No. 22-5542

In the Supreme Court of the United States

JOHNNY JOHNSON, PETITIONER

v.

PAUL BLAIR, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Capital Case

Questions Presented

1. Did Congress intend to require the Court of Appeals to issue opinions when denying certificates of appealability when it did not include that requirement in the statute?

2. Did the United States Court of Appeals violate federal law when it selected from one of two statutory options provided by Congress?

3. Should this Court grant certiorari review to consider a claim of accumulated prejudice when trial counsel's performance was not deficient?

4. Did the Missouri Supreme Court fail to follow clearly established federal law as announced by this Court when it declined to consider the cumulative prejudicial effects of alleged trial counsel errors when this Court has never announced that standard?

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Opinions Below

The judgment of the court of appeals is not published in the federal supplement and is contained in the petitioner's appendix. App. 1a. The opinion of the district court is not published in the Federal Supplement but is available at 2020 WL 978038. App. 4a.

Jurisdiction

The judgment denying a certificate of appealability was entered on January 21, 2022. App. 1a. A petition for rehearing and rehearing *en banc* was denied on April 8, 2022. App. 55a. Justice Kavanaugh granted an extension of time and ordered that the petition be filed on or before September 5, 2022. The petition for writ of certiorari was filed on September 6, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Factual Statement

Johnny Johnson lured a six-year-old girl to a concrete pit, tried to rape her, and then caved in her head with a boulder brick and a "rather large boulder" when she would not yield to his advances. Johnson was convicted and sentenced to death. His direct appeal and post-conviction relief efforts did not overturn his conviction, and the district court and the court of appeals did not grant federal habeas corpus relief. Johnson complains the Eighth Circuit did not use his preferred method to process his application for a certificate of appealability, and he complains that the state courts did not accumulate his separate claims of error into one claim. These complaints are not worthy of this Court's extraordinary review. The family members of Johnson's victim and the community have waited more than 20 years for justice; they should wait no longer.

1. On a Thursday evening in July 2002, six-year-old Cassandra "Casey" Williamson, her mother and father, and some family friends in the neighborhood were having a cookout when they saw Johnny Johnson walking down the street. Tr. 821, 871–72.[1] Casey's mother had known Johnson since he was three years old, and Johnson had done nothing that caused Casey's mother to suspect that Johnson was suffering from mental illness. Tr. 869–70. While at the picnic, Casey's mother and others spoke with Johnson, and none of Johnson's conduct suggested that he was mentally ill. Tr. 869–70. Casey's mother had a "nice conversation" with Johnson

[1] Although Johnson did not submit the trial transcript with his appendix, Respondent will provide a copy upon request.

where there was no sign Johnson was mentally ill, unstable, or seeing things. Tr. 860–63. Johnson ended up spending the night on a couch in the home of Casey's father. Tr. 827.

On Friday morning, the alarm clock woke up Casey and her father. Tr. 826. Casey's father went downstairs to get ready before finding Casey something to eat, and Casey's father saw Johnson on the couch. Tr. 827. After spending 15 minutes in the bathroom getting ready, Casey's father came out and started looking for Casey. Tr. 827–28. Casey and Johnson were gone. Tr. 828.

That Friday morning, a neighbor saw Johnson carrying a little girl on his back while walking across a parking lot. Tr. 936–37. At about the same time, a motorist also saw a man—later identified as Johnson—carrying a little girl—later identified as Casey—on his back. Tr. 951, 953, 956–57. Johnson was smiling. Tr. 951.

Johnson took Casey to an abandoned glass factory.[2] In the glass factory, after dropping down into a concrete pit, Johnson asked Casey if she wanted to see his penis. Tr. 1290. Even though Casey said no, Johnson pulled down his shorts and exposed his penis. Tr. 1291, 1377–78. Johnson then asked Casey to pull down her panties so he could see her vagina. Tr. 1378. When she said no, Johnson grabbed Casey's underwear, tearing it off her and forcing her to the ground. Tr. 1379.

[2] The glass factory was an abandoned, torn down factory surrounded by a wooded area with trails that was a popular place for teenagers and children to play. Tr. 834, 969–70, 972–73. The factory itself consisted of "the foundation, a few tunnels, a few like ground structures. . . ." Tr. 970.

Johnson then got on top of Casey, pinned her to the ground with his chest, and rubbed his penis on her leg to try to get an erection. Tr. 1379. Casey fought back, scratching Johnson's chest. Tr. 1379. Johnson got up and abandoned his attempts to rape Casey, choosing to murder her instead. Tr. 1379. Johnson grabbed a brick and hit Casey in the head at least six times. Tr. 1379, 1432–35. Casey ran around the pit, leaving a trail of blood. Tr. 1136–37, 1156–59, 1195–98, 1228–30. After more blows from Johnson, Casey could not run so she tried to crawl away. Tr. 1291. Johnson continued to strike Casey with the brick, eventually fracturing her skull. Tr. 1291. Because Casey would not stop moving, Johnson lifted a "rather large boulder" over his head and brought it down on Casey's head and neck, breaking her skull. Tr. 1291, 1424–25, 1430. Johnson then wiped blood off the victim's face with her underpants, threw them in another opening in the wall, and tossed some rocks, leaves, and other debris in the pit on to the victim's body. Tr. 1054–55, 1116–17, 1136, 1140, 1291–92, 1380. Johnson climbed out of the pit, went back through the tunnel, and headed down to the nearby Meramec River to wash the victim's blood and other trace evidence from his body. Tr. 1291–92, 1380. A construction worker saw Johnson, shirtless, walking up from the bottom of a boat ramp on the Meramec River that same Friday morning with a hateful look on his face. Tr. 962, 966, 970–71.

That morning, officers found Johnson near Casey's home and asked Johnson if he would speak with them. Tr. 1014–15. Johnson agreed. Tr. 1015. Johnson spontaneously stated that he "wouldn't hurt little kids" because he "had one of his own." Tr. 1015. Johnson told officers that he had been swimming in the river that

morning but denied going through the glass factory to get to the river. Tr. 1016. The officer found this odd because traveling through the glass factory was the most direct route for Johnson to get to the river. Tr. 1017. Johnson eventually confessed his crimes to the officers over the course of multiple interviews on the same day.

Meanwhile, a searcher found Casey's foot underneath a pile of rocks inside a five-feet-deep concrete chamber that was only accessible by crawling through a tunnel. Tr. 1054–57. There was "a piece of concrete that probably weighed a hundred pounds right up where [Casey's] head would be." Tr. 1057.

2. Johnson called eight witnesses at trial designed to present a defense that Johnson could not deliberate because of his alleged mental illness. Tr. 1446–1793. The jury convicted Johnson. During the sentencing phase, the State presented victim impact evidence and evidence of Johnson's convictions for seven criminal offenses and two ordinance violations, that included convictions for second-degree burglary, felony and misdemeanor stealing, property damage, and an "indecent act." Tr. 1986–2032. Johnson called seventeen witnesses to present evidence of Johnson's personal and family history and evidence of Johnson's alleged mental health issues. Tr. 2033–2265. The jury found all three of the submitted statutory aggravating circumstances: that the murder was outrageously wanton and vile, that the murder was committed while committing the offense of kidnapping, and that the murder was committed while committing the offense of attempted forcible rape. The jury, through its verdict, also found that the aggravating circumstances outweighed the mitigating circumstances Johnson presented and that he was not deserving of mercy.

After his conviction, Johnson brought a direct appeal, which the Missouri Supreme Court denied. *State v. Johnson*, 207 S.W.3d 24 (Mo. 2006). This Court denied certiorari review. *Johnson v. Missouri*, 550 U.S. 971 (2007). Johnson then returned to state court and sought post-conviction relief, which the trial court has denied. The Missouri Supreme Court affirmed the denial of post-conviction relief. *Johnson v. State*, 388 S.W.3d 159 (Mo. 2012). Johnson petitioned for federal habeas relief, which the district court denied without issuing a certificate of appealability. Johnson requested a certificate of appealability from the Eighth Circuit, which was denied by the panel.

3. Congress has enacted a victim's crime statute, and extended some rights to victims of a defendant who has a pending federal habeas action. 18 U.S.C. § 3771. Respondent has communicated with Casey's family, and they have informed Respondent of their hope that Casey will be remembered for more than just her tragic murder. Casey's family has created various public events, memorials, and scholarships in her honor. *See*, *e.g.,* Mary Shapiro, *Friends remember Casey Williamson through safety fair*, St. Louis Post Dispatch May, 9, 2011, http://www.perma.cc/2JML-YS5E; *see also* Remembering Casey, http://www.rememberingcasey.com (last accessed Oct. 7, 2022).

Argument

I. This case is an exceptionally poor vehicle for addressing the questions presented.

Johnson's petition arrives at this Court one day beyond the statutory deadline, devoid of the necessary steps to present a live issue and filled with evidence of Johnson's delay. As a result, this petition presents an exceptionally poor vehicle for the Court to consider the questions presented.

A. Johnson's petition was filed one day beyond the deadline.

Johnson filed his petition 151 days after the Eighth Circuit denied rehearing en banc, and thus one day after the statutory deadline and Justice Kavanaugh's order allowed. Johnson requested a sixty-day extension of time, and requested that Justice Kavanaugh order the petition to be filed no later than September 6, 2022. Justice Kavanaugh, following the commands of 28 U.S.C. § 2101(c), granted Johnson sixty additional days—not sixty-one—and ordered that the petition be filed no later than Monday, September 5, 2022. Johnson did not comply, and instead mailed his petition on the 151st day: September 6, 2022. Pet. 1–2. Presumably, Johnson will claim that because September 5, 2022, was a federal holiday, this Court's Rule 30 applies to the order granting, in part, the application for an extension of time. *See* Rule 30.1 (extending the last day of a time period "until the end of the next day that is not a . . . federal legal holiday . . . ."). Because § 2101(c) is "mandatory" and "jurisdictional," if the Court grants certiorari, then it must consider the interplay between its rules and § 2101(c) and the effect of disobeying the Circuit Justice's decision to deny Johnson September 6, 2022, as the last day to file. *Missouri v. Jenkins*, 495 U.S. 33,

45 (1990) ("We have no authority to extend the period for filing except as Congress permits.").

B. Johnson did not timely press, and the courts below did not pass upon, the federal question he presents for review.

Johnson's untimely petition also fails to present a live question to the Court because none of Johnson's arguments were advanced to the correct courts at the correct time. Johnson's complaints about accumulated prejudice were never presented to the Missouri courts. *Johnson v. State*, 388 S.W.3d 159, 163–166; 168–69 (Mo. 2012). So, under AEDPA, those claims are procedurally defaulted. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1743 (2022). Johnson has never advanced a reason to excuse that default.

Similar to his state court briefing, Johnson did not timely present his accumulated-error claim to the district court. Instead, Johnson waited until his reply (traverse) to raise the claim. Doc. 69, *Johnson v. Blair*, 4:13-CV-278-HEA (E.D. Mo.). Johnson's untimely presentation of his claim in federal court makes this case a poor vehicle. *See McCleskey v. Zant*, 449 U.S. 467, 488 (1991) (holding that, pre-AEDPA, arguments raised for the first time in a fourth habeas petition are an abuse of the writ).

In his current petition, Johnson all but admits that he did not raise this accumulated prejudice claim in his habeas petition in district court. Pet. at 18 (citing the reply and not the habeas petition). A petitioner may not raise a claim for the first

time in his reply (traverse).[3] *See* Rule 2(c)(1), Rules Governing Section 2254 Cases in the United States District Courts ("The petition must . . . specify all grounds for relief available to the petitioner."); *see also McNeil v. Adm'r New Jersey State Prison,* CV 19-2069, 2019 WL 12249410, at *1 (3d Cir. Dec. 5, 2019) (not reported); *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005); *Jackson v. Duckworth*, 112 F.3d 878, 880 (7th Cir. 1997); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Thompkins v. McKune*, 433 Fed. App'x. 652, 660 (10th Cir. 2011). Because Johnson failed to timely present this claim to the federal district court in his habeas petition, no lower court has seen the question that Johnson asks this Court to consider.

Separately, Johnson's complaints that the Eighth Circuit's certificate of appealability process violates federal law were not raised or briefed in the application or the reply, but Johnson instead saved them for rehearing and for this Court. So again, Johnson presented untimely claims at a procedurally improper moment, denying the initial reviewing court the opportunity to address these arguments—a common thread in this capital litigation.

C. Johnson's strategy of delay makes this case a poor vehicle.

Johnson has unnecessarily delayed this capital litigation by raising claims too late and by requesting continuances in excess of several years. In the district court, Johnson requested 853 days—more than two years—to file his reply to the petition. *See Johnson v. Blair*, 4:13-CV-278-HEA (E.D. Mo. Feb. 28, 2020).

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[3] Likewise, Johnson cannot obtain an order from this Court directing the Eighth Circuit to consider whether it should reverse the district court for denying a claim that was not raised until the reply.

Johnson's delay persisted through the Eighth Circuit. Once there, Johnson sought delay after delay, even filing extension requests the day his application was due. By making requests on the due date, the delay became a *fait accompli*. *See, e.g.,* C.A. Resp. in Opp. to Mot. for Extension of Time at 3, *Johnson v. Blair*, 20-3529 (8th Cir. Mar. 8, 2021). Johnson's application presented a collection of arguments largely copied and pasted from a previously unsuccessful brief without informing the Eighth Circuit that its decision in that case dictated denial of Johnson's application. C.A. Resp. in Opp. to App. for Certificate of Appealability at 4, *Johnson v. Blair*, 20-3529 (8th Cir. Mar. 28, 2021).

At bottom, Johnson's litigation strategy has manifested delay after delay. Missouri and the victims of his crimes have "an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)); 18 U.S.C. § 3771(a)(7). Johnson's strategy highlights concerns about capital defendants using legal processes for unnecessary delays.

Even if the Court finds the petition's questions potentially interesting, this untimely, claims-defaulted, and dilatory petition does not deserve this Court's review. The Court should review a petition that cleanly presents the merits without the procedural obstacles created by Petitioner.

II. The first and second questions presented fail to implicate a circuit split and are otherwise unworthy of review.

Johnson's first question complains that the Eighth Circuit does not issue written opinions when denying certificates of appealability. Johnson does not show

the Eighth Circuit has violated any statute or the existence of a meaningful split between the circuits. Johnson's second question presented, likewise asserts that a single circuit judge should be empowered to grant a certificate of appealability. Johnson's complaints do not warrant this Court's extraordinary review.

A. No federal court must issue an opinion when denying a certificate of appealability.

The statutes are clear; state prisoners have no right to an automatic appeal from a district court's denial of federal habeas relief. 28 U.S.C. § 2253(c)(1). Congress has authorized a prisoner to appeal only when "a circuit justice or judge issues a certificate of appealability." § 2253(c). For a certificate to issue, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). Additionally, a certificate, if granted, must "indicate what specific issue or issues" are certified for appeal. § 2253(c)(3). Congress chose to impose no other procedural rules on federal courts, including a requirement that the Court of Appeals issue a written opinion. § 2253.

Without any statutory mandate, this Court has not chosen to impose a judicial mandate. Instead, this Court has explained that the certificate of appealability requirement mandates only "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, certificate 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 whether a certificate should issue need only conduct a limited review necessary to determine the need for a certificate—not the full merits of a petitioner's case. *Id.*

This Court has explained the standard that applies in that limited review of certificate of appealability applications. To receive a certificate, a petitioner must make "a substantial showing of the denial of a constitutional right," § 2253(c)(2), by showing "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.

Applying these standards, both the district court and the Eighth Circuit declined to issue a certificate of appealability on any of Johnson's claims for habeas relief. Pet. App. 1a. In his first question presented, Johnson only alleges that the Eighth Circuit "failed to conduct a reasoned analysis . . . ." Pet. App. 21a. But the Eighth Circuit "carefully reviewed the original file of the district court and the parties' submissions . . . ." Pet. App. 1a. Unsatisfied with this answer, Johnson asks this Court to read *Miller-El* and *Slack* to require an additional procedural step not found in the text of § 2253, namely that the Eighth Circuit be required to issue an opinion when denying a certificate of appealability. Nothing requires a court of appeals, or this Court, to issue written opinions when denying a certificate of

appealability—and it would controvert Congress's expressed intent that certificates of appealability would properly limit judicial resources to worthy habeas petitions.[4]

Along with these unsupported arguments, Johnson attempts to manufacture a circuit split, arguing that "[t]he Eighth Circuit's [certificate of appealability] practice is outside of the mainstream . . . ." Pet. App. 22a. But Johnson cannot cite a single authority for the proposition that a circuit court must issue an opinion when denying a certificate of appealability. Pet. App. 23a–24a. Indeed by failing to raise this issue in his application for a certificate of appealability, he also denied the Eighth Circuit the opportunity to review this claim and address any contrary authority or practice. Thus the Petition, like the applications for a certificate of appealability, cite no conflicting decisions of the courts of appeals or analysis by the Eighth Circuit. Therefore, no split in authority warrants review of Johnson's first question presented.

B. Neither § 2253 nor the Constitution require a federal court to issue a certificate of appealability on the authority of a single judge.

Johnson's second argument also fails to apply the text of the statute or this Court's precedent. In his second question presented, Johnson contends that if a circuit judge dissents from the denial of a certificate of appealability, then the circuit court has automatically violated § 2253. Pet. at 24–25. Yet, Johnson's complaint is not

[4] Although Johnson does not acknowledge this tension, any ruling by this Court that § 2253 requires a written opinion to deny a certificate of appealability would, by the statute's terms, apply to this Court as well. And of course, the holding would apply to federal habeas review of state convictions as well as review of federal convictions. § 2253(a) ("In a habeas corpus proceeding or a proceeding under section 2255 . . .").

supported by the statutory text or by this Court's precedent; and, again, Johnson cannot show a circuit split worthy of this Court's review.

Section 2253 provides that either a circuit justice or judge may issue a certificate of appealability. § 2253(c)(1). And, as Johnson admits, the circuit courts have adopted administrative rules to govern how those courts process applications for certificates of appealability. Pet. at 24. The circuit courts may promulgate procedural rules about certificates of appealability because Federal Rule of Appellate Procedure 22(b) provides that authority. Fed. R. App. P. 22(b)(2) ("A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes."). This Court has agreed, holding "[i]t is more consistent with the Federal Rules and the uniform practice of the courts of appeals to construe § 2253(c)(1) as conferring the jurisdiction to issue certificates of appealability upon the court of appeals rather than by a judge acting under his or her own seal. *Hohn v. United States*, 524 U.S. 236, 245 (1998); *see also* Randy Hertz & James S. Liebman, § 35.4 Initiating the Appeal, Federal Habeas Corpus Practice and Procedure (2022 ed.). That holding is consistent with this Court's practice: when an application for a certificate of appealability is submitted to the circuit justice in a capital case, he or she will refer the application to the entire court. *See, e.g., Roberts v. Lubbers*, 534 U.S. 946 (2001); *Mathis v. Thaler*, 564 U.S. 1031 (2011); *Taylor v. Bowersox*, 571 U.S. 1233 (2014); *Stoutamire v. La Rose*, 140 S. Ct. 128 (2019); *DeBenedetto v. Lumpkin*, 141 S. Ct. 2697 (2021).

Likewise, when an application for a certificate of appealability has been referred to the Court, and when the Court has decided to deny the application over the views of some members of the Court, then the Court has issued a summary denial while noting which members of the Court would grant the application. *See, e.g., Anderson v. Collins*, 495 U.S. 943 (1990) (Mem.) ("The application for a certificate of probable cause to appeal to the United States Court of Appeals for the Fifth Circuit presented to Justice White and by him referred to the Court is denied. Justice Brennan and Justice Marshall would grant the application.").

Against this history, tradition, and straightforward application of appellate principles, Johnson offers that other circuits have adopted different rules and that, in his view, the Eighth Circuit grants too few applications for certificate of appealability. Pet. at 24–25. Other circuits may have adopted different rules. But those rules do not show that the Eighth Circuit's panel procedure violates Federal Rule of Appellate Procedure 22(b) or this Court's holding in *Hohn*.

Johnson makes one final argument: that if a federal judge dissents from the denial of a certificate of appealability, then the claim must automatically be debatable by jurists of reason. Pet. 24–25. Here too, Johnson's "self-evident" arguments prove too little. Pet. 24. Johnson cites no cases—from this Court or any other—that hold that a dissent from a single federal judge means a certificate of appealability must issue. Such a formalistic rule would move certificate of appealability analysis from an objective standard to a subjective standard, in violation of this Court's precedent. *See, e.g., Giffin v. Sec'y, Fl. Dept. of Corr.*, 787 F.3d 1086, 1095 (11th Cir. 2015), *cert.*

denied sub nom. Giffin v. Jones, 136 S. Ct. 825 (2016) (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011) and *Williams v. Taylor*, 529 U.S. 362, 409–10 (2000) (opinion of O'Connor, J.)).

Likewise, the different administrative rules adopted by the circuits do not constitute a circuit split, and Johnson does not muster an argument that the administrative rules of the Fourth and Ninth Circuit create a circuit split with the Eighth Circuit. Pet. 25. Nor could he; a circuit split refers to "a *decision* in conflict with another United States court of appeals on the same important matter . . . ." Rule 10(a). As a result, no circuit split exists on this question presented, and it does not merit review.

III. The third question presented is an academic question, because no court below found trial counsel's performance deficient, so any decision on accumulated prejudice would be an advisory opinion.

In his next argument for certiorari review, Johnson alleges a split in authority on whether, after finding multiple instances of deficient performance, a court should accumulate the prejudicial effect of the multiple errors when determining that there is a reasonable probability that the result of the proceeding would have been different. Pet. 26–31. This case is a poor vehicle to consider that claim—because Johnson did not present it timely to the district court and did not present it to the state courts at all—as explained more fully in point I.B, *supra*. Aside from the vehicle problems, Johnson's complaint is academic because no court has ever found that his trial counsel performed deficiently at all. Therefore, even if the petition was granted,

and Johnson prevailed, the Court's decision would not reach the accumulated prejudice question.

The Missouri Supreme Court was presented with, and denied, three claims of ineffective assistance of counsel: (1) trial counsel should have called a neuropsychologist; (2) trial counsel should have called Johnson's teacher; and (3) trial counsel should have presented more mental health evidence. *Johnson*, 388 S.W.3d at 163–166, 168–69. The Missouri Supreme Court rejected Johnson's claims, finding that trial counsel did not render deficient performance when not calling a neuropsychologist because trial counsel consulted six other mental health experts and after reviewing "extensive mental health and school records." *Johnson*, 388 S.W.3d at 165. The Missouri Supreme Court also found trial counsel did not provide deficient performance when not calling Johnson's teacher because Johnson told counsel not to call the teacher, because Johnson's teacher would have provided cumulative evidence, and because trial counsel contacted many of Johnson's other teachers. *Id*. at 166. Finally, the Missouri Supreme Court determined trial counsel's performance was not deficient when trial counsel did not adduce more mental health evidence because Johnson's claim relied on calling some expert to impeach the State's rebuttal witness and Johnson failed to identify who that witness would be. *Id*. at 168. In his federal habeas petition, Johnson raised these same claims. Doc. 69, *Johnson v. Blair*, 11–28, 4:13-CV-278-HEA (E.D. Mo. Feb. 28, 2020). The federal district court likewise rejected Johnson's arguments and found that his trial counsel was not ineffective. Pet. App. 32a–47a. For each claim, the court determined that the Missouri

Supreme Court's adjudication of the claim was reasonable and entitled to deference. Pet. App. 38a, 42a, 46a.

Johnson does not challenge the Missouri Supreme Court's or the district court's finding that trial counsel's performance was not deficient. Pet. 26–31. Although mere error is insufficient for obtaining this Court's review, Petitioner must allege error because this Court has held that a reviewing court may dispose of a *Strickland* claim on either prong. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Here, the state court analyzed both prongs of *Strickland* and found no deficient performance and no prejudice. *Johnson*, 388 S.W.3d at 163–166, 168–69. This is fatal to Johnson's petition because this Court reviews judgments, not legal reasoning. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). This Court's review of the accumulated prejudice question would render, at most, an advisory opinion because Johnson has not requested a court to find or shown that the lower courts erred when finding that trial counsel's performance was not deficient. *Id.* (". . . if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do."). To do so would violate this Court's longstanding rule against issuing advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96 n. 14 (1968) ("The rule against advisory opinions was established as early as 1793 . . . ."). This case does not necessarily present the question Johnson asks this Court to review, and the Court should not make an exception to its settled rules here.

IV. The fourth question presented is an unadorned request for error correction, but there is no error for this Court's review.

Johnson's fourth question presented merely argues that the decisions below incorrectly apply *Strickland*. Certiorari is not a venue for mere error correction, and on top of that, there is no error in the analysis by the courts below.

AEDPA requires a federal court to accord deference to a state court's decision on the merits unless that decision is contrary to, or an unreasonable application of, clearly established federal law as announced by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). So, Johnson's contention that the Missouri Supreme Court's decision is not entitled to deference because other courts of last resort and courts of appeals apply a different test is irrelevant. Instead, a federal court reviewing a claim under AEDPA's "doubly deferential standard" must look to clearly established law as announced by this Court. *Burt v. Titlow*, 571 U.S. 12, 15, 19 (2013). There is no "clearly established Federal law as determined by the United States Supreme Court" that requires courts to accumulate the prejudicial effect of multiple errors of trial counsel.

Johnson, argues that this Court's decision in *Strickland* requires a court to consider the accumulated prejudicial effect of multiple trial counsel errors because the *Strickland* decision uses the plural "errors" ten times in the opinion. Pet. 27. If, as Johnson claimed, this Court's cases require lower courts to accumulate the effect of multiple instances of deficient performance, then Johnson would cite this Court's cases. He does not. This Court has denied certiorari on this question many times. *See, e.g., Scott McLaughlin v. Anne Precythe*, 21-7660 (cert. denied June 21, 2022); *Michael*

Tisius v. Paul Blair, 21-8153 (cert. denied Oct. 3, 2022); *Middleton v. Roper*, 455 F.3d 838 (8th Cir. 2006), *cert. denied Middleton v. Roper*, 549 U.S. 1134 (2007); *see also Baze v. Parker*, 371 F.3d 310, 330 (6th Cir. 2004) (holding that arguments for accumulating prejudice are a "theory" that "depends on non-Supreme Court precedent . . . .").

It is unsurprising that this Court has declined to hear that argument. As the Eighth Circuit has recognized, if another circuit has applied the same rule, then the state court's decision must be a reasonable—not an unreasonable—application of, or contrary to, clearly established federal law. *Colvin v. Taylor*, 324 F.3d 583, 588 (8th Cir. 2003). *Colvin*'s holding makes sense; federal habeas review is not "ordinary error correction," it is only for "extreme malfunctions in the state criminal justice systems." *Woods v. Donald*, 575 U.S. 312, 316 (2015); *Brown v. Davenport*, 142 S. Ct. 1510, 1523–24 (2022).

But even if Johnson had shown that the decisions below were wrong—which he has not and cannot—then this Court should still not grant certiorari review because Johnson, at most, has alleged mere error. This Court's certiorari review is not typically an avenue for mere error correction. *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). Johnson has requested summary reversal, but that is typically reserved for cases "where it appear[s] that the lower court [has] conspicuously disregarded governing Supreme Court precedent . . . ." *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J.,

concurring). Neither are appropriate where, as in this case, the courts below correctly applied the law.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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