Nos. 23-5243 & 23A93

In the Supreme Court of the United States

JOHNNY JOHNSON, PETITIONER,

v.

DAVID VANDERGRIFF, RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUGGESTIONS IN OPPOSITION TO MOTION FOR STAY

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Capital Case

Questions Presented

1. Should this Court grant certiorari review merely because Johnson complains that the court below erred when it adjudicated his *Ford*[1] and *Panetti*[2] claim?

2. Should this Court grant certiorari review on Johnson's claim that *Ford* and *Panetti*'s "substantial threshold showing of incompetency" standard of review is not favorable enough for petitioners?

3. Should this Court grant certiorari to consider Johnson's complaints about how the Missouri Supreme Court interprets state law?

[1] *Ford v. Wainwright*, 477 U.S. 399 (1986).
[2] *Panetti v. Quarterman*, 551 U.S. 930 (2007).

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Reasons for Denying the Application for Stay of Execution

I. Johnson is not entitled to a stay of execution because he has not satisfied the *Hill* factors.

This Court should deny Johnson's request for a stay because Johnson has not and cannot show that all of the four *Hill* factors weigh in his favor or even that any do. In *Hill*, this Court explained:

> We state again, as we did in *Nelson*, that a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts.

Hill v. McDonough, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004), *and In re Blodgett*, 502 U.S. 236, 239–240 (1992) (per curiam)). More recently, this Court reaffirmed *Hill* and its holding, stating, "Both the State and the

victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (quoting *Hill*, 547 U.S. at 584). And just this month, three members of this Court reaffirmed that, in their view, *Hill* was the governing standard. *Barber v. Ivey*, 600 U.S. ---, 2023 WL 4669437 at *4 (July 21, 2023) (Sotomayor, J. dissenting from the denial of application for stay). In order to receive a stay, Johnson must make a "clear showing" that *each* of the four necessary factors weigh in his favor: a strong likelihood of success on the merits, irreparable injury, injury to other parties, and the public interest. *Nelson*, 541 U.S. at 650; *Hill*, 547 U.S. at 584.

As explained below, Johnson cannot make a strong showing of a strong likelihood of success on the merits. Johnson's claims are nothing more than unadorned requests for error correction. Pet. 29–38. And even setting that aside, Johnson's claims fail after applying this Court's precedents. Indeed, only if a prisoner makes the necessary preliminary showing—a substantial threshold showing of insanity—that he is incompetent to be executed, is he then entitled to a hearing. *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J, concurring). In *Panetti v. Quarterman*, 551 U.S. 930, 948–49 (2007), this Court considered a claim under AEDPA that Texas had unreasonably applied federal law in failing to hold a "fair hearing" after conceding that Panetti made a substantial threshold showing of incompetency. In so doing, this Court phrased the *Ford* rule as such:

> Justice Powell's opinion states the relevant standard as follows. "Once a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness."

Panetti, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 426). But this "fair hearing," the *Panetti* Court made clear, means *only* that the prisoner have an opportunity to be heard, and "a constitutionally acceptable procedure may be far less formal than a trial[.]" *Id.* (quoting *Ford*, 477 U.S. at 426). Indeed, the *Ford* concurrence (which this Court has said is the controlling opinion of *Ford* under *Marks v. United States*, 430 U.S. 188 (1977)), "did not set forth 'the precise limits that due process imposes in this area[,]" and instead "observed that a State 'should have substantial leeway to determine what process best balances the various interests at stake' once it has met the 'basic requirements' required by due process." *Id.* at 949–950 (quoting *Ford*, 477 U.S. at 427). "These basic requirements include an opportunity to submit 'evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.'" *Id.* at 950 (quoting *Ford*, 477 U.S. at 427).

Here, despite finding that Johnson failed to demonstrate a substantial threshold showing of insanity, the Supreme Court of Missouri followed its own rule and allowed Johnson to submit evidence and argument his counsel, including psychiatric evidence that differed from the State's evidence. This satisfied *Ford*'s explicitly stated test and therefore assuredly falls within the substantial leeway that *Ford* and *Panetti* recognized were left to state courts to balance the relevant interests in competency proceedings. In the face of that straightforward analysis, Johnson asserts three questions presented that are little more than loose complaints about the procedure Missouri's Supreme Court has chosen after *Ford* and *Panetti*. But these

three questions presented do not show that Johnson has a strong likelihood of success on the merits. As will be discussed in greater detail below, Missouri's Supreme Court faithfully applied *Panetti* and *Ford*, and Johnson's petition fails to state an error, let alone a basis for the issuance of writ of certiorari.

In addition, the records requested by Johnson on July 31 and received by Johnson on July 31 show that Johnson is not incompetent to be executed. After the stay was entered by a panel of the Eighth Circuit, Johnson told the mental health provider that he "feels 'alright.'" Resp. App. A33. Johnson reported that the "brain zaps" have stopped and that his sleep has improved. *Id*. Johnson also reported that "the [auditory and visual hallucinations] and sense of demons or others messing with him stopped in the same tiem [sic] frame." Resp. App. A33. Johnson further reported that he refuses his medicine when he feels "lazy." Resp. App. A34.

On the second factor, Johnson fares no better; Johnson will not be irreparably harmed by not being granted a stay to press the questions presented in his petition before this Court because they are meritless and do not state a basis for certiorari review.

Johnson has also failed to show that the next factors—injuries to the other parties and the public interest—weigh in his favor. This Court has repeatedly recognized the States' important interests in enforcing lawful criminal judgments without federal interference. "The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'" *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2022) (quoting The Federalist No. 39, p. 245 (J. Madison) (Clinton

Rossiter ed. 1961)); *see also Gamble v. United States*, 139 S. Ct. 1960, 1968–69 (2019). Federal intervention "disturbs the State's significant interest in repose for concluded litigation," and it "undermines the States' investment in their criminal trials." *Id.* (quotations and citations omitted). "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.*

The surviving victims' of Johnson's abduction, attempted rape, and murder of six-year-old Casey Williamson will suffer a "profound injury" from any stay order. *Id*. When a panel of the Eighth Circuit issued a stay order hours before the twenty-first anniversary of Johnson's crimes, the victims suffered mightily. The surviving victims have endeavored to make meaning from Casey's brutal murder. Casey's family has created various public events, memorials, and scholarships in her honor. *See, e.g.,* Remembering Casey, http://www.rememberingcasey.org (last accessed July 25, 2023). Just days ago, Casey's family held the 2023 Valley Park Safety Fair, designed to "empower families and offer resources that could help prevent the devastating loss of a child." Joey Schneider, *Valley Park holds safety fair in memory of Casey Williamson*, KMOV (July 22, 2023), https://fox2now.com/news/missouri/valley-park-holds-safety-fair-in-memory-of-casey-williamson. "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Shinn*, 142 S. Ct. at 1733 (quoting *Calderon*, 523 U.S. at 556).

A stay of execution would frustrate the State's "significant interest in repose" and would delay the justice that "real finality" provides. As Casey's mother explained in a declaration from July 26, 2023, the twenty-first anniversary of Johnson's horrible crimes against Casey, the Eighth Circuit's previous stay was a "double whammy" because it came so close to the anniversary of her daughter's murder. Resp. App. at A1 ¶6. Johnson's crimes have already destroyed Casey's family. *Id.* at A1 ¶3. Casey's mother now suffers from "anxiety, depression, PTSD, nightmares, insomnia, and fibromyalgia." *Id.* One of Casey's sisters self-medicated because of the murder and eventually "lost her life." *Id.* Casey's uncle has suffered a "mental breakdown," and Casey's grandfather "drank himself to death following the death of Casey." *Id.* Casey's mother "hoped [she] would receive closure on August 1, 2023, when Johnson was to be executed." *Id.* at A1 ¶5. The news of the stay has "consumed" Casey's mother and the prospect of a stay for months or years has greatly concerned Casey's mother. *Id.* at A2 ¶8. Casey's mother is "so worried that [her] family will not be able to endure litigation for months or years" but knows "that [she] cannot endure this litigation for much longer." *Id.* at A2 ¶13. For these reasons, the final two factors weigh against Johnson.[3]

[3] Elsewhere, Johnson has suggested that Casey's father does not wish for the execution to go forward. Reply in Supp. of App. for Stay, *9, *Johnson v. Vandergriff,* 23-5147 (July 26, 2023). A recent news story casts doubt on that argument. *See* Dana Rieck, *Johnny Johnson killed their girl. They await his Missouri execution, after deep family scars*. St. Louis Post-Dispatch (https://www.stltoday.com/news/local/crime-courts/johnny-johnson-killed-their-girl-they-await-his-missouri-execution-after-deep-family-scars/article_544e88ec-2bea-11ee-979f-776ae36cec14.html)(last accessed July 31, 2023).

And even setting those factors aside, Johnson's strategy of delay weighs against a stay. Johnson filed this petition for certiorari on July 31, 2023, hours before his scheduled execution. But Johnson is seeking certiorari review of a state court decision that was issued nearly seven weeks ago—on June 8, 2023. Nothing prevented Johnson from filing this petition on that same day, but he apparently chose not to as a strategy of intentional delay. And, despite his execution being scheduled less than fifty-four days after the Missouri Supreme Court's denial, Johnson delayed for *fifty-three* days before filing this petition.

In total, Johnson delayed for approximately 80 of the 104 days between the issuance of his execution warrant and the date of his execution. This delay is particularly troubling here because Missouri moved to set Johnson's execution date nearly three months before then on November 14, 2022, which put Johnson on notice of his potential upcoming execution. Despite that advanced notice of the potential that his execution date would be readily forthcoming, Johnson has—at every stage of this now extremely protracted capital litigation—chosen delay *for the sake of delay*.

Moreover, Johnson appears to have failed to serve a copy of his petition on counsel for the Warden. Johnson's certificate of service reflects that the petition was mailed to Assistant Attorney General Stephen Hawke, who has not been counsel of record since March 4, 2017.[4] Undersigned counsel has conducted a search of his

[4] On March 4, 2017, Assistant Attorney General Gregory M. Goodwin entered his appearance in the United States District Court for the Eastern District of Missouri and became counsel of record. Assistant Attorney General Goodwin handled the remainder of the proceedings in the district court, the Eighth Circuit, this Court,

email, and undersigned counsel spoke with Assistant Attorneys General Hawke and Clarke, and neither of them received a service copy of the petition.[5] Johnson's counsel's failure to serve a copy of this petition on counsel for Respondent has resulted in delay, and that delay is attributable to Johnson. *See, e.g. Shinn*, 142 S. Ct. at 1733 ("[T]he attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). Johnson is not entitled to a stay.

Brief in Opposition

Statement

A. Background

1. Nearly thirty years ago, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("ADEPA") "to reduce delays in the execution of state and federal criminal sentences, *particularly in capital cases*," and "to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citation and quotations omitted and emphasis added). As part of this process, Congress expressed a judgment on the "appropriate balance between finality and error correction." *Jones v. Hendrix*, 143 S. Ct. 1857, 1877 (2023). In light of the carefully crafted balancing of interests, this Court has refused to create a presumption against finality. *Id*. AEDPA imposes a "highly deferential standard" on

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and the Missouri Supreme Court (with the assistance of Assistant Attorney General Andrew Clarke).

[5] Respondent discovered this certiorari petition after a clerk sent an email to counsel of record before this Court.

federal courts that is "difficult [for petitioners] to meet." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Federalism, finality, and reducing the delays in the execution of state sentences in capital cases are of incredible importance. "Our Federalism," stands for

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). Federalism concerns are at their apex in federal habeas because "[t]he power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'" *Shinn*, 142 S. Ct. at 1730 (quoting The Federalist No. 39, p. 245 (J. Madison) (Clinton Rossiter ed. 1961)); *see also Gamble*, 139 S. Ct. at 1968–69. Federal intervention "disturbs the State's significant interest in repose for concluded litigation," and it "undermines the States' investment in their criminal trials." *Id.* (quotations and citations omitted). For the same reasons, finality is important to the States as well. But finality has special meaning for the victims of crime because "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* (quoting *Calderon*, 523 U.S. at 556). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty . . . ." *Id.*

While Johnson asks this Court to issue a writ of certiorari directly to the Supreme Court of Missouri, because Johnson seeks certiorari review related to his

state-court criminal conviction and sentence this Court's review is informed by AEDPA.

2. Twenty-one years ago, Johnny Johnson took six-year-old Casey Williamson to a concrete pit in an abandoned factory where he attempted to forcibly rape her.[6] After pulling down his pants and exposing himself to her, Johnson tore Casey's underwear off her and forced her to the ground. Johnson pinned her to the ground while he rubbed his penis on her leg. Casey resisted Johnson's sexual predation, scratching Johnson's chest. Johnson then grabbed a brick and struck Casey in the head at least six times. Casey continued to try to get away from Johnson, even after she could no longer walk. As she tried to crawl away, Johnson continued to strike her with the brick, eventually fracturing her skull. Casey continued to move. Johnson then lifted a boulder over his head and brought it down on Casey's head and neck, killing her. Johnson left Casey's body in the pit, covering much of it with rocks, leaves, and other debris. He left the abandoned factory and washed himself of Casey's blood in the Meramec River.

After completing the ordinary course of review, including federal habeas review, Johnson filed a state habeas petition alleging that he was incompetent to be executed. The Missouri Supreme Court took briefing and evidence and rejected Johnson's claim because, in part, his evidence was not credible.

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[6] The following description of the crime comes from the district court's order denying habeas relief in a related case (which is also has a pending petition for certiorari before this Court), and is quoted without further attribution. Order, *Johnson v. Vandergriff*, 4:23-CV-845-MTS (E.D. Mo. July 17, 2023).

3. On July 25, 2023, mere hours before the twenty-first anniversary of Casey's abduction, attempted rape, and murder, a divided panel of the United States Court of Appeals for the Eighth Circuit issued a stay of execution. *Johnson v. Vandergriff*, 23-2664 (8th Cir. July 25, 2023); Resp. App. at A1 ¶6. After receiving the news, Johnson's victims have suffered. When Casey's mother received the news so close to the anniversary, it was a "double whammy," and it "consumed" her. Resp. App. at A1 ¶6; Resp. App. at A2 ¶8. But more than that, the news was "heart wrenching and scary" because Casey's mother "know[s] that [she] cannot emotionally and physically do this again" since Casey's mother has been "fighting for twenty-one years to get justice for Casey." Resp. App. at A2 ¶7. Finality will allow Casey's mother to "remember [her] daughter for who she was, not what happened to her." *Id*. The prospect that justice would be delayed "feels so unfair" to Casey's mother because "Johnson received twenty-one years that Casey never got the chance to have." Resp. App. at A2 ¶13. At bottom, Casey's mother is "so worried that [her] family will not be able to endure litigation for months or years. [Casey's mother] knows that [she] cannot endure this litigation for much longer." Resp. App. at A2 ¶13.[7] The Eighth Circuit's stay was vacated by the Eighth Circuit en banc on July 29, 2023, *Johnson v. Vandergriff*, 23-2664 (8th Cir. July 25, 2023), and Johnson has a separate petition for writ of certiorari pending before this Court from that case.

[7] Following the Eighth Circuit en banc court's vacatur of the stay, counsel contacted Casey's mother to inform her of the news.

B. Proceedings Below

1. After the Missouri Supreme Court affirmed his convictions on direct appeal and state-court post-conviction relief, Johnson began federal habeas review on February 13, 2013. *Johnson v. Steele*, 4:13-CV-278-HEA (E.D. Mo. Feb. 13, 2013). The district court denied relief and denied a certificate of appealability on February 28, 2020. Doc. 85, *Johnson*, 4:13-CV-278-HEA (E.D. Mo. Feb. 28, 2020). Johnson sought a certificate of appealability from the United States Court of Appeals for the Eighth Circuit, which denied a certificate on January 21, 2022. *Johnson v. Blair*, 20-3529 (8th Cir.). The Eighth Circuit denied rehearing and rehearing en banc on April 8, 2022. *Id*. This Court denied certiorari review on November 14, 2022. *Johnson v. Blair*, 22-5542 (Nov. 14, 2022). On the same date, Missouri filed a motion in the Supreme Court of Missouri to set Johnson's execution date.

2. Nearly a month after the Supreme Court of Missouri issued its execution warrant, Johnson filed a state habeas petition alleging he was incompetent to be executed. *State ex rel. Johnson v. Vandergriff*, SC100077 (Mo. 2023). After receiving briefing and evidence, the Missouri Supreme Court denied habeas relief in a written opinion. *State ex rel. Johnson v. Vandergriff*, 668 S.W.3d 574 (Mo. 2023). The Missouri Supreme Court found, among other things, that Johnson's evidence was not credible. *Id*. at 578. When the Supreme Court of Missouri denied Johnson's petition, fifty-four days remained before the execution scheduled for August 1, 2023.

3. After delaying for approximately thirteen days, Johnson filed a motion to recall the mandate in the Supreme Court of Missouri on Friday, July 21, 2023, at

4:04 p.m. The motion requested a stay and the appointment of a special master. On Saturday, July 22, 2023, the Warden filed suggestions in opposition to the motion to recall the mandate. On July 25, 2023, Johnson filed a reply in support of his motion to recall the mandate. On July 29, 2023, and after the Eighth Circuit vacated its stay of Johnson's execution, the Missouri Supreme Court denied Johnson's motion to recall the mandate.

Reasons for Denying the Writ

II. This case is a poor vehicle for addressing the questions presented.

Johnson's petition is a poor vehicle for resolving the questions presented for at least three reasons. *First*, Johnson has unreasonably delayed in bringing this petition for certiorari review. *Second*, Johnson has raised his *Ford* and *Panetti* claims in a federal habeas petition, which this Court has held is a more appropriate venue for such claims because it respects our system of dual sovereignty. *Third*, any relief would be barred under *Edwards v. Vannoy,* 141 S. Ct. 1547 (2021). As a result, this petition presents an exceptionally poor vehicle for the Court to consider the questions presented.

A. Johnson has unreasonably delayed in bringing this claim.

Johnson comes to this Court with a history of delay. Missouri pointed out this history to the Court in Johnson's 2022 certiorari petition, when Johnson filed that certiorari petition one day out of time and raised unpreserved claims after delaying for weeks at the district court and at the court of appeals. Br. in Opp. at 13–16, *Johnson v. Blair*, 22-5542. In fact, federal habeas review of Johnson's case took more

than ten years, in large part due to Johnson's delays and despite never receiving any relief.

Now, Johnson returns to this Court with hours remaining before his scheduled execution. But this time, Johnson delayed for approximately 80 of the 104 days between the issuance of his execution warrant and the date of his execution. Once the Supreme Court of Missouri set Johnson's execution date, he was on notice to bring any claim that he was incompetent to be executed. Instead of bringing his claim in a timely fashion, Johnson waited nearly a month after the Missouri Supreme Court issued its execution warrant to file a state-court habeas petition asserting, *inter alia*, that he was incompetent to be executed under *Ford* and *Panetti.* Tellingly, Johnson waited nearly a month despite the fact that his expert visited Johnson in February 2023. This delay is particularly troubling here as Missouri moved to set Johnson's execution date nearly three months before then on November 14, 2022, which put Johnson on notice of his potential upcoming execution. After briefing and receiving documentary evidence, the Missouri Supreme Court denied Johnson's petition on June 8, 2023.

Despite his execution being scheduled less than fifty-four days after the Missouri Supreme Court's denial, Johnson delayed for *fifty-three* days before filing this petition for certiorari hours before his execution. In total, Johnson delayed 80 of the 104 total days between the issuance of the warrant and the date of his scheduled execution. While Johnson had a pending federal habeas petition under 28 U.S.C. § 2254 alleging the Missouri Supreme Court unreasonably applied clearly established

federal law or unreasonably determined the facts in light of the evidence presented during state proceedings, nothing, except delay for the sake of delay, prevented Johnson from filing this petition for certiorari directly from the Missouri Supreme Court's decision on June 8, 2023.

And, as pointed out *supra*, Johnson's recent conduct in filing this petition *without* providing notice or service on counsel of record is, itself, evidence of a strategy of delay. Although Johnson filed his petition sometime on July 31, 2023, counsel for Respondent only discovered the petition in the late evening hours, and only after being contacted by a court clerk. The delay of Johnson's counsel is attributable to Johnson, and therefore, Johnson has delayed. *See, e.g. Shinn*, 142 S. Ct. at 1733 ("[T]he attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error.") (quoting *Coleman*, 501 U.S. at 753.

At bottom, Johnson has constructed and executed a strategy of delay. Missouri—and more importantly the victims of Johnson's crime—have "an important interest in the timely enforcement of a sentence." *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill*, 547 U.S. at 584); 18 U.S.C. § 3771(a)(7). Johnson's strategy convincingly illustrates the wisdom of this Court's concerns about unnecessary delay in capital cases. And the emotional impact of this case on Casey's mother amply illustrates this Court's prior concerns about the "profound injury" that delay inflicts on the surviving victims of crime.

B. This Court should decline to issue a writ of certiorari to respect our system of dual sovereignty.

This Court should not grant certiorari review of state post-conviction claims because this Court has found federal habeas proceedings (within the confines of AEDPA) provide a more appropriate avenue to consider federal constitutional claims. *Lawrence v. Florida,* 549 U.S. 327, 335 (2007); *Kyles v. Whitley,* 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of certiorari).

"To respect our system of dual sovereignty," this Court and Congress have "narrowly circumscribed" federal habeas review of state convictions. *Shinn,* 142 S. Ct. at 1730. The States are primarily responsible for enforcing criminal law and for "adjudicating constitutional challenges to state convictions[.]" *Id.* at 1730–31 (citation and quotations omitted). Federal intervention intrudes on state sovereignty, imposes significant costs on state criminal justice systems, and "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* at 1731 (citation and quotations omitted).

To avoid the harms of unnecessary federal intrusion, "Congress and federal habeas courts have set out strict rules" requiring prisoners to present their claims in state court and requiring deference to state-court decisions on constitutional claims. *Id.* at 1731–32; *see* 28 U.S.C. § 2254(d), (e). A grant of certiorari now would allow Johnson an end-run around the rules that Congress and federal courts have crafted to maintain our federalist system of government. Johnson has filed a petition for certiorari on his *Ford* and *Panetti* claims under AEDPA and this petition is therefore a poor vehicle for this Court's review. To respect "Our Federalism," *Younger,* 401 U.S.

at 44, and "finality, comity, and the orderly administration of justice," this Court should enforce the limits on federal review of state convictions and deny Johnson's petition. *Shinn,* 142 S. Ct. at 1733 (quoting *Dretke v. Haley,* 541 U.S. 386, 388 (2004)).

C. Because this case is on collateral review, Johnson is ineligible to receive the benefit of any new rule.

Johnson's complaints about the Missouri Supreme Court's *Panetti* procedures amount to a request that this Court create a new rule that requires an in-person hearing if the petitioner presents *any* evidence and requests a hearing. *See, e.g.,* Pet. 29–37. Granting that request would create a new rule of criminal procedure. But, as this Court recently reaffirmed, new rules of criminal procedure are not retroactive to cases on collateral review. *Edwards,* 141 S. Ct. at 1551 (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)). As a result, Johnson could not benefit from any new rule that he has proposed. That, in turn, makes this a poor vehicle for the Court's consideration of the questions presented.

III. Johnson's request to "clarify" *Panetti* and *Ford* is an admission that this case does not merit the Court's extraordinary intervention, and that the Missouri Supreme Court's decision is not even erroneous.

Johnson's first argument in favor of certiorari review is a request for this Court to consider and announce a new definition of "substantial threshold showing of insanity." Pet. 29–33. Johnson apparently faults this Court for not articulating a standard more to his liking, *id.* at 29–30, before complaining that the Missouri Supreme Court erred when it adjudicated his case and then arguing that he should prevail no matter the standard. *Id.* at 30–33. Johnson's self-contradictory arguments show the lack of merit to his claim.

What Johnson fails to appreciate is that a "substantial threshold showing of insanity" is, itself, a complete standard. Competency-to-be-executed claims are inherently fact-bound questions, and the determination of whether an offender has made a sufficient showing to receive additional process is left to the state courts in the first instance. *Panetti*, 551 U.S. at 949–50.

Johnson's true aim becomes apparent when he returns to attacking the Missouri Supreme Court's decision based on portions of the record that he feels are more to his benefit. Pet. 30–31. Again, Johnson is merely complaining that the decision below is wrong; but error correction is not a sufficient reason to grant certiorari review. *See, e.g., 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.").

As for Johnson's proposed alternative standards, Pet. 31–32, they are solutions in search of a problem. This Court has announced a test and properly left it to the lower courts to apply that test. *Panetti*, 551 U.S. at 949–50 (holding that a State "should have substantial leeway to determine what process best balances the various interests at stake' once it has met the 'basic requirements' required by due process.") (quoting *Ford*, 477 U.S. at 427)). Johnson's disagreement with that decision is not a reason to grant certiorari review.

Finally, Johnson's last-ditch efforts to tie his case to the facts of *Panetti* is futile. In *Panetti*, both the petitioner and the State *agreed* that Panetti had made a substantial threshold showing of incompetency. *Id.* at 950. Not so in this case. Unlike

Panetti, here the State presented contrary evidence, and the petitioner's evidence was a months-old evaluation by a singular, hired expert. Contrary to Johnson's suggestions, the result in Johnson's case differed from the result in *Panetti* because the decision in both cases turn on the facts presented in those cases. Johnson, as the Missouri Supreme Court found, ultimately failed to make the substantial threshold showing.

IV. Johnson's implication that the Missouri Supreme Court *might* have violated the Due Process Clause is meritless.

For his second reason for certiorari review, Johnson contends that the Supreme Court of Missouri's process for adjudicating competency-to-be-executed claims *might* be in violation of the Due Process Clause. Pet. 33–37. Johnson's own framing of the question concedes that the claim is meritless.

First, Johnson complains that, in his view, the Supreme Court of Missouri's decision was wrong. Pet. 33–34. But mere error correction does not justify certiorari review. *See, e.g., Ross*, 417 U.S. at 616–17 ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). And, of course, the Missouri Supreme Court's decision is not even wrong. The Missouri Supreme Court disbelieved Johnson's evidence because it found that his evidence was not credible. *Johnson*, 668 S.W.3d at 579. Under Missouri law, a fact finder is always free to believe all, some, or none of the evidence. *State v. Jackson*, 433 S.W.3d 390, 400 (2014). Of course, the same is true in federal court. *See, e.g., Blodgett v. C.I.R.*, 394 F.3d 1030, 1036 (8th Cir. 2005). But even more than that, both Johnson's medical records and the affidavit of one of

his medical providers demonstrated that Johnson was competent to be executed. Ashley Skaggs, the institutional chief of mental health at prison, executed an affidavit explaining:

> During my visits with Mr. Johnson, he has never expressed these kinds of hallucinations or delusional beliefs. On the contrary, in recent months Mr. Johnson has reported that his auditory hallucinations are well managed by medication and has denied more severe symptoms or side effects. ... During my visits with Mr. Johnson, he has made statements about his upcoming execution, his communications with his attorneys, and the status of his legal appeals. ... From my observations, Mr. Johnson appears to understand the nature of his upcoming execution.

Johnson, 668 S.W.3d at 579. And Johnson's medical records indicated that "his current medications are controlling his mental health symptoms—including reports from April and May of 2023 that he has been free of auditory hallucinations since taking medication." *Id.*

Events that have occurred after the Supreme Court of Missouri's opinion bolster confidence in the correctness of that opinion. As the most recent medical records show, Johnson understands the nature of the proceedings against him and the rationale for the State's punishment. After the stay was entered, Johnson told the mental health provider that he "feels 'alright.'" Resp. App. A33. Johnson reported that the "brain zaps" have stopped and that his sleep has improved. *Id.* Johnson also reported that "the [auditory and visual hallucinations] and sense of demons or others messing with him stopped in the same tiem [sic] frame." Resp. App. A33. Johnson further reported that he refuses his medicine when he feels "lazy." *Id.* Johnson is, in other words, competent to be executed.

Second, Johnson attempts to compare Missouri's procedures to the rejected procedures in *Panetti*. Pet. 34–35. In *Panetti*, the Court identified several shortcomings in the state court that deprived the petitioner of "a 'fair hearing' in accord with fundamental fairness." 551 U.S. at 950–52. *First*, "[t]he state court refused to transcribe its proceedings, notwithstanding the multiple motions petitioner filed requesting this process." *Id.* at 950. And, based on the available materials (incomplete as they were without a transcript), it appeared that "the state court on repeated occasions conveyed information to petitioner's counsel that turned out not to be true; provided at least one significant update to the State without providing the same notice to petitioner; and failed in general to keep petitioner informed as to the opportunity, if any, he would have to present his case." *Id.* *Second*, it appeared that the state court may have "violated state law by failing to provide a competency hearing." *Id.* That possibility undermined any reliance on the "substantial leeway" that the States would ordinarily be afforded in determining "what process best balances the various interests at stake." *Id.* at 950–51. *Third*, "the order issued by the state court implied that its determination of petitioner's competency was made solely on the basis of the examinations performed by the psychiatrists it had appointed—precisely the sort of adjudication Justice Powell warned [in *Ford*] would 'invit[e] arbitrariness and error[.]' " *Id.* at 951 (citing *Ford*, 477 U.S. at 424). *Fourth*, the state court "failed to provide petitioner with an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts." *Id.* Instead, after mailing the court-appointed experts' report to

the parties, the state court "told petitioner's counsel, by letter, to file 'any other matters you wish to have considered' within a week." *Id*. In response, petitioner "renewed his motions for an evidentiary hearing, funds to hire a mental health expert, and other relief." *Id*. The state court had previously "said it would rule on [petitioner's] outstanding motions," which explained—and justified—why counsel "did not submit at that time expert psychiatric evidence to challenge the court-appointed experts' report . . . ." *Id*. Ultimately, the state court never ruled on the petitioner's pending motions, and it ended the matter without holding a competency hearing. *Id*.

But in Johnson's case, Johnson was given the opportunity to present evidence and make argument, and he was permitted the opportunity to provide additional evidence and argument in reply to the Warden's response. *See Cole v. Roper*, 783 F.3d 707, 713 (8th Cir. 2015) (Gruender, J., concurring). That is all that due process requires: notice and opportunity to be heard. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Indeed, in *Panetti,* this Court instructed that the "basic requirements" of due process demand nothing more than "an opportunity to submit 'evidence and argument from prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.' " *Panetti*, 551 U.S. at 950 (quoting *Ford*, 477 U.S. at 427). The Supreme Court of Missouri provided all that and more. And once Missouri satisfied due process, the federal question was resolved because, as this Court has held, "a State 'should have substantial leeway to determine what process best balances the various interests at stake' once it has met the 'basic

requirements' required by due process." *Panetti*, 551 U.S. at 949–50 (quoting *Ford*, 477 U.S. at 427 (Powell, J. concurring in part and concurring in the judgment)). As a result, Johnson's efforts to create a legal error worthy of this Court's review fail.

And *third*, Johnson raises complaints about the fact determinations the Supreme Court of Missouri made. Pet. 34–36. But that is not a reason to grant certiorari review. The Supreme Court of Missouri weighed all the evidence and determined that "Johnson's evidence lacks credibility, particularly when viewed in light of the State's evidence, to demonstrate a substantial threshold showing of insanity." *Johnson*, 668 S.W.3d at 579. The Missouri Supreme Court's credibility determinations cannot be easily disturbed by a federal court. *See Marshall v. Longberger*, 459 U.S. 422, 434 (1983) ("We greatly doubt that Congress . . . intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself."). While *Marshall* was discussing federal habeas review, AEDPA informs this Court's determination here, and it stands to reason that Johnson should not receive a better standard of review by making an end-run around AEDPA.

It is not surprising that the Missouri Supreme Court did not find Dr. Agharkar to be credible. This Court and other courts have, like the Missouri Supreme Court did here, rejected Dr. Agharkar's opinions. *See, e.g.,* Pet. for Cert., *Tracy Beatty v. Bobby Lumpkin*, 22-6004 (Nov. 9, 2022) (denying writ of certiorari and application for stay after Dr. Agharkar issued report contending that offender was "clearly psychotic . . . .") (offender executed Nov. 9, 2022); App. for Stay or Vacatur of Injunction, W*illiam*

Barr v. Wesley Purkey, 20A9 (July 16, 2020) (granting vacatur of preliminary injunction based, in part, on argument that Dr. Agharkar's report was fundamentally flawed on its face) (offender executed July 16, 2020); *Conner v. GDCP Warden*, 784 F.3d 752, 761–66 (11th Cir. 2015) (affirming district court's decision to deny petitioner's claim he was intellectually disabled despite petitioner's use of Dr. Agharkar's testimony to the contrary); *Green v. Davis*, 414 F.Supp.3d 892, 913 (N.D. Tx. Sept. 27, 2019) (holding that the court's "independent review of the record belies" the petitioner's argument, based in part on Dr. Agharkar's testimony, that "he suffered from deficits in social and interpersonal skills."). When this Court rejected Dr. Agharkar's opinions in *Beatty v. Lumpkin* and *Barr v. Purkey*, it did so on the basis of a cold record. Now Johnson seeks a writ of certiorari to prevent the Missouri Supreme Court from doing exactly what this Court has done.

At bottom, Johnson's arguments in his second point amount to little more than complaints that he did not prevail below. But that does not entitle him to a writ of certiorari. The Missouri Supreme Court faithfully applied this Court's precedent in *Ford* and *Panetti*; this Court's certiorari review is unwarranted.

V. Johnson's complaint about the Supreme Court of Missouri's adjudication of his claim is nothing more than a complaint about the Missouri Supreme Court's application of Missouri law.

Johnson's final argument for certiorari review is a complaint that, in other cases, the Missouri Supreme Court exercises its discretion under state law to appoint a special master, but in Johnson's case, the Missouri Supreme Court did not. Pet. 37–38.

If Johnson is raising a claim challenging the Missouri Supreme Court's habeas denial *and not the judgment of conviction and sentence,* then his claim fails because federal review only extends to claims that the State court's decision is in violation of the constitution. 28 U.S.C. § 1257(a). This Court cannot review a claim challenging the Missouri Supreme Court's state habeas procedures because state court procedures are an independent and adequate state law question that is immune from federal review. *See, e.g., Coleman*, 501 U.S. at 729. In *Coleman*, this Court explained that federal courts have no jurisdiction to review a state court decision that rests on a state law ground, regardless of whether that state law is procedural or substantive. *Id*. To hold otherwise would be to issue an advisory opinion. *Id*.

Put simply, Johnson's final complaints are that the Missouri Supreme Court should have, but did not, appoint a special master under state law. Pet. 37–38. That is a pure state-law question, and is, therefore, immune from review. *Coleman*, 501 U.S. at 729. In an effort to avoid this conclusion, Johnson invokes *Hicks v. Oklahoma*, 447 U.S. 343 (1980), and the Equal Protection Clause. Pet. 38. Neither applies.

A *Hicks* claim requires a showing that state law vests a "substantial and legitimate expectation that [the petitioner] will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion . . . ." *Hicks*, 447 U.S. at 346. Johnson's claim does not relate to a jury sentencing claim, but instead to the discretionary appointment of a special master. Pet. 37–38. The Missouri Supreme Court is the finder of fact and concluder of law in capital state habeas petitions. *Cole v. Roper*, 783 F.3d at 711. There is, therefore, no "substantial

and legitimate expectation" that the Missouri Supreme Court will appoint a special master in any particular case.

Johnson's Equal Protection Clause argument fairs even worse. An equal protection claim requires Johnson to identify a suspect class, such as race. *See, e.g., Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2160 (2023). Johnson, who is white, makes no effort to identify a suspect class. Johnson abducted, attempted to rape, and forcibly murdered six-year-old Casey Williamson. As a result of his horrific crimes, he was sentenced to death. Murderers and attempted child rapists are not members of a suspect class, and Johnson's failure to meaningfully engage with this Court's precedents dooms his argument.

Conclusion

The Court should deny the petition for writ of certiorari and deny the application for a stay of execution.

Respectfully submitted,

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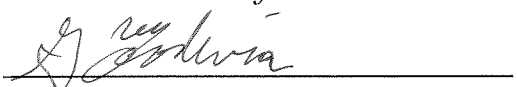
Missouri Attorney General



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