain functioning. (*Id*. 614-615).

Dr. Beaver also agreed with Dr. Dean's findings regarding petitioner's significant psychiatric problems. However, Dr. Beaver's evaluation and testing focused on petitioner's brain dysfunction. (*Id*. 621-622). Dr. Beaver, like Dr. Dean, found that petitioner suffered from depression, a psychotic disorder, post-traumatic stress disorder, and neurological damage and cognitive limitations. (*Id*. 635).

Petitioner's poly-substance dependency issues exacerbated his psychological, neurological and cognitive problems. (*Id*. 622, 637). Petitioner started drinking at a young age. (*Id*. 623). He started using other drugs, including methamphetamine, cocaine, LSD and huffing toxic chemicals. (*Id*.). People are at greater risk for having significant chemical dependency problems when they have a family history of chemical dependency or abuse, psychiatric problems, significant cognitive limits and abusive and unstable family situations. Petitioner had all these risk factors. (*Id*. 624). His drug abuse added "insult to injury" from a neuro-developmental perspective. (*Id*. 624-625). Petitioner already had an impaired brain as evidenced by the fact he failed kindergarten and first grade and his later alcohol and drug use exacerbated the problem. (*Id*. 625, 632, 721).

Petitioner's organic brain syndrome, combined with psychiatric disorders was a permanent condition that affected petitioner's ability to think, solve problems, act rationally, and deal with stress. (*Id*. 641). Dr. Beaver's testimony would have provided powerful evidence to support the statutory mitigating circumstances that

petitioner suffered from extreme emotional disturbance and his capacity to appreciate the criminality of his conduct was substantially impaired[3]. *See* § 565.032.3(2)(7) RSMo (2000).

The second component of petitioner's *Wiggins* claim, advanced both in the state post-conviction litigation and in the district court below, was a claim of ineffective assistance of counsel for failing to investigate and present the testimony of Pamela Strothkamp, petitioner's sixth grade teacher during the penalty phase of trial.

Prior to trial, defense investigator Lisa McCulloch obtained information that Ms. Strothkamp was petitioner's sixth grade special education teacher. (29.15 Tr. 570-571). Ms. McCulloch attempted to contact Ms. Strothkamp and left her two phone messages at two different telephone numbers. (*Id*. 573). After petitioner told Ms. McCulloch he did not want her to contact Ms. Strothkamp, Ms. McCulloch abandoned her investigation of this witness and made no further attempts to locate her. (*Id*. 573). Ms. McCulloch never informed trial counsel about her unilateral decision to abandon the search for Ms. Strothkamp.

Petitioner's Rule 29.15 counsel had little difficulty in locating Ms. Strothkamp. (*Id*. 565-568). After she was located and interviewed by post-conviction counsel, Ms. Strothkamp provided extremely powerful mitigating evidence about petitioner's childhood of abuse and neglect that none of the other teachers who testified at trial could provide. (29.15 L.F. 493). Ms. Strothkamp remembered Johnny very well

[3] These two mitigating factors were submitted to the jury in Instruction number 24 (L.F. 791).

because he was in the first special education class she taught which only had ten to twelve students. (*Id*. 400).

During her 29.15 testimony, Ms. Strothkamp testified that petitioner always came to school in dirty clothes and he reeked of body odor and urine. (*Id*. 417). In order to find out more about his situation and help him, Ms. Strothkamp called petitioner's mother. However, petitioner's mother refused to cooperate with her. At this point, Ms. Strothkamp realized that petitioner's mother had many of her own problems and could not fulfill her parenting responsibilities. (*Id*. 418-419).

Although she knew from the outset of her relationship with petitioner that he was neglected, Ms. Strothkamp became even more concerned about his welfare when he came to school with bruises on his body. (*Id*. 442-443). Ms. Strothkamp observed bruises the size of thumbprints on the back of petitioner's neck, his throat, and on his back. (*Id*. 443). She also noticed bruising on his legs. (*Id*. 444). Ms. Strothkamp was so concerned that she went to her principal to report her observations, which resulted in child protective services being contacted. (*Id*. 442, 458-461, 470-471).

Since he had failed kindergarten and first grade, petitioner was two years older than his fellow special education classmates. Despite this age difference, the younger kids picked on petitioner and made fun of him. (*Id*. 409-417). Petitioner responded to this bullying in a socially awkward way and did not appear to understand social boundaries. (*Id*. 438).

Ms. Strothkamp visited petitioner's home in an attempt to make contact with petitioner's mother, because his mother refused to come to school for parent-teacher

meetings. (*Id*. 410-411). As the school year progressed, petitioner's problems seemed to get worse and he frequently missed school. (*Id*. 471). Petitioner was evasive when trying to explain why he was absent from school. (*Id*.). He appeared to be tired every morning. (*Id*.). Eventually, he tried to commit suicide. (*Id*. 414).

Ms. Strothkamp became so concerned that she took it upon herself to personally review petitioner's school records from kindergarten through sixth grade. (*Id*. 423-426). These records indicated that petitioner displayed neurological problems and school personnel recommended that he see a doctor. (*Id*. 427). Petitioner exhibited problems with spatial, perceptual, fine motor coordination, gross motor skills and eye-hand coordination. (*Id*.). Several IQ tests consistently placed him in the low 80s. (*Id*. 431-434). As a result, he was diagnosed as suffering from a learning disability. (*Id*. 431).

Ms. Strothkamp also believed petitioner had an auditory processing disorder. (*Id*. 402-403). She was familiar with this disorder because she had researched it after her son suffered a head injury. *Id*. She based this belief on her observation that petitioner did not respond appropriately to spoken words and lacked a fundamental understanding of language. Based upon these observations and the fact that petitioner had been in special education classes since kindergarten, Ms. Strothkamp recommended that petitioner undergo a battery of tests to determine his cognitive functioning, speech and auditory processing difficulties in order to appropriately place him in the proper academic setting. (*Id*. 406-407).

For whatever reason, her recommendations were ignored and petitioner did not receive any professional help for his problems. (*Id.* 473). Ms. Strothkamp regrets the fact that more could not have been done to help him and prevented the tragedy that landed him on death row. (*Id.*).

The final component of this *Wiggins* claim involved trial counsel's failure to investigate and present available evidence to impeach and contradict the testimony of the prosecution's trial expert Byron English. Because Dr. English had performed the competency evaluation of petitioner prior to trial, trial counsel was on notice that he would be a prosecution witness. (L.F. 670-691). Counsel also took Dr. English's deposition on December 15, 2004, approximately a month before trial. (L.F. 201).

In addition, Dr. English's pretrial report diagnosed petitioner as suffering from methamphetamine intoxication, with perceptual disturbances, and poly-substance dependence, (alcohol, cannabis, methamphetamine, hallucinogens, cocaine, and inhalants), in remission, within a controlled environment. (29.15 Exh. 11). Dr. English's report also found that "although Mr. Johnson does suffer from a mental disease as described in the provisions of Chapter 552…, it is the opinion of this examiner that the client's apparent auditory hallucinations at the time of the alleged offenses were not a production of his mental disorder, but a sequel to his intravenous methamphetamine/alcohol abuse." (*Id.*). Dr. English also stated in his report that he believed that petitioner's schizoaffective disorder, depressive type, was in remission, that petitioner was partially malingering, and he had an antisocial personality disorder. (*Id.*).

During his trial testimony for the prosecution, Dr. English testified petitioner's drug and alcohol use was reported to him by petitioner during his evaluation. (Tr. 809-811). According to Dr. English, petitioner's auditory hallucinations were the result of his methamphetamine intoxication, not his mental illness. (*Id*.).

Despite knowing Dr. English did not understand diminished capacity and that petitioner's drug use was going to be an issue, trial counsel took no steps to rebut Dr. English's trial testimony in either the guilt or penalty phase. Had counsel properly prepared, they could have effectively discredited Dr. English's testimony with the following evidence presented during petitioner's 29.15 proceeding.

In light of petitioner's medical and social history, it is clear that his hallucinations were symptoms of his mental illness. He theoretically could have heard voices from some drugs, but he also heard voices when he was confined and drug free. (29.15 Tr. 82, 102, 104, 105, 111, 143-144). A hallucination is a hallucination, and experts cannot distinguish voices caused by drugs as opposed to a psychotic disorder. (*Id*. 103, 195). Psychotic symptoms are the same, regardless of their etiology. (*Id*. 195).

Several doctors had treated petitioner since 1996 for his psychotic symptoms and his depression. (*Id*. 80, 83-84, 93, 104, 106, 108, 109-110, 114, 116, 128, 147, 150, 151). Petitioner was prescribed Thorazine, Haldol, Mellaril, Zyprexia, Trazadone, Paxcil, Elavil, Loxitane, Cogentin, Perphenazine, Chlorpromazine, Antivan, Trifalin, Lithium, Doxepin, and Novane for his condition. (*Id*. 83-84, 93, 104, 105, 107, 127, 132, 147, 151, 154, 181, 184). Petitioner also had flashbacks, which were not

consistent with the types of drugs he used. (*Id*. 90-91). Over time, petitioner became more psychotic. (*Id*. 111). In the days before the crime, he was psychotic, paranoid, and acting bizarre. (*Id*. 142).

Petitioner has heard voices since he was fourteen. (*Id*. 109). Petitioner slashed his wrist in response to the commands he heard. (*Id*. 104). The voices reappeared year after year, telling him to hurt himself. (*Id*. 109). He tried to plug his ears to escape the voices. (*Id*. 152-153). He scratched himself and mutilated himself trying to escape. (*Id*.). He wore a hooded sweatshirt trying to muffle out the noises. (*Id*. 184). He swallowed razor blades. (*Id*. 189). Petitioner, plagued by hallucinations his whole life, desperately wanted them to stop. (*Id*. 177-178). Therefore, English's suggestion that petitioner used illegal drugs to induce hallucinations was ridiculous in light of his medical history. (*Id*.).

Dr. English also found petitioner's schizoaffective disorder was in remission, but provided no foundation for this finding. (*Id*. 179-180). In fact, petitioner was still hearing voices while incarcerated. (*Id*. 180, 181, 182, 187). Jail doctors continued to treat petitioner with antipsychotic medications. (*Id*. 181, 184). The jail's medical providers also observed petitioner's psychotic symptoms while he was in custody. (*Id*. 182-183, 183-184, 187).

Contrary to English's testimony, someone having command hallucinations does not have to act upon them immediately. (*Id*. 104). The overwhelming majority of patients with command hallucinations can control their behavior. (*Id*. 105).

However, at times, for some psychotic individuals, the commands become too difficult to resist. (*Id.* 105).

A qualified expert, experienced with dual diagnosis patients, would know that petitioner's psychosis was unlikely due to drug use like LSD, because hallucinations are usually visual. (*Id*. 120-121). A patient does not usually get persistent visual somatic and auditory hallucinations from LSD. (*Id*. 121). Petitioner's symptoms were more consistent with schizophrenia. (*Id*. 121-122). Petitioner also did not fit the criteria for amphetamine intoxication with perceptual disturbances. (*Id*. 174). His perceptual disturbances resulted from his schizoaffective disorder. (*Id*. 174).

A qualified expert would never diagnose a personality disorder, such as antisocial personality disorder, when one is suffering from a psychotic disorder such as schizophrenia. (*Id*. 129-130, 160, 164, 173). The DSM IV 2R directs that an examiner should not diagnose a patient with a personality disorder if the condition is better explained by another psychiatric diagnosis such as schizophrenia. (*Id*. 164).

As noted earlier, both the Missouri state courts during the 29.15 proceeding and the district court below, addressed each of the three components of petitioner's *Wiggins* claim in isolation, rather than cumulatively, in assessing whether trial counsel's performance was deficient and prejudice ensued. (A-30-47); *Johnson v. State*, 388 S.W.3d at 163-168. The district court also failed to address several other arguments made by petitioner that the court could review petitioner's *Wiggins* claim de novo because petitioner could overcome the relitigating bars of 28 U.S.C. § 2254(d)(1) and (2). (*See* Doc. 69, pp. 25-40). Had a COA issued, petitioner would have

briefed these additional 2254(d) issues before the Eighth Circuit, as well as the aforementioned 2254(d)(1) issue that Judge Kelly, in dissent, recognized was a viable and substantial issue that was worthy of appellate review.

In the present petition, petitioner contends that this Court's discretionary intervention is necessary to address important issues regarding the aberrant practices the Eighth Circuit employs in considering whether or not to grant a COA, as well as the substance of petitioner's *Wiggins* claim. In light of all the circumstances, petitioner suggests that the appropriate course for this Court to take is to issue a per curiam reversal with directions to the Eighth Circuit to grant a COA on petitioner's *Wiggins* claim based upon Judge Kelly's dissent and the other 2254(d) arguments petitioner advanced in the courts below.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE EIGHTH CIRCUIT'S PRACTICE OF DENYING CERTIFICATES OF APPEALABILITY, IN BOTH NON-CAPITAL AND CAPITAL CASES, WITHOUT EXPLANATION, EVEN IN SITUATIONS WHERE ONE JUDGE SITTING ON THE THREE JUDGE PANEL BELIEVES A COA SHOULD ISSUE, CONFLICTS WITH 28 U.S.C. § 2253, F.R.A.P. 22(b), AND PRIOR DECISIONS FROM THIS COURT.

In his COA application before the court of appeals, in addition to arguing that the district court's piecemeal analysis of petitioner's *Wiggins* claim was debatably wrong and that the district court failed to address several other compelling 2254(d) arguments, petitioner also stressed that a COA is warranted in close cases where the prisoner is under a sentence of death. In support of this argument, petitioner cited

cases from this Court and other circuits that have observed that any doubt regarding whether to issue a COA should be resolved in a condemned prisoner's favor where capital punishment is involved. *See e.g., Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *Petrocelli v. Angelone*, 248 F.3d 877, 884 (9th Cir. 2001); *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980); *Andres v. United States*, 333 U.S. 740, 752 (1948). Despite the lack of unanimity of the Eighth Circuit panel, this argument did not persuade the panel majority that this case deserved to be heard on appeal.

More importantly, the Eighth Circuit's unexplained, blanket denial of a COA by "split decision" also did not comport with the standards required by statute and this Court's jurisprudence. As this Court has noted: "the [COA] determination under Sec. 2253(c) *requires* an overview of the claims in the habeas petition and *a general assessment* of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (emphasis added). Indeed, this Court noted that the COA process "must not be *pro forma* or a matter of course." *Id*. at 337. In *Miller-El*, this Court reversed the Fifth Circuit's denial of a COA because it had "side-stepped" the appropriate procedure. *Id*. at 336.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court also stated: "The COA statute establishes procedural rules and *requires* a threshold inquiry into whether the circuit court may entertain an appeal." *Id.* at 482 (emphasis added); *See also Hohn v. United States*, 524 U.S. 236, 248 (1998). In *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), this Court also reversed the Fifth Circuit for "paying lip-service" to the COA standard and remanded the case for further proceedings.

The unexplained blanket denial of petitioner's COA motion also conflicts with *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Barefoot* permitted dismissal of a capital habeas appeal via a motion for stay of execution only after full briefing and unlimited oral argument where the Fifth Circuit, thereafter, denied a COA by issuing an lengthy decision on the merits of the claims. *Id.* at 893.

This blanket COA denial here failed to analyze and address the merits of petitioner's claims in any manner. As a result, this Court's intervention is warranted because the panel failed to conduct a reasoned analysis required by statute, the federal rules of appellate procedure, and binding precedent. *See Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (remanding COA to district court because its "blanket denial" did not comport with Rule 22(b)(1)); *Porterfield v. Bell*, 258 F.3d 484, 485-487 (6th Cir. 2001) (same); *Porter v. Gramley*, 112 F.3d 1308, 1311 (7th Cir. 1997) (noting in procedural history it had previously remanded the case to allow the district court to comport with F.R.A.P. 22(b)(1)).

An additional important and problematic issue arising from this blanket denial practice that the Eighth Circuit routinely employs, even in capital cases, is the inescapable fact that a summary denial of the COA without the issuance of a reasoned opinion analyzing the merits of any of the prisoners' constitutional claims leaves nothing of constitutional substance to allow a prisoner an adequate opportunity to seek discretionary review before this Court. In light of this Court's repeated statements that "death is different" and that a heightened standard of review should be adhered to in capital cases, *see, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305

(1976), a strong argument can be made that *Barefoot* requires a court of appeals to issue a detailed opinion on the merits of constitutional claims and procedural issues presented when it denies a COA in a **first** capital habeas appeal.

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

In both capital and non-capital cases, the Eighth Circuit routinely issues orders like it issued in this case, stating only "[t]he court has carefully reviewed the original file of the district court and the parties' submissions, and application for a certificate of appealability is denied." Petitioner filed a detailed and lengthy motion in the Eighth Circuit detailing the basis for a COA. The State filed an overlength response, and petitioner subsequently filed a reply. The panel majority did not address any of the issues raised in these pleadings and did not provide any reasoned basis to support its decision to deny a COA. (A-1).

The Eighth Circuit's COA practice is outside of the mainstream of federal appellate practice in a number of respects. First, the Eighth Circuit's COA denial rate

is substantially higher than at least two other circuits.[4] For first-in-time capital habeas petitions within the Eighth Circuit, COAs were denied in 47.6% of cases between 2011 and 2016. This is true despite the fact that the standard for obtaining a COA is not burdensome. As this Court held in *Miller-El*:

> [A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. . . . Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.
> 537 U.S. at 337-338.

In contrast, the COA denial rate cited in the *Buck* brief for the Eleventh Circuit is 6.3%, while that of the Fourth Circuit is 0%. Anecdotal evidence indicates that the Sixth Circuit's denial rate is also 0%.

Second, unlike most other circuits, the Eighth Circuit does not explain to habeas litigants (or to any subsequent reviewing court) why their claims are not debatably meritorious. When denying a COA motion, the Eighth Circuit always issues a uniform summary order like it issued in this case. The Eighth Circuit does not appear to have explained its reasons for denying a COA in a capital habeas appeal since 1997.

The Sixth Circuit, in stark contrast, issues reasoned decisions when it elects to deny a COA and explained the importance of reasoned opinions in this context in *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). In *Murphy*, the court reversed a blanket denial of a COA, and remanded the case to the district court for analysis of the

[4] *See Buck v. Davis*, 137 S. Ct. 759 (2017), brief of petitioner, Appendix A.

individual issues presented in the petition. Citing its earlier decision in *Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001), the court held that remand was required because, "[t]he district court here failed to consider each issue raised by Murphy under the standards set forth by the Supreme Court. . . ." *Murphy*, 263 F.3d at 467.

Even more problematic is the fact that Judge Kelly dissented and found that a COA should issue on petitioner's *Wiggins* claim. (A-1). Judge Kelly's dissent, by itself, requires a COA to issue.

The denial of a COA by "split decision" violates the controlling statute, which provides that appeals in habeas corpus actions may not be taken "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). Under this statute, it is clear that a single circuit judge may grant a COA. It also is self-evident that a "split decision" indicates that a constitutional claim is "debatable among jurists of reason," and should be enough to require a COA – especially in a capital case whether any doubt should be resolved in a condemned prisoner's favor.

A COA denial by a two to one vote by a three judge panel also cannot be reconciled with *Miller-El*. This Court's precedents require a COA to issue when the question presented is debatable among jurists of reason. 537 U.S. at 336 (citing *Barefoot*, 463 U.S. at 893 n.4 (1983); *Slack*, 529 U.S. at 484.

In *Buck v. Davis*, this Court held that the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." 137 S. Ct. at 773. Courts making a COA inquiry should "ask only if the District Court's decision was debatable." *Id*. at 774 (quoting *Miller-El*, 537 U.S. at 348) (internal quotation marks

omitted). The bar is not burdensome: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. (quoting *Miller-El*, 537 U.S. at 338).

The majority of the circuits, including the Eighth Circuit, have local or administrative rules which require a three-judge panel to review an application for a certificate of appealability. *See* 8th Circuit Rule 27A; Adm. Rule I.D.3. However, in the Third, Fourth, and Ninth Circuits, which each require a multiple-judge panel[5], it only takes one judge on the panel to find that the prisoner has made a necessary showing under § 2253 for a COA to issue.[6] Thus, in these three circuits, a 2-1 vote against the issuance of a COA would allow the appeal to be heard.

Based upon the 2-1 vote on the question of whether to issue a COA to permit appellate review of petitioner's *Wiggins* claim, a reasonable jurist has found it debatable whether his claim could have been resolved in a different manner. The Eighth Circuit's failure to hear this appeal is inconsistent with the modest showing required to obtain a COA under *Miller-El*, *Barefoot*, and *Slack* and is fundamentally unjust.

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[5] The Third and Fourth Circuits require a three-judge panel and the Ninth Circuit requires a two-judge panel.

[6] Third Circuit – Rule 22(a): "If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. §2253(c), the certificate will issue." Fourth Circuit – Rule 22(a): "If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. §2253(c), the certificate will issue." Ninth Circuit – Rule 6.3(b): "Any judge participating may vote to grant relief and so order. If all judges present agree that relief will not be granted, they shall so order."

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE MISSOURI SUPREME COURT'S AND THE DISTRICT COURT'S DECISION THAT PARSED PETITIONER'S UNITARY WIGGINS CLAIM INTO SEPARATE COMPONENTS IN ASSESSING WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL IS CONTRARY TO PRIOR DECISIONS OF THIS COURT AND CONFLICTS WITH THE VIEWS OF VIRTUALLY EVERY OTHER STATE SUPREME COURT AND FEDERAL COURT OF APPEALS.

Petitioner's *Wiggins* claim, as noted earlier, alleged that trial counsel was constitutionally ineffective in failing to investigate and present additional mitigating evidence in three respects. The primary 2254(d)(1) argument petitioner advanced in the courts below was that the Missouri Supreme Court's decision was contrary to clearly established law because it truncated petitioner's claim of penalty phase ineffectiveness into separate components in assessing both *Strickland* performance and *Strickland* prejudice. (*See* Dist. Ct. Doc. 69, pp. 25-31).

The Eighth Circuit majority and the District Court did not address petitioner's argument that clearly established caselaw from this Court, as well as the views of virtually every other federal circuit court of appeals and state supreme court[7], apply a cumulative effect test in assessing *Strickland* prejudice. *See Strickland v. Washington*, 466 U.S. 668, 695-696 (1984); *Wiggins v. Smith*, 539 U.S. 510, 536 (2003); *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000); *Cargle v. Mullin*, 317 F.3d 1196, 1206-1207, 1220, 1224-1225 (10th Cir. 2003); *Pavel v. Hollins*, 261 F.3d 210,

[7] Only the Fourth Circuit and a few state supreme courts truncate multiple *Strickland* claims in assessing performance and prejudice. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); *Weatherford v. State*, 215 S.W.3d 642, 649-650 (Ark. 2005).

216 (2nd Cir. 2001); *Karis v. Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002); *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001); *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006); *Marshall v. Hendricks*, 307 F.3d 36, 62-63 (3rd Cir. 2002) *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). Both before and after *Wiggins*, the Eighth Circuit has repeatedly refused to review multi-faceted or multiple claims of ineffectiveness of counsel cumulatively in assessing counsel's performance and *Strickland* prejudice. *See e.g. Middleton v. Roper*, 455 F.3d 838, 853 (8th Cir. 2006). *Hall v. Luebbers*, 296 F.3d 685, 692-693 (8th Cir. 2000).

This Court's opinion in *Strickland* refers at least ten times to the "errors" of counsel. *Strickland v. Washington*, 466 U.S. 668, 694-696 (1984). For instance, the court noted that the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Id*. at 694. This was no accident. *Strickland* represents the promise that, through the assistance of counsel, an accused will receive a "fair trial, a trial whose result is reliable." *Id*. at 687. A standard intended to guarantee the ultimate reliability of the outcome cannot achieve its purpose unless a reviewing court is obliged to weigh the collective impact of all of counsel's errors.

In articulating the now familiar two-prong standard for assessing claims of ineffective assistance of counsel, *Strickland* held that: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient

performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

Strickland also held that "[e]ven if the defendant shows that particular errors of counsel were unreasonable, …the defendant must show that they actually had an adverse effect on the defense." *Id*. at 693. The court in *Strickland* also stated that, "The result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id*. at 694. Thus, to meet the *Strickland* prejudice test, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*.

Two years later, this Court, in elaborating upon the analysis required by *Strickland*, stated that "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel has rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986). The court in *Strickland* also stated that "in any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. In making the prejudice determination, *Strickland* requires that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id*. at 695.

It is, therefore, clear from *Strickland's* repeated references to counsel's performance; to the breakdown of the adversarial process; to the totality of the circumstances; to the reliability of the trial's result; to trial counsel's representation; and to counsel's errors in the plural, that the *Strickland* decision intended that counsel's errors to be considered cumulatively when determining whether counsel's overall performance was deficient and whether this deficient performance prejudiced the defendant. *See, e.g.*, *Lindstadt v. Keane*, 239 F.3d 191, 194, 198-199 (2nd Cir. 2001). By stating that the right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel, if that error is sufficiently egregious and prejudicial," *Murray v. Carrier*, 477 U.S. 478, 496 (1986), this Court has made it unmistakably clear that in most cases counsel's ineffectiveness will be based upon the cumulative effect of multiple errors. *See also Smith v. Murray*, 477 U.S. 527, 535 (1986); *United States v. Cronic*, 466 U.S. 648, 657, n.20 (1984). In fact, some courts have recognized that the case in which ineffective assistance arises from only a single error as opposed to multiple errors is the exception to the rule. *See, e.g.*, *Gordon v. United States*, 518 F.3d 1291, 1297-1298 (11th Cir. 2008).

It is also abundantly clear in several more recent decisions involving claims of penalty phase ineffectiveness in capital cases, reviewing courts must consider the cumulative impact of both mental health and non-mental health mitigating evidence in assessing whether the petitioner can establish his entitlement to relief. *See Wiggins v. Smith*, 539 U.S. 510, 536 (2003); *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000). The Eighth Circuit's position on this issue also conflicts with this Court's

more recent decision in *Porter v. McCollum*, 558 U.S. 30 (2009). This Court in *Porter* noted that the Eleventh Circuit, like the Missouri Supreme Court and the district court in this case, had improperly parsed the mitigating evidence into separate components in conducting its review of Mr. Porter's *Wiggins* claim under 2254(d). *Id.* at 38.

This cumulation question is not just of critical importance in this case; it is also important to the proper administration of justice in courts across the country. This question arises frequently and it goes to the heart of the appropriate *Strickland* analysis. Because of the Eighth Circuit's nearly solitary position that a cumulative analysis is inappropriate, the federal courts of appeal have been unable to arrive at a consensus on this question and, as a result, criminal defendants in different parts of the country are subject to varying levels of Sixth Amendment protection.

In the Eighth Circuit and in other jurisdictions where *Strickland* prejudice continues to be viewed in isolation, the application of *Strickland* fundamentally conflicts not only with the language of *Strickland* itself but also with this Court's *Strickland* derived *Brady* jurisprudence, which commands the accumulation of prejudice arising from the prosecution's improper withholding of evidence. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *see also United States v. Bagley*, 473 U.S. 667, 682-683 & n.13 (1985) (holding that the *Strickland* prejudice standard supplies the proper test for assessing whether suppressed evidence is sufficiently "material" under *Brady v. Maryland*, 373 U.S. 83 (1963)).

As the *Brady*-related cases recognize, any rule forbidding cumulation for purposes of assessing prejudice is extraordinarily unfair. There can be no question that in carrying out the appropriate prejudice analysis a court must consider all of the evidence of a defendant's guilt, not just some of the evidence. *Kyles*, 514 U.S. at 436. If the effect of all of counsel's errors is not taken into account in assessing whether the jury would be reasonably likely to reach a different outcome, then the scales are improperly weighted against a finding of a Sixth Amendment violation. Only a holistic analysis of the prejudice resulting from deficient representation can accurately determine whether a different outcome was reasonably probable.

The Eighth Circuit's departure from these principles in this case require this Court's discretionary intervention to clarify the way that *Strickland* should be applied in cases involving multiple errors by trial counsel. The Eighth Circuit's approach, like that of the Fourth Circuit and a few state courts, undermine *Strickland* and creates considerable tension with this Court's *Strickland* derived *Brady* jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.