THIS IS A CAPITAL CASE

EXECUTION SET FOR August 1, 2023 6:00 p.m. (central)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL E. KIRSCH*
LAURENCE E. KOMP
MEREDITH H. SCHLACTER
MANDI SCHENLEY
Assistant Federal Public Defenders
Western District of Missouri
1000 Walnut Street, Suite 600
Kansas City, MO 64106
(816) 471-8282
daniel_kirsch@fd.org
laurence_komp@fd.org
meredith_schlacter@fd.org
mandi_schenley@fd.org

KENT E. GIPSON
Law Office of Kent Gipson, LLC
121 E. Gregory Blvd.
Kansas City, MO 64114
816-363-4400/Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

**Counsel of Record*, Member of the Bar of the Supreme Court

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Mr. Johnson does not rationally understand the reason for his execution. Mr. Johnson has been evaluated a single time under the *Panetti/Madison* competency-to-be-executed standard. A neuropsychiatrist, board-certified in forensic psychiatry, determined Mr. Johnson does not possess a rational understanding. Mr. Johnson possesses a genuine delusional belief that the true purpose of his execution is an effort by Satan to end the world. With six months to prepare contrary expert evidence, the State could only muster a-page-and-a-half affidavit from a non-forensically trained prison counselor. Without conducting an evaluation, the counselor based her opinion on her approximately 70 minutes of total contact with Mr. Johnson over three years. The counselor did not apply the competency-to-be-executed standard. The State does not contest that the counselor is prohibited by Missouri law to prescribe medicine, practice psychology, diagnose, or render a forensic opinion.

The state court, in a non-unanimous opinion, credited the counselor over the board-certified neuropsychiatrist's evaluation to find Mr. Johnson did not meet the *Panetti* threshold. The court credited the counselor's opinion that Mr. Johnson's mental illness was well managed by medication. However, two decades-worth of records document that Mr. Johnson's delusions and hallucinations persist despite medication. The court also credited the counselor because she had not personally observed "end of the world" delusions and medical records showed "no such" delusions. In truth, five instances in Mr. Johnson's records documented the *same end of the world delusions* Mr. Johnson reported during his competency evaluation.

Despite these circumstances, the district court found that Mr. Johnson failed to establish that the state court's finding that the *Panetti* threshold not been met was unreasonable under 28 U.S.C. § 2254(d). A majority of an appellate panel determined under 28 U.S.C. § 2253(c)(2) and *Miller-El* that reasonable jurists could disagree with the district court and issued a COA and a stay of execution. The en banc court vacated the panel's decision, and then, despite clear evidence that Mr. Johnson's claim was datable and without finding that panel abused its discretion in entering a stay, denied a COA and stay.

This case presents the following questions:

> When a panel has determined that 28 U.S.C. 2253(c)(2) has been satisfied and an appeal and concordant stay are necessary, does an en banc court have authority to vacate these determinations and deny petitioner his right to appeal absent a finding that the panel has abused its discretion?

Could a jurist of reason find a state court decision concluding that the petitioner did not meet *Panetti*'s required threshold showing of incompetence is contrary to or an unreasonable application of law or rests on an unreasonable determination of the facts when the petitioner presented evidence establishing that he lacks a rational understanding of the reason for his execution and the State has not presented any relevant evidence to the contrary?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Johnny Johnson is the petitioner in this case and was represented in the court below by Kent Gipson and the Capital Habeas Unit of the Federal Defender's Office for the Western District of Missouri.

David Vandergriff, Warden of Potosi Correctional Center, is the Respondent. He was represented in the court below by Assistant Missouri Attorney General Andrew Clarke and Gregory Goodwin.

Pursuant to Rule 29.6, no parties are corporations.

RELATED PROCEEDINGS

United States Supreme Court:

Johnson v. Missouri, No. 06-10222 (May 29, 2007) (cert denied from direct appeal)
Johnson v. Blair, No. 22-5542 (Nov. 14, 2022) (cert denied from § 2254 proceedings)
Johnson v. Vandergriff, No. 23-55147 (pending) (cert denied from state habeas proceeding)
Johnson v. Vandergriff, No. 23A63 (pending) (stay application connected case to No. 23-55147)

United States Court of Appeals for the Eighth Circuit:

Johnson v. Blair, No. 20-3529 (Jan. 21, 2022) (2254 proceeding)
Johnson v. Vandergriff, No. 23-2664 (July 29, 2023) (2254 *Ford* proceeding)

United States District Court for the Eastern District of Missouri:

Johnson v. Steele, 4:13-cv-00278-HEA (Feb. 28, 2020) (§ 2254 proceeding)
Johnson v. Vandergriff, 4:23-cv-00845-MTS (July 17, 2023) (2254 *Ford* proceeding)

Supreme Court of Missouri:

Missouri v. Johnson, No. SC86689 (Nov. 7, 2006) (direct appeal)
Johnson v. Missouri, No. SC91787 (Nov. 20, 2012) (post-conviction appeal)
State ex. Rel. Johnny Johnson v. Vandergriff, No. SC100023 (Apr. 19, 2023) (*Brady* habeas corpus)
State ex rel. Johnny Johnson v. Vandergriff, No. SC100077 (June 8, 2023) (*Ford* habeas corpus)

Circuit Court of St. Louis County, Missouri:

Missouri v. Johnson, No. 02CR-003834 (Jan. 2005) (trial)
Johnson v. Missouri, No. 2107CC-01303 (Mar. 6, 2007) (post-conviction proceeding)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Petitioner Johnny Allen Johnson respectfully petitions for a writ of certiorari to review the order of the Eighth Circuit Court of Appeals entered on July 29, 2023. Apx. 130a-143a.

OPINIONS BELOW

A July 25, 2023 amended Eighth Circuit order granted Mr. Johnson's request for a certificate of appealability, granted a stay of execution, and set a briefing schedule for expedited treatment of the *Ford* appeal. The order is unpublished and appears in the Appendix at p. 126a. A July 26, 2023 Eighth Circuit order requesting a response to Respondent's rehearing/rehearing en banc requests is unpublished and appears in the Appendix at p. 127a. A July 28, 2023 Eighth Circuit order granting rehearing en banc is unpublished and appears in the Appendix at p. 128a. A July 29, 2023 corrected Eighth Circuit order vacating the panel's order is unpublished and appears in the Appendix at p. 129a. A July 29, 2023 Eighth Circuit judgment denying a COA and the motion for stay is to be published and appears in the Appendix at p. 130a-143a.

JURISDICTION

The Eighth Circuit Court of Appeals entered judgment on July 29, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Rule 13.1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2253(c) states in relevant part:

(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).

Fed. R. App. P. 22(b)(2) states:

(b) Certificate of Appealability.

> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

Fed. R. App. P. 35(a) states:

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

The Eighth Amendment of the United Stated Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment of the United Stated Constitution states in relevant part, "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 laws."

STATEMENT OF THE CASE

Mr. Johnson's Competency Evaluation

The only competency-to-be-executed evaluation Mr. Johnson has ever had found that Mr. Johnson is incompetent to be executed. Neuropsychiatrist Dr. Bhushan Agharkar, M.D.,[1] evaluated Mr. Johnson and concluded that Mr. Johnson—due his irrational delusions—does not have a rational understanding of the basis for his execution. Apx. 54a. Specifically, Mr. Johnson's understanding of the reason for his execution is "that Satan is using the State of Missouri to execute him to bring about the end of the world[.]" *Id.* Mr. Johnson has confirmed this to be the reason because the voice of Satan has told him so. *Id.*

Mr. Johnson has suffered from severe mental illness and cognitive impairments all his life. *Id.* at 9a-49a, 53a. References to similar types of delusions about being "the end of the world," being "the Dead," being a vampire, demons, and

[1] Dr. Agharkar has been licensed to practice medicine in Georgia since 2002. Apx. 1a. In addition to completing his Doctor of Medicine degree, he completed a Forensic Psychiatry Fellowship at Emory University School of Medicine, and he holds dual board certification as a Diplomate of Adult Psychiatry (AP) and Forensic Psychiatry (FP) of the American Board of Psychiatry and Neurology (ABPN). *Id.* at 2a. In 2015, the American Psychiatric Association awarded him Distinguished Fellow status. *Id.* He has served as a consultant to the Federal Bureau of Investigation, the United States Armed Forces, and the Department of Defense. *Id.* He holds Top Secret security clearance with the United States government. *Id.* As a neuropsychiatrist, he treats a wide variety of medical conditions, including schizophrenia spectrum disorders and other neurologic impairments or neurodevelopmental disorders. *Id.* at 1a.

spiritual warfare are peppered throughout Mr. Johnson's medical records. Some examples of these include:

- In 1996, when Mr. Johnson was 18, he voluntarily admitted himself for mental health care after experiencing a "blackout," was hearing voices, and was seeing his dead friends telling him to kill himself. R. Doc. 10-6 at 271. [2]

- In 1997, "he continued to hear voices telling him to kill himself." R. Doc. 10-7 at 180.

- In March 1998, he experienced visual and auditory and hallucinations. The voices were telling him to kill himself or hurt others. R. Doc. 10-8 at 575. The treating doctor noted that the voices were "command in nature, and at times, telling him to hurt himself or that he is worthless." *Id.*

- In April 1998, he was crying frequently and reported auditory and visual hallucinations. *Id.* at 575. "[Mr. Johnson] was very distraught and said, 'They were coming to get him.'" *Id.*

- In September 1998, his mental state was "consistent with paranoid psychosis." *Id.* at 560.

- In 2001, an evaluating psychiatrist noted that Mr. Johnson's previous symptoms included hearing both female and male voices who sometimes spoke in normal tones and other times addressed him in a derogatory way. R. Doc. 10-11 at 486. The voices sounded like they were coming from outside of his head, were intermittent rather than continuous, and could be temporarily interrupted by activities such as listening to music. *Id.* Mr. Johnson also reported having had delusions that people were trying to harm him or that people could read his mind. *Id.* at 486-87. The doctor concluded that Mr. Johnson had displayed paranoid delusions as a component of his illness. *Id.* at 488.

- In 2002, he "appeared paranoid," was "crying and fearful," and saw "demons." R. Doc. 10-11 at 521.

- In February 2003, He reported hearing voices telling him to "kill, kill, kill." R. Doc. 10-11 at 535.

[2] The citations are to the record below. Excerpts from the records related to the demon and end of the world delusions are included in the Appendix.

- In 2003, saw "shadow people that seem to come out of cracks." R. Doc. 10-12 at 312.

- In 2004, saw demons and stated, "I am not from this dimension. – I was born in this world. But my soul is from a different world." Apx. 60a.

- In 2004, had "demonic dreams with dead people and flames" and heard the voice of "Leviathan." Apx. 61a.

- In 2004, banged his head on his cell door and scratched himself to draw blood, and wrote in blood on his cell walls, "I'm the Dead." R. Doc. 10-12 at 337; R. Doc. 10-9 at 270; R. Doc. 10-8 at 337.

- In 2005, had nightmares of dead people coming to get him. R. Doc. 18-1 at 58.

- In 2005, after cutting himself with a razor, discussing suicidal ideations, voices telling him to cut his arm off, and Mr. Johnson "had written 'die' in feces on the window to the cell. Had also written 'were dead' on the wall in feces" and in blood. Apx. 64a, 65a.

- In 2006, Mr. Johnson "was talking like he was someone else who was trying to kill 'Johnny'" and "I could not understand who he said he was, but he kept talking about telling Johnny what to do and Johnny wouldn't do it." Apx. 66a.

- In 2008, heard a "demonic voice." Apx. 67a.

- In 2021, Mr. Johnson was placed on suicide watch after reporting he was a vampire.[3] Apx. 70a-71a. "I am not suicidal. I am vampire. I have been one for awhile [sic]. I am hearing everubodu [sic] in the camp. I found about the machine. It is everybody. I want to have some regular clothes. I am not suicidal." *Id.* at 71a-72a. During another evaluation the same day, mental health staff reported that Mr. Johnson "explained that he was on suicide watch due to realizing he was vampire, which he substantiated by noting he can 'flex my eyes' and manipulate his bones/back as well." *Id.* at 72a. He also reported he could "'hear the whole camp at one time' which he confirmed was overwhelming." *Id.* Despite being "compliant with medications," the content of Mr. Johnson's speech "was dominated by delusional themes of being a vampire" and "he appeared to be distracted by internal stimuli, which was

[3] Three days after being placed on suicide watch from this incident, prison counselor Ashley Skaggs conducted a follow-up appointment with Mr. Johnson. R. Doc. 18-1 at 530. Her one-and-half-page affidavit fails to include any of the above details.

evidenced by delays in responding." *Id.* He had auditory hallucinations "and reminded me frequently of being a vampire." *Id.*

In a least five separate instances, Mr. Johnson expressed a delusion that the world will end when he dies:

- In 2004, Dr. Dean, a psychologist, reported that during her four-day evaluation of Mr. Johnson, he "expressed the belief that 'when I was born the world was created, and **when I die the world will die**.'" Apx. 90a.

- In 2005, a prison psychiatrist reported Mr. Johnson stated, "I think **I'm the 7th sign. I'm the end of the world when I die**." Apx. 63a.

- In 2020, a prison doctor reported Mr. Johnson heard voices and said, "sometimes **I think that the world will end if I die**." Apx. 68a.

- In 2020, the prison reported that Mr. Johnson was hearing "male/female voices inside his head telling him that people talk about him, **the end of the world**, he is God etc. [sic]." Apx. 69a.

- In 2022, a prison psychologist reported that Mr. Johnson had auditory hallucinations of voices telling him "**the world is going to end**," auditory hallucinations on a "regular basis" and "has heard God's voice talking directly to him and sometimes he 'can hear the other side of the world and different spirits.'" Apx. 73a-74a.

Mr. Johnson also has delusions about being able to "go into others' minds." Apx. 6a. On September 22, 2020, Mr. Johnson informed mental health that he "can close [his] eyes and see into somebody else's eyes," which he said he knew was not "real" but also believed was his "power." Apx. 74a.

Between 2002 and his trial in 2005, Mr. Johnson went back and forth from DOC to the jail six times. Trial Tr. 1777. Each time, he was in the psychiatric infirmary. *Id.* Even with medication, Mr. Johnson consistently reported symptoms of auditory hallucinations and difficulty sleeping. *Id.* at 1760-61, 1780.

During Dr. Agharkar's evaluation, Mr. Johnson exhibited a "combination of conditions" including "an extensive delusional belief system involving paranoid, grandiose, and bizarre beliefs." Apx. 54a. Mr. Johnson suffers from "disorganized thought processes and thought blocking. His beliefs about why he is to be executed are rooted in delusional thinking, the product of a severe psychotic mental illness and a cognitively impaired brain." *Id.* at 53a. Furthermore, "[h]is brain damage/dysfunction does not allow him to rationally weigh and deliberate or reason through his decisions and thinking." *Id.* at 54a. As a result of this combination of conditions, Mr. Johnson's "understanding of the reason for his execution—that Satan is using the State of Missouri to execute him to bring about the end of the world—is irrational." *Id.*

Dr. Agharkar noted that "this irrational understanding is further demonstrated by his belief that he potentially can change this plan by going into the judge and lawyers' heads or that the spirits of the underworld can influence the State to not execute him for Satan's purposes." Apx. 54a. Mr. Johnson also has "delusional beliefs regarding his ability to live on after death in an animal's mind or as the undead[, which] are particularly troubling and indicate a lack of rational awareness of the finality of his punishment." *Id.* Dr. Agharkar concluded that by virtue of his severe psychotic mental illness and cognitively impaired brain, Mr. Johnson "does not have a rational understanding of the reasons for his execution" and "is incompetent to be executed." *Id.*

Incompetency to be Executed Legal Proceedings

On April 19, 2023, the Supreme Court of Missouri granted the State's motion to set an execution date, scheduling Mr. Johnson's execution for August 1, 2023, at 6:00 p.m. The parties agree Mr. Johnson's incompetency to be executed claim did not become ripe until the Missouri Supreme Court issued the execution warrant. *Panetti v. Quarterman*, 551 U.S. 903, 942 (2007); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-46 (1998); State's Reply in Supp. of Mot. to Set Execution Date at 5, *State v. Johnson*, No. SC86689.

On May 16, 2023, Mr. Johnson raised the newly ripened claim that his execution would violate the Eighth and Fourteenth Amendments of the Constitution under *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti*, and *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019), because he lacks a rational understanding of the reason for the execution, rendering him incompetent to be executed. His evidence included Dr. Agharkar's evaluation and prior medical/mental health records and educational records that he had been able to obtain. Despite numerous requests for Mr. Johnson's updated medical/mental health records, the most recent records Mr. Johnson had been able to obtain were current through November 16, 2022. Petitioner's Reply Sugg. in Supp. or Mot. for Stay of Execution at 3, *Johnson v. Vandergriff*, No. SC100077.

On May 17, 2023, Mr. Johnson filed a motion for a stay of execution in the Missouri Supreme Court under the same case number so that he could fully litigate his *Ford* claim in state court and subsequently in federal court (if needed). The

State opposed the petition and motion for stay on May 24, 2023, and Mr. Johnson filed his reply on May 30, 2023. His stay reply detailed his efforts to obtain his records and the lack of responses he received. *Id.* at 3-5.

In response to Mr. Johnson's *Ford* claim and stay motion, and in spite of being on notice of the potential *Ford* claim since February, the State submitted a one-and-a-half-page affidavit of Ashley Skaggs,[4] a counselor at Potosi Correctional Center. Skaggs stated in her affidavit that she began working at Potosi in 2021. Apx. 58a. Skaggs further stated that before preparing her affidavit, she reviewed Dr. Agharkar's report. *Id.* Skaggs stated that in her visits with Mr. Johnson, he has never expressed the kinds of hallucinations or delusions that were mentioned in Dr. Agharkar's report. *Id.* Skaggs opined that Mr. Johnson's mental illness "was well managed by medication" and he "appears to understand the nature of his upcoming execution." *Id.* at 58a, 59a.

The State also submitted updated medical/mental health records, current through May 10, that previously had not been provided to Mr. Johnson. Those records revealed that Mr. Johnson had reported the above-mentioned delusions, including the delusions about his death causing the end of the world, to prison mental health staff during his two decades of incarceration. The records further revealed that Mr. Johnson's symptoms, including auditory hallucinations and

[4] Skaggs is a licensed professional counselor who, as the State does not contest, cannot prescribe medicine or practice psychology and is not qualified to diagnose or render a forensic opinion. Mo. Rev. Stat. § 337.500; Mo. Rev. Stat. § 337.015(1).

delusions, were constantly present in spite of 30-plus different types of strong antipsychotic medications.

On June 8, 2023, the Missouri Supreme Court denied relief. Over a dissent, the court determined Mr. Johnson had not made a substantial threshold showing of insanity. *Id.* at 110a (finding that "Johnson's evidence lacks credibility, particularly when viewed in light of the State's evidence, to demonstrate a substantial threshold showing of insanity."). The court further ruled that no petitions for rehearing could be filed. *Id.* at 111a.

The court relied upon the substance of Ms. Skaggs's affidavit and petitioner's prison records to discredit Dr. Agharkar and found that petitioner could not meet the threshold showing of insanity necessary to receive a hearing on his *Panetti* claim. *Id.* at 104a, 108a-110a. At the outset of its analysis, the court rejected the State's argument that Mr. Johnson's *Panetti* claim should be denied because he was aware he was being executed for murder. *See id.* at 107a-108a. However, the court proceeded to find that petitioner could not meet the threshold test of insanity by relying upon Skaggs's affidavit and some of petitioner's prison records indicating that petitioner had expressed remorse for the offense and was aware his legal appeals were coming to an end. *Id.* at 109a. The court suggested those records indicated he was aware of why he was being executed. *Id.* The court also found, based on Skaggs's affidavit and notations in some of the medical records indicating that Mr. Johnson was not experiencing auditory hallucinations during particular

appointments, that Mr. Johnson's current medications were controlling his mental health symptoms. *Id.*

On the afternoon of June 29, 2023, the State of Missouri provided updated medical/mental health records to Mr. Johnson. These records were current through May 26, 2023. Other than the records the State submitted with its response to the state habeas petition, this was the first set of medical/mental health records the State produced to Mr. Johnson since April 26, 2023 (when Mr. Johnson received records current only through November 16, 2022).

On June 30, 2023, Mr. Johnson sought federal habeas relief in the United States District Court for the Eastern District of Missouri under 28 U.S. § 2254. It is undisputed that Mr. Johnson's *Ford* claim is a first petition and not a second or successive request for relief. *Panetti*, 551 U.S. at 942; *Martinez-Villareal*, 523 U.S. at 641-46; *Lonchar v. Thomas*, 517 U.S. 314, 321 (1996).

On July 17, 2023, the district court found that Mr. Johnson did not show that the non-unanimous opinion of the Missouri Supreme Court was contrary to or involved an unreasonable application of clearly established federal law or was an unreasonable determination of fact in light of the evidence presented in state court. Apx. 115a. The district court denied a certificate of appealability. *Id.* at 125a. The district court also denied a motion for stay, without any analysis. *Id.* On July 18, 2023, Mr. Johnson filed a notice of appeal.

Counsel for petitioner received additional prison psychiatric records from the Attorney General's office on July 12 and July 20, 2023. These records were

unavailable to Mr. Johnson or the court during the litigation of his state habeas petition. These new records established, among other things, that Mr. Johnson's treating doctors at the prison changed his antipsychotic medication on July 5, 2023, and then doubled the dosage of that medication five days later. Apx. 87a. These new records also indicated that Mr. Johnson continued to suffer from hallucinations and delusions while on his previous antipsychotic medication, and even after his medication had been altered. Apx. 82a-87a. The records also revealed that in a May 31, 2023 appointment with the prison psychiatrist, Mr. Johnson reported he "has felt regularly people are controlling him, that he hears voices in his head and has others' voices come out of his mouth at times. He reports this has been going on for an extended period." *Id.* at 82a. In a June 27, 2023 appointment with the psychiatrist, Mr. Johnson "confirmed ongoing AVH [auditory/visual hallucinations]" and "sometimes he has contact with demons as indicated by feeling heat on his ears." *Id.* at 85a.

After reviewing some of this new evidence, Dr. Agharkar conducted a follow-up face to face evaluation of petitioner on July 15, 2023. Apx. 56a-57a. Mr. Johnson also obtained affidavits from two of petitioner's former treating doctors at the Missouri Department of Corrections, Angeline Stanislaus and Alwyn Whitehead. All three of these doctors found that Mr. Johnson was not malingering. Apx. 56a-57a; 91a-102a. More importantly, Dr. Agharkar's new report indicated, based upon his recent face-to-face evaluation on July 15, 2023, that petitioner continues to suffer from auditory hallucinations and the same irrational delusions about the

reasons for his execution despite being overly sedated by his current medication regimen.[5] *Id.* at 56a-57a. Dr. Agharkar noted: "Mr. Johnson has been trying to enter the minds of the Judge and the Prosecutor but has been unsuccessful. He does not think that will work at this point because he 'can't figure out the code.' He absolutely believes he can communicate with the "Underworld" but has grown frustrated with "them" because he cannot get what they say to work. He continues to believe he has been marked with the 'Seventh sign' and his death would cause the end of the world." *Id.* at 57a. Mr. Johnson told Dr. Agharkar "he does not trust prison staff and knows 'they don't believe' him so he does not talk to them about his symptoms. Mr. Johnson also confirmed that his interactions with prison staff are extremely brief and do not delve deeply into his belief system." *Id.*

Based upon this new evidence, petitioner filed a motion to recall the mandate in the Missouri Supreme Court on July 21, 2023, seeking reconsideration of the Court's prior denial of his state habeas petition. Petitioner's motion also reiterated his requests for a stay of execution and the appointment of a Special Master to conduct an evidentiary hearing on his Eighth Amendment claims.

On July 22, 2023, Mr. Johnson filed in the Eighth Circuit an application for COA and motion for a stay pending resolution of his appeal. A panel considered his

[5] Prior evaluations by Drs. Stanislaus and Whitehead similarly found that petitioner's symptoms are a regular presence in his life even while he is on medication. Dr. Stanislaus reported that even while petitioner was medicated, he still suffered from breakthrough symptoms of his illness. App. at 91a. Dr. Whitehead agreed: "Medication does not get rid of Mr. Johnson's symptoms; it just makes them less apparent. Mr. Johnson consistently heard voices even when on the medication." *Id.* at 98a. Furthermore, although Mr. Johnson was medicated when he was evaluated by Dr. Pablo Stewart, a psychiatrist who evaluated Mr. Johnson as part of Mr. Johnson's post-conviction proceedings, Mr. Johnson exhibited psychosis during Dr. Stewart's evaluation. PCR Tr. 191.

application and motion, and on July 25, 2023, the panel issued an order finding that his appeal should proceed. Apx. 126a. The panel also granted the motion to stay and set a briefing schedule for the appeal. *Id.* One judge dissented. *Id.*

At approximately 1:30 AM on July 26, 2023, the State filed a petition for en banc review and requested vacation of the stay. On July 26, 2023, the Eighth Circuit ordered Mr. Johnson to respond to the en banc petition by 1:00 PM on July 27, 2023. App. 127a. On July 28, 2023, the Eighth Circuit (en banc) entered an order granting the petition for en banc rehearing. Apx. 128a.

On July 29, 2023, the Eighth Circuit (en banc) entered a corrected order granting rehearing en banc and vacating the July 25, 2023 order granting a COA and entering a stay. Apx. 129a. Later that same day, the Eighth Circuit (en banc) entered a judgment summarily vacating the July 25, 2023 panel decision granting the COA and the stay of execution. Apx. 130a-143a. Three judges dissented: Judge Kelley, Judge Erickson, and Chief Judge Smith. Judges Erickson and Smith joined in a written dissent authored by Judge Kelly, and Judge Erickson authored a separate dissent in which Judge Kelly joined. *Id.*

Judge Kelly's dissent, joined by Chief Judge Smith and Judge Erickson, made clear that the panel that initially granted the COA and the stay did so based on its determination that "jurists of reason would find it debatable" whether Mr. Johnson's federal habeas petition stated a "valid claim of the denial of a constitutional right" and whether the district court's procedural ruling was correct. Apx. 135a-142a. Emphasizing that the question of Mr. Johnson's ultimate

entitlement to federal habeas relief is a "merits question that has not yet been presented to this court" at the COA stage, the dissenting judges concluded he was likely to meet that burden because the state court's decision denying the competency claim was contrary to this Court's precedent in *Panetti*, involved an unreasonable application of *Ford*, *Panetti*, and *Madison*, and was based on an unreasonable determination of the facts in evidence, satisfying both § 2254(d)(1) *and* (d)(2). The state court's decision was therefore not entitled to deference under § 2254(d) and Mr. Johnson should be permitted at minimum to pursue an appeal.

Noting that Mr. Johnson's evidence of incompetence was materially indistinguishable and arguably even stronger than that presented in *Panetti*, the dissent found the state court's holding that he had not made the requisite threshold showing of incompetence was contrary to this Court's precedent in *Panetti*. The dissent further noted that in *Panetti*, this Court conducted its own "independent review of the record" to conclude that the petitioner had made the substantial threshold showing of incompetence.

The dissent also found the state court's denial of Mr. Johnson's habeas was based on an unreasonable application of clearly established federal law, because the only evidence the state submitted to rebut Mr. Johnson's expert's conclusions did not "provide meaningful insight" into whether Mr. Johnson is competent under the required standard. The state court concluded Mr. Johnson failed to make the required showing based on statements that were largely irrelevant under the

governing legal standard for competency, and its decision therefore involved an unreasonable application of *Ford*, *Panetti*, and *Madison.*

Finally, the dissent found the state court's decision was based on an unreasonable determination of the facts in evidence. The State's evidence did not speak to whether Mr. Johnson has a rational understanding of the reasons for his execution and was "entirely consistent with a worldview that is nonetheless clouded by irrational delusions." The state court's factual findings and credibility determinations were contradicted by the record before it and the state's submitted evidence did not support the conclusion that Mr. Johnson was competent to be executed. The state court's conclusion that Mr. Johnson did not make the required threshold showing was therefore based on an unreasonable determination of the facts in light of the evidence that was presented. At a minimum, "reasonable jurists could, and in fact do, debate the issue."

Turning to the stay, the dissent found it was warranted under the standard in *Hill v. McDonough*, 547 U.S. 573 (2006), because Mr. Johnson had shown a significant possibility of succeeding on the merits of his habeas claim. Moreover, because competency to be executed claims only become ripe once an execution date is set, they will necessarily be litigated close in time to the recently scheduled date of execution. Whatever interest the state has in carrying out the execution must be considered in light of the need to determine whether it is constitutional to carry out the sentence at this time. If Mr. Johnson lacks a rational understanding of his execution, he is not competent, and the proceedings necessary to make this

determination will take time, requiring a stay of execution. The dissent concluded that the Constitution requires the process be permitted to unfold, and Mr. Johnson's claim should therefore be allowed to be heard.

Judge Erickson joined in the dissent authored by Judge Kelly and also wrote separately, joined by Judge Kelly, to emphasize that the process afforded to Mr. Johnson failed to meet the minimum procedural due process required by the Constitution. Apx. 142a-143a. Although the Eighth Circuit has previously determined in the context of different case the procedure adopted by the Missouri Supreme Court is not unreasonable in light of *Panetti* and *Ford*, the "elasticity of this process must be subject to some limits, and I believe this case crosses the line."

Judge Erickson noted that credible questions of a longstanding nature exist about Mr. Johnson's competency. The state court declared Mr. Johnson's evidence less credible than that submitted by the state, but "the Constitution requires more than a fiat declaration that one piece of paper is more credible than another." No hearing on Mr. Johnson's competency was ever held before a factfinder and no evidence was developed. "No one has ever been asked to explain his or her opinions or observations" and no trier of fact has been able to consider the underlying reasons for the opinions. Instead, the state court made credibility determinations only "by weighing competing pieces of paper." Judge Erickson acknowledged that the Constitution does not require a full competency trial, but "it does require something more than what happened here." The state court's credibility

determinations were thus an unreasonable determination of the facts in light of the evidence presented.

Concurring with the en banc court's judgment, Judge Gruender, joined by the other six judges in the majority, addressed points raised by the dissenting judges. Apx. 131a-135a. The concurrence contended the dissenting judges misunderstood *Panetti* and did not adequately defer to the facts determined by the state court. The concurrence also found the process provided by the Missouri Supreme Court in Mr. Johnson's case to be adequate under *Panetti*. Significantly, the concurrence noted that the correction records did rebut the state court's findings that there was no reference to similar delusions in the records, thus, the evidence submitted by the state did not contradict Dr. Agharkar's conclusions. The concurrence also divined Skaggs's statement that Mr. Johnson "appears to understand the *nature* of his upcoming execution" meant he rationally understands the reasons for his execution based on a definition of "nature" in the New Oxford American Dictionary, although her affidavit did not explicitly address the rational understanding standard. The concurrence did not address or analyze the motion for a stay of execution.

REASONS FOR GRANTING THE WRIT

I. This Court should review this case to settle the meaning of 28 U.S.C. 2253(c)(2) and whether an en banc court has authority to vacate a panel's COA grant and deny a petitioner his right to appeal and concordant stay absent a finding that the panel has abused its discretion.

A. This Court should settle the meaning of 28 U.S.C. § 2253(c)(2) and determine whether the disagreement of jurists of reason establishes a habeas petitioner's right to appeal or instead eviscerates that right.

In two separate proceedings, Mr. Johnson has made a substantial showing under 28 U.S.C. § 2253(c)(2) of the denial of his Eighth and Fourteenth Amendment rights because he does not have a rational understanding of the reason for his execution. First, a majority of the three-judge panel deciding whether Mr. Johnson was entitled to a COA to appeal the district court's denial of his incompetency-to-be-executed claim determined that (1) reasonable jurists could debate the district court's resolution of his claim or (2) the issues presented were adequate to deserve encouragement to proceed further. Second, during en banc proceedings, three out of 10 judges again determined Mr. Johnson to satisfy the above standard. Yet, despite this showing, Mr. Johnson now cannot have his claim heard on appeal.

This Court should grant this petition to settle whether the disagreement of jurists of reason establishes a habeas petitioner's right to appeal under § 2253(c)(2), as this Court repeatedly has held, or whether such disagreement instead strips that right. This Court should settle whether Congress intended for a habeas petitioner like Mr. Johnson, who has had three judges determine that he satisfied § 2253(c)(2) and had a statutory right to appeal, to then lose his right to appeal just because other judges disagree.

Such a result is certainly at odds with this Court's interpretation of the statute's minimum threshold for affording appellate rights to habeas petitioners, which is itself premised on reasonable disagreement. This Court repeatedly has explained that a COA should issue when the district court's decision is "debatable among jurists of reason" or "the issues presented are adequate to deserve

encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "[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 338. A claim is "debatable" when it is "open to dispute on any logical basis. The focus is on the existence of a debatable issue, not on which party was correct." *Adam v. Stonebridge Life Ins. Co.*, 612 F.3d 967, 974 (8th Cir. 2010).

A dissenting opinion shows that a claim at issue is debatable among jurists of reason. As Chief Justice Roberts has explained: "Reasonable minds may disagree with our analysis-in fact, at least three do." *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (referring to the three dissenting justices). The State agrees. R. Doc. 13, at 4 ("[T]he dissent shows, at most, that fairminded jurists can disagree."). Several courts or jurists have determined that when there is a dissent about whether a claim is debatable, a petitioner meets § 2253(c)(2)'s requirements. *See*, *e.g.*, *Jordan v. Fisher*, 576 U.S. 1071 (2015) (Sotomayor, J., dissenting, joined by Ginsburg, Kagan, JJ.) (that two judges found that a claim was highly debatable indicated that reasonable minds could differ, and had differed, on the resolution of the petitioner's claim); Rule 22.3 (3d Cir. 2011) ("[I]f any judge on the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue"); *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine").

Here, when Mr. Johnson's COA application was first presented to the Eighth Circuit, a majority of the panel found that Mr. Johnson satisfied § 2253(c)(2) and was entitled to an appeal. After considering arguments from the parties, the panel simply applied *Miller-El* and concluded based on § 2253(c)(2) that Mr. Johnson made a substantial showing of the denial of a constitutional right regarding his *Ford* claim and the state court's unreasonable treatment of the claim. Apx. 126a. Complying with the text of § 2253(c)(3), the panel identified the specific appellate issue. *Id.* The panel hewed faithfully the text of the statute provided by Congress.

However, the State disagreed and sought the opinions of additional justices he deemed would be more favorable to his position, i.e. would disagree with the judges who determined that Mr. Johnson's claim was debatable. The State found enough judges to erase Mr. Johnson's appeal regarding his *Ford* claim. But in doing so, the State's actions (looking for disagreement) highlighted the debatability of the claim, which actually demonstrates Mr. Johnson's satisfaction of § 2253(c)(2).

In *Beem v. McKune*, 317 F.3d 1175, 1179 (10th Cir. 2003), a divided panel of the Tenth Circuit originally granted petitioners habeas relief. As a result of the division regarding the panel decision, the court subsequently granted the State's request for en banc review. *Id.* The court explained that "[t]hese developments satisfy us that reasonable jurists would find the district court's assessment of the petitions' constitutional claims 'debatable,'" and the court therefore granted the petitioners' certificates of appealability. *Id.*

The Eighth Circuit's en banc developments similarly showed that the district court's assessment of Mr. Johnson's constitutional claim was debatable. The en banc decision revealed that in addition to the two judges who previously determined Mr. Johnson was entitled to an appeal, a third judge agreed. A fourth judge did not agree that Mr. Johnson was entitled to an appeal and wrote a four-page concurring opinion expressing his disagreement with the three judges who determined that Mr. Johnson's claim was debatable. The very purpose of his opinion was "to address the points made by the dissenting judges." Apx. 131a. In turn, the dissenting judges explicitly recognized that the dispute between the concurring opinion and their position itself demonstrated, "[a]t a minimum, reasonable jurists could, and in fact do, debate the issue." *Id.* at 141a (Kelly, J., dissenting).

The fact that six other judges joined the concurring opinion does not change the fact that three reasonable jurists disagreed with their analysis. *Biden*, 143 S. Ct. at 2375. Under this Court's interpretation of § 2253(c)(2), such a disagreement should entitle a habeas petitioner to an appeal. But here, the disagreement had the opposite result: Mr. Johnson lost his statutory right to appeal.

The facts of this case underscore the importance of settling this question. Now that Mr. Johnson's right to appeal has been taken from him, unless this Court grants certiorari, he will not have had any appeal of his claim that because he does not rationally understand the reason for his execution, his execution serves no penological purpose. As a result, he will be executed despite "credible questions of a

longstanding nature . . . about the extent and nature of Johnson's rational understanding of the reason for his execution." Apx. 143a (Erickson, J., dissenting).

In Missouri, when a capital petitioner asserts that he is incompetent to be executed, the Missouri Supreme Court acts as both the factfinder *and* the highest appellate court of the state. Because the court routinely does not permit the appointment of a special master in competency cases and did not do so here, Mr. Johnson had to present his fact-specific claim in a forum not designed for making determinations of fact in the first instance. And because the court simultaneously acts as the highest appellate court of the state, Mr. Johnson has not had any recourse to challenge any erroneous factual findings the court made. In fact, in Mr. Johnson's case, the court explicitly held that he could not file a petition for rehearing to challenge any erroneous findings. What occurred is best characterized by Judge Erickson: "I believe the Constitution requires more than a fiat declaration that one piece of paper is more credible than another." *Id.*

This lack of due process was made all the more problematic by the substance of the state's purported evidence, which "d[id] not provide meaningful insight into whether Johnson 'grasp[s] the . . . meaning and purpose' of his execution or rationally understands the 'link between his crime and its punishment.'" Apx. 139a (Kelly, J., dissenting) (quoting *Madison*, 139 S. Ct. at 723). The state's evidence amounted to "observations from a prison mental-health counselor that are largely irrelevant under the governing legal standard for competency in this context." *Id.* And the State "d[id] not dispute that Skaggs . . . is not qualified under state law to

even make such a competency determination." *Id.* In fact, the state's evidence was "entirely consistent with a worldview that is nonetheless clouded by irrational delusions." *Id.* at 140a. In other words, "[i]n response to Johnson's expert report, the State offered no evidence to support the conclusion that Johnson was competent to be executed." *Id.* at 141a. Its evidence "simply failed to directly address the issue of competency." *Id.*

"This is not a case where a hearing was held someplace, by someone, and evidence was presented and developed from which the finder of fact or a reviewing court can make rational determinations." *Id.* at 143a (Erickson, J., dissenting). Instead, the process the state court employed "required the ultimate finder of fact to make credibility determinations by weighing competing pieces of paper." *Id.* Critical to the concept of weighing conflicting evidence, "[n]o one has ever been asked to explain his or her opinions or observations," and "[n]o trier of fact has ever had the chance to dig into the underlying reasons for the opinions." *Id.* Because the ultimate factfinder was also the only arbiter of appeal and that court preemptively denied Mr. Johnson the right to even petition for rehearing, Mr. Johnson has not had any state appellate process.

Despite the lack of state appellate process, Mr. Johnson, for a few days, had a federal statutory right to appeal. But when the State disagreed that Mr. Johnson should be able to appeal and specifically sought judges who would agree to terminate his appellate right guaranteed to him by Congress, Mr. Johnson lost his only chance of any appellate review of this incompetency claim (save for the

requested action of this Court). This Court should grant this petition to settle the meaning of § 2253(c)(2) and whether the disagreement of other jurists of reason establishes a habeas petitioner's right to appeal or instead eviscerates that right.

B. The Eighth Circuit's en banc decision conflicts with relevant decisions of this Court disfavoring en banc review, recognizing that a COA is warranted when reasonable jurists disagree, and mandating the abuse of discretion standard of review for a previously entered stay.

Because the State disagreed with the panel decision providing Mr. Johnson his one and only appeal of his claim that he is incompetent to be executed, the State employed the court's en banc procedure to terminate Mr. Johnson's right to appeal and vacate his stay. Under 28 U.S.C. § 2253, the panel determined Mr. Johnson already had satisfied the requirements establishing his right to appeal. Nothing about the majority's grant of a COA, which was a non-merits ruling, conflicted with any decision of this Court or the Eighth Circuit or decided a question of exceptional importance. Despite these circumstances, the Eighth Circuit (en banc) determined that the case satisfied the requirements for en banc review. Subsequently, although the en banc concurring opinion demonstrated that reasonable jurists debated whether the lower court correctly adjudicated Mr. Johnson's claim, the en banc court nonetheless determined that Mr. Johnson did not satisfy 28 U.S.C. § 2253(c)(2). This ruling conflicts with this Court's jurisprudence regarding the standards for en banc review and the standards for determining whether a COA should issue.

The State also used the en banc procedure to circumvent this Court's jurisprudence mandating that a reviewing court may only overturn a stay when the prior court abused its discretion, resolving any doubt in favor of a continuation of a previously entered stay. Due to these conflicts with decisions of this Court, and because the court's en banc ruling departs from the accepted and usual course of judicial proceedings, this Court should grant review. Alternatively, this Court should grant the petition, vacate, and remand the case for panel appeal.

En banc review is a disfavored procedure, and courts ordinarily do not permit it. Fed. R. App. P. 35. This disfavored procedure is only ordered in two limited circumstances: "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." *Id.* As courts have recognized, "[t]he function of en banc hearings is not to review alleged errors for the benefit of losing litigants." *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974); *see also Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 993 (8th Cir. 2010) "It should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings."). Mere disagreement with the panel decision does not warrant en banc review. Fed. R. App. P. 35; *see also*, *e.g.*, *Issa v. Bradshaw*, 910 F.3d 872, 873-78 (6th Cir. 2018) (Sutton, J., concurring) (disagreeing with the panel decision but noting en banc review was improper, explaining, "The trust implicit in delegating authority to three-judge panels to

resolve cases as they see them would not mean much if the delegation lasted only as long as they resolved the cases correctly as others see them.").

The panel ruling in this case could not meet any of these requirements. Neither a panel's COA grant nor a stay of execution carries precedential value. As a matter of law, a COA grant is a "non-merits," threshold determination. *Miller-El,* 537 U.S. at 336. There can be no conflict with a non-merits ruling. Counsel's research has been unable to identify a single case in which a three-judge panel granting a COA in a non-successive habeas case has been vacated on en banc review. "It is difficult to believe that Congress intended to give an automatic, second appeal to each litigant in a Court of Appeals composed of more than three judges." *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 258 (1953).

Because the panel ruling did not conflict with any decision of any court, it was not appropriate for en banc review. While the State summarily argued this case "presents an exceptionally important question," his framing of that question conflated the standard for granting a COA with the ultimate merits in contravention of this Court's COA authority. As explained in Claim I, *supra*, the panel's finding that reasonable jurists could disagree with the district court's opinion was wholly consistent this Court's standard for applying § 2253.

Mere disagreement with the panel decision is not enough to warrant en banc review. The panel's non-merits COA decision presents no conflict with any precedent and creates no precedent-setting effect of exceptional public importance. Rather, it merely found that reasonable jurists could disagree with the district

court's opinion, and because of that, Mr. Johnson had the right to appeal the district court's ruling. That finding is legally unremarkable and consistent with applicable precedent regarding the standard for grating COAs.

As to the panel's entry of a stay, the Court merely determined that because Mr. Johnson was entitled to appeal, Mr. Johnson was entitled to a stay in order for the appeal to proceed. [6] The panel set a briefing schedule under which Mr. Johnson's initial brief would have been due in approximately 30 days. This panel ruling is legally unremarkable.

The Eighth Circuit's vacation of the stay, on the other hand, was legally deficient and remarkable for its departure from the norm. A reviewing court may only vacate a prior court's entry of a stay when the prior court abused its discretion. *Rhines v. Weber*, 544 U.S. 269, 279 (2005); *Kemp v. Smith*, 463 U.S. 1344, 1345 (1983) (Powell, J., in chambers). Courts reviewing a stay entered by a panel must accord "great deference" to the court entering the stay. *O'Connor v. Board of Education*, 449 U.S. 1301, 1304 (1980) (Stevens, J., in chambers); *see also Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). Vacation of a stay "should be reserved for exceptional circumstances." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). Any doubt should be resolved in favor of a continuation

[6] The dissent confirmed that was the basis for the panel's order granting the stay. Apx. 135a (Kelly, J., dissenting) (the stay was properly granted because Mr. Johnson showed a "significant possibility of succeeding on the merits of his habeas claim) (citing *Hill*, 547 U.S. at 584; *id.* at 136a ("Whether Johnson is ultimately entitled to federal habeas relief . . . is a merits question that has not yet been presented to this court, and is why the panel entered a stay of execution); *id.* at 142a (noting that if Mr. Johnson lacks a rational understanding of the reasons for his execution he is incompetent, and "[a]ny proceedings necessary to make this determination do not have to be prolonged, but they will take time . . . The Constitution requires no less.").

of a previously entered stay. *Lendhard v. Wolff*, 443 U.S. 1306, 1313 (1979) (Rehnquist, C.J.).

The State did not present any argument whatsoever contending that the panel abused its discretion by entering the stay and did not even mention the standard in its request for en banc review. Similarly, the court did not find that the panel abused its discretion. Because the court did not apply the requisite standard for the vacation of a stay, its ruling is contrary to this Court's jurisprudence.

The Eighth Circuit's ruling, but for this Court's intervention, ensures that the denial of Mr. Johnson's *Ford* claim will never be reviewed by any appellate court. This is so even though three Eighth Circuit judges have found that his claim is potentially meritorious, as did one judge of the Missouri Supreme Court. As these judges found, reasonable jurists could disagree with the district court's ruling for numerous reasons. As explained above, the en banc ruling itself establishes that reasonable jurists could disagree about these aspects of Mr. Johnson's claim.

As a "non-merits," threshold determination, the panel decision did not conflict with any decision of this Court or the Eighth Circuit. However, the Eighth Circuit's en banc reversal of the panel decision conflicts with the standards for en banc review and for determining whether a COA should issue. Furthermore, because the court did not apply the requisite standard for the vacating a stay (abuse of discretion), and its ruling is contrary to this Court's jurisprudence requiring deference to the prior entry of a stay. The court's en banc decision departs from the accepted and usual course of judicial proceedings and calls for an exercise of this

Court's supervisory power. This Court should grant review. Alternatively, this Court should grant the petition, vacate, and remand the case for panel appeal.

II. This Court should hear this case because reasonable jurists could conclude the Missouri Supreme Court decision is contrary to or an unreasonable application of Supreme Court law and rests on unreasonable determinations of fact.

As the opinions of three Eighth Circuit judges and the state-court dissent show, reasonable jurists could conclude that the Missouri Supreme Court's decision finding that Mr. Johnson did not meet the minimum threshold standard for incompetency is contrary to or an objectively unreasonable application of *Panetti* or *Madison* or is based on unreasonable determinations of fact. The dissenting judges explicitly recognized that the dispute between the concurring opinion and their position itself demonstrated, "[a]t a minimum, reasonable jurists could, and in fact do, debate the issue." Apx. 141a (Kelly, J., dissenting). Accordingly, this Court should grant review and hear Mr. Johnson's appeal. Alternatively, this Court should grant the petition, vacate, and remand the case for panel appeal.

A. Reasonable jurists could conclude that the state court's decision was contrary to clearly established federal law.

Substantial evidence shows that the relevant facts in Mr. Johnson's case are materially indistinguishable from those in *Panetti*. Like Mr. Panetti, Mr. Johnson's delusions involve "an extensive delusional belief system involving paranoid, grandiose, and bizarre beliefs," many of which center on concepts related to spiritual warfare and demons. Apx. 54a. Those delusions lead Mr. Johnson to

believe the reason for his execution is "that Satan is using the State of Missouri to execute him to bring about the end of the world." *Id.*

Like Mr. Panetti's "fixed delusion" that his execution's true purpose was to stop him from preaching, 551 U.S. at 955, Mr. Johnson's genuine, fixed belief is that the true purpose of his execution is that Satan is attempting to bring about the end of the world. His "irrational understanding is further demonstrated by his belief that he potentially can change this plan by going into the judge and lawyers' heads or that the spirits of the underworld can influence the State to not execute him for Satan's purpose." Apx. 54a. And he also has "delusional beliefs regarding his ability to live on after death in an animal's mind or as the undead," which "indicate[s] a lack of rational awareness of the finality of his punishment." *Id.* Mr. Johnson's longstanding delusions about being "the end of the world," "the Dead," and a vampire, along with his hallucinations involving demons, reveal that this delusional belief system is not new. It has endured over decades, and it currently manifests as a belief that the true purpose of his execution is for Satan to bring about the end of the world.

The fact that the respondent in *Panetti* did not contest the threshold showing does not render the materially indistinguishable facts between *Panetti* and Mr. Johnson's case meaningless. The *Panetti* Court did not base its decision regarding whether the petitioner satisfied the threshold standard on whether that fact was disputed. Rather, the Court verified that the evidence satisfied that minimum threshold with its own "independent review of the record." *Panetti*, 551 U.S. at 950.

This independent review shows that the lack of dispute is immaterial to the inquiry of what constitutes a substantial threshold showing.

As evidenced by the dissent from the en banc ruling, reasonable jurists could disagree with the district court's determination that the Missouri Supreme Court decision does not contradict Supreme Court law. Apx. 137a-138a (Kelly, J., dissenting) (Mr. Johnson's delusional beliefs "are strikingly similar to the ones described in *Panetti*" and his threshold evidence "is arguably even stronger than the incompetency-related evidence at issue in *Panetti*" so the state court's decision is "clearly contrary to *Panetti*").

Reasonable jurists also could conclude the state court opinion was contrary to *Panetti* and *Madison* because in finding that Mr. Johnson did not satisfy the threshold showing of incompetency, the state court relied on Skaggs's opinion applying an awareness standard, as opposed to the requisite rational understanding standard, as sufficient to negate Mr. Johnson's otherwise uncontroverted evidence showing his lack of rational understanding of the reason for his execution. The dissent noted this was a basis to grant the COA, given that "nowehere in [her] affidavit does Skaggs attest that Johnson is competent to be executed under the applicable federal-law standard," and "her impressions do not meet the exacting requirements of *Panetti*. *Id.* at 138a-139a.

B. Reasonable jurists could conclude that the state court's decision was an objectively unreasonable application of clearly established federal law.

In parts of its opinion, the state court correctly identified the governing legal standard. Apx. 107a-108a. Yet despite that acknowledgement, the court

nevertheless relied on Skaggs's claim that Mr. Johnson "appears to understand the nature of his execution," as well as notations in the medical records indicating Mr. Johnson felt remorse for having committed the offense and was pursuing appeals in his legal case. *Id.* at 109a. But under *Panetti*, neither Mr. Johnson's purported understanding of the "nature of his execution," nor his remorse for committing the offense or pursuit of legal remedies through his attorneys, are sufficient to negate Mr. Johnson's lack of rational understanding, in which he believes the reason for his execution is that Satan is using the State of Missouri to end the world. *Panetti*, 551 U.S. at 959 ("A prisoner's awareness of the state's rationale for an execution is not the same as a rational understanding of it.").

The state court did not find, absent Skaggs's evidence, that Mr. Johnson's evidence did not satisfy the threshold standard. Rather, it only determined that Mr. Johnson did not meet the threshold standard *in light of* Skaggs's affidavit (applying an incorrect awareness standard). Apx. 110a. But the application of an incorrect competency standard is of no import to the competency determination, particularly at the threshold stage. *Panetti*, 551 U.S. at 959.

In addition to applying an invalid legal standard, Skaggs was not even qualified to render an opinion with respect to the threshold *Ford* question in the first place, which the State does not dispute. *See* Apx. 139a (Kelly, J., dissenting) ("Missouri also does not dispute that Skaggs . . . is not qualified under state law to even make such a competency determination."). Missouri statutes and precedent prohibit professional counselors from doing so. *See Johnson v. State*, 58 S.W.3d 496,

499 (Mo. banc 2001) (Prison counselor not qualified to render opinion about potential for future violence because "professional counseling and practice of professional counseling […] are not defined to include diagnoses of any sort."); Mo. Rev. Stat. § 337.500; Mo. Rev. Stat. § 337.015(1). Furthermore, Skaggs's involvement in the effort to ensure that Mr. Johnson is deemed fit for execution while also purportedly providing him with mental health treatment unfairly pits her loyalty to her employer at odds with her to duty to petitioner to provide him necessary health care.

Unlike Dr. Agharkar, Skaggs never even evaluated Mr. Johnson. Instead, her opinion regarding Mr. Johnson's competency was based on mere five- to ten-minute encounters for the purpose of treatment. *See* Apx. 141a n.4 (Kelly, J., dissenting) ("At no point did Skaggs conduct an evaluation of any kind to determine whether Johnson was competent to be executed.").

Skaggs's opinion (1) was not based on an evaluation, (2) did not satisfy the state's own processes and procedures with respect to the necessary qualifications for an expert opinion regarding Mr. Johnson's schizophrenia, (3) applied a competency standard invalidated in *Panetti* itself, and (4) injected due process and conflict of interest issues that otherwise would not have been part of the case absent the court's reliance on Skaggs's opinion. Reasonable jurists could (and did) find that the state court's reliance on Skaggs was an objectively unreasonable application of *Panetti*. Apx. 138a-139a (Kelly, J., dissenting) (the state court's finding that Mr. Johnson failed to make the requisite threshold showing based on evidence

presented by the state that was "largely irrelevant under the governing legal standard" and which did "not provide meaningful insight" into Mr. Johnson's competency "involved an unreasonable application of *Ford*, *Panetti*, and *Madison.*").

In addition to its objectively unreasonable reliance on Skaggs, the state court's commingling the threshold question with the ultimate merits analysis of Mr. Johnson's evidence to hold that he had not met the minimum required threshold also was an objectively unreasonable application of *Panetti*. If *Panetti* meant for the threshold determination to be equivalent to a full merits determination, there would have been no reason for the Court make any distinction between a threshold determination and a subsequent "fair hearing." *Panetti*, 551 U.S. at 949.

As in *Panetti*, "the factfinding procedures upon which the [Missouri Supreme Court] relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Id.* at 954. Reliance on an opinion applying the incorrect legal standard is seriously inadequate for the ascertainment of the truth. *Id.* Furthermore, the State's failure to comply with its own processes and procedures ensuring that only those with the necessary qualifications render an opinion based on a psychiatric diagnosis—in this case, the effect of Mr. Johnson's schizophrenia spectrum disorder on his competency—was objectively unreasonable. *Id.* at 950-51. Reasonable jurists could conclude that the state court's conflation of a merits-type analysis with threshold minimum showing required for further process was an objectively unreasonable application of Supreme Court law. *Id.* at 950; *see*

also Apx. 142a-143a (Erickson, J., dissenting) (concluding that reasonable jurists could find that "the process afforded Johnson fails to meet minimum procedural due process requirements under the Constitution" where the state court's credibility determinations were made by "fiat declaration that one piece of paper is more credible than another" and further opining that although "the Constitution does not require a full trial, it seems to me that it does require something more than what happened here.").

C. The Missouri Supreme Court's decision rested on an unreasonable determination of the facts in light of the evidence before the court.

Because the state court refused Mr. Johnson the opportunity to duly develop the factual basis for his incompetency claim through a hearing, this Court does not owe any deference to the state court's factual determinations. *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) ("Having refused [Petitioner] a hearing on the matter, the state cannot argue now that the normal AEDPA deference is owed the factual determinations of the [state] courts."). However, even if AEDPA does apply, it does not pose any barrier to relief because reasonable jurists could—and do—conclude that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in state-court.

Instead of Mr. Johnson's mental health records containing no fact supporting Dr. Agharkar's conclusion regarding Mr. Johnson's delusions, as the state court found, App. 108a-110a, the records contain at least 15 separate instances of similar delusions, at least five of which are the *same delusion* Mr. Johnson expressed to Dr. Agharkar. All ten Eighth Circuit judges agree that the records contain such

delusions, contrary to the state court's finding. *See* Apx. 134a (Gruender, J., concurring). Moreover, the records both contradict Skaggs's affidavit and show that Skaggs, over the course of three years, spent less than half the amount time that Dr. Agharkar spent with Mr. Johnson.

Mr. Johnson's mental health records also contradict Skaggs's claim in her affidavit that Mr. Johnson's symptoms are managed by medication (and implication that they will continue to be so managed going forward). Apx. 58a-59a. The records show that although he is sometimes able to cope with the voices he regularly experiences, and that the medications are, at times, "effective" in keeping those symptoms at a level he finds manageable, they never render him "free of auditory hallucinations," as the state court concluded. *Id,* at 109a. For example, on January 23, 2023, Skaggs noted that Mr. Johnson "said he's doing better and is hearing **less** voices." R. Doc. 18-1, at 588 (emphasis added). Hearing **less** is not **none**.

Although on February 2, 2023, Skaggs noted that Mr. Johnson reported that he did not have hallucinations while on medication, on March 8, 2023, she also noted that Mr. Johnson reported that "the voices are still 'a whisper' and at baseline," reflecting that he does indeed experience auditory hallucinations while compliant with his medications. *Id.* at 590, 594. On May 10, 2023, Skaggs noted that Mr. Johnson "reports he is now having minor auditory hallucinations. He described them as laughing or chattering in his ear." *Id.* at 601. Another note from the same day states that Mr. Johnson was "having issues with sleep" and reported "mild AH [auditory hallucinations] of 'chattering and laughing.'" *Id.* at 602. And as

the dissent noted, "treating a symptom of mental illness is not the same as curing someone of mental illness. . . . The Court 'therefore could not reasonably infer from' the temporary absence of auditory hallucinations that Johnson no longer suffers from psychotic delusions that render him incompetent to be executed." Apx. 141a (Kelly, J., dissenting) (citing *Brumfield v. Cain*, 576 U.S. 306, 316 (2015).

These records establish that Skaggs's claim is unsupported.[7] The records also show that what Mr. Johnson may have reported to be "effective" in terms of his medications or treatment may not fully reveal the depth of his psychosis at a given time. R. Doc. 18-1, at 575 ("It is believed that offender may be minimizing his symptoms and things bothering him."); *see also id.* at 582 ("whether pt is minimizing rx . . . remains to be seen"). The totality of Mr. Johnson's medical records establishes that while the magnitude and intensity of his hallucinations may fluctuate over time, they are a regular presence in his life even while he is on medication. *Id.* at 594, 602. As noted above, prior evaluations by Drs. Stanislaus and Whitehead found that petitioner's symptoms are a regular presence in his life even while he is on medication. And although Mr. Johnson was medicated when he was evaluated by Dr. Stewart, Mr. Johnson exhibited psychosis during Dr. Stewart's evaluation. PCR Tr. 191.

[7] New records recently disclosed to Mr. Johnson on July 12, 2023, and July 20, 2023, further confirm that Mr. Johnson is still hearing voices and experiencing delusions. On May 31, 2023, a physician reported: "Pt states he has felt regularly people are controlling him, that he hears voices in his head and has others' voices come out of his mouth at times. He reports this has been going on for an extended period." On June 27, 2023, the doctor reported that Mr. Johnson "confirmed ongoing AVH [auditory/visual hallucinations]" and "sometimes he has contact with demons as indicated by feeling heat on his ears." As recently as July 5, 2023, and July 10, 2023, the prison changed his medication due to his "psychosis." Mr. Johnson presented these records to the Missouri Supreme Court in his motion to recall the mandate.

Mr. Johnson is not asking this Court merely to re-weigh the evidence to reach a different conclusion than the Missouri Supreme Court. Rather, Mr. Johnson is asking this Court to *look* at the evidence that was submitted to the state court, which the state court failed to thoroughly do, and apply the law to the correct facts. *See Simmons v. Luebbers*, 299 F.3d 929, 937 (8th Cir. 2002). Those facts include Dr. Agharkar's evaluation, which is the only evaluation of Mr. Johnson's competency conducted by a qualified mental health expert, and which is supported by the lengthy history of similar and related delusions laid out in the decades of mental health records.

Those facts contradict Skaggs's affidavit, upon which the Missouri Supreme Court relied to negate Mr. Johnson's otherwise uncontroverted evidence. Thus, reasonable jurists also could conclude that the state court's reliance on Skaggs's affidavit, including its suggestion that her multiple five- to ten-minute meetings with Mr. Johnson over the course of three years rendered her opinion more credible than that of Dr. Agharkar, who spent more than double the amount of time evaluating Mr. Johnson than all of Skaggs's interactions combined, was unreasonable in light of the totality of the evidence before it.

This history clearly and convincingly establishes that Mr. Johnson has been endorsing these same kinds of delusional beliefs about the end of the world and spiritual warfare for decades, long before an execution date was in his near future. It shows that the state court unreasonably characterized the records as not supporting the current delusion, which all ten judges recognized. Thus, reasonable

jurists could find that the state court decision was unreasonable in light of the evidence presented. *See* Apx. 141a (Kelly, J., dissenting) (The state court's decision "was 'based on an unreasonable determination of the facts' given the evidence presented, as "the record clearly indicates that Johnson has on more than one occasion expressed delusions similar to the ones that he expressed to his expert psychiatrist" and the fact that he did not express them to Skaggs "does not automatically discredit Johnson's expert's observations, especially in light of Johnson's 'long history of hallucinations, delusions, and disorganized thinking.'"); *see also* Apx. 134a (Gruender, J., concurring) (acknowledging, contrary to the state court's decision, that "Johnson's past medical records show that he had expressed delusions like the ones mentioned in the report").

The foregoing shows that reasonable jurists could conclude that the state court's decision finding that Mr. Johnson did not meet the minimum threshold standard for incompetency rests on unreasonable determinations of fact and is contrary to or an objectively unreasonable application of *Panetti* or *Madison*. This Court should grant review and hear Mr. Johnson's appeal. Alternatively, this Court should grant the petition, vacate, and remand the case for panel appeal.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

DANIEL E. KIRSCH*
LAURENCE E. KOMP
MEREDITH H. SCHLACTER
MANDI SCHENLEY
Assistant Federal Public Defenders
Western District of Missouri
1000 Walnut Street, Suite 600
Kansas City, MO 64106
(816) 471-8282
daniel_kirsch@fd.org
laurence_komp@fd.org
meredith_schlacter@fd.org
mandi_schenley@fd.org

KENT E. GIPSON
Law Office of Kent Gipson, LLC
121 E. Gregory Blvd.
Kansas City, MO 64114
816-363-4400 • Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

*Counsel of Record, Member of the Bar of the Supreme Court