Nos. 23-5244 & 23A90

In the Supreme Court of the United States

JOHNNY JOHNSON, PETITIONER,

v.

DAVID VANDERGRIFF, RESPONDENT.

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

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

ANDREW BAILEY
Missouri Attorney General

GREGORY M. GOODWIN
Chief Counsel, Public Safety Section
Counsel of Record

ANDREW J. CLARKE
Assistant Attorney General

Attorneys for Respondent

Capital Case

Questions Presented

1. Did the United States Court of Appeals violate federal law when it selected from one of two statutory options provided by Congress for issuing certificates of appealability?

2. Should this Court grant certiorari review merely on Johnson's claim that the district court's decision applying AEDPA's highly-deferential standard is wrong?

Table of Contents

Table of Authorities

Cases

Statutes

Rules

In the Supreme Court of the United States

No. 23-5244 & 23A90

JOHNNY JOHNSON, PETITIONER,

v.

DAVID VANDERGRIFF, RESPONDENT

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

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

Statement[1]

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

[1] Respondent objects to Johnson's statement of facts. For instance, Johnson contends that his expert has determined he currently is incompetent to be executed, but Johnson cites to a report from five months ago. Pet. 3. Johnson cites to what he claims are examples of his mental illness, but none of these examples show that Johnson is incompetent to be executed. Pet. 4. Johnson contends that the district court denied his request for a stay without analysis (Pet. 11) but the district court denied a stay because it denied his claim and his application for certificate of appealability (Pet. App. 124a–125a). Johnson cites to and relies on records not presented to the state court, which is improper under AEDPA, as explained *infra*. Pet. 11–13. And Johnson implies that the Eighth Circuit en banc found that the Missouri Supreme Court's decision was based on an unreasonable determination of the facts. Pet. 18. Not so. Pet. App. 133a.

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 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 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). 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 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 . . . ." *Id.*

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.[2] 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

[2] The following description of the crime comes from the district court's order denying relief, and is quoted without further attribution. Order, *Johnson v. Vandergriff*, 4:23-CV-845-MTS (E.D. Mo. July 17, 2023).

executed. The Missouri Supreme Court took briefing and evidence and rejected Johnson's claim because, in part, his evidence was not credible. Johnson sought federal habeas review under the familiar and deferential AEDPA standard that requires federal courts to give deference to state court decisions unless they are unreasonable applications of, or contrary to, clearly established federal law, or unless they are based on an unreasonable determination of the facts. 28 U.S.C. § 2254. The district court carefully reviewed the Supreme Court of Missouri's decision and determined that it was not an unreasonable application of, or contrary to, clearly established federal law, nor was it based on an unreasonable determination of the facts.

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 Eighth Circuit issued a stay of execution. 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.[3]

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).

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*, SC100023 (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.

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

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. Instead of filing a federal habeas petition immediately, Johnson waited another twenty-two days before filing a federal habeas petition in the United States District Court for the Eastern District of Missouri. *Johnson v. Vandergriff*, 4:23-CV-00845, Doc. 3 (E.D. Mo. June 30, 2023). The federal district court, in a well-reasoned and thorough opinion, denied Johnson's petition on July 17, 2023. *Johnson v. Vandergriff*, 4:23-CV-00845, Doc. 23 (E.D. Mo. July 17, 2023); Pet. App. 112a–125a. Instead of immediately filing an application for a certificate of appealability in the Eighth Circuit, Johnson waited another five days to do so.

4. The Eighth Circuit panel received briefing, and at about 4:30 p.m. on July 25, 2023, a divided panel of the Eighth Circuit issued an unexplained order granting a stay of execution and a certificate of appealability "limited to the claim that Johnson is incompetent to be executed." *Johnson v. Vandergriff*, 23-2664 (8th Cir. Jul. 25, 2023); Pet. App. 126a. The divided panel granted an unexplained stay and a certificate of appealability despite the district court's well-reasoned and thorough opinion, and despite AEDPA's highly deferential standard. *Id*.

5. Less than nine hours after the divided panel granted a stay and certificate of appealability, the Warden filed a petition for rehearing en banc and motion to vacate the stay. On July 26, 2023, the Eighth Circuit en banc ordered Johnson to respond to the petition by 1:00 p.m. on July 27, 2023. Johnson did so. On

July 29, 2023, the Eighth Circuit en banc vacated the stay and certificate of appealability and dismissed the appeal.

Reasons for Denying the Writ

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

Johnson's petition is a poor vehicle for resolving the questions presented for at least two reasons. *First*, Johnson has unreasonably delayed in bringing this petition for certiorari review. And *second*, 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 10 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 more than half of the time 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. 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 *another twenty-two* days before filing a federal habeas petition in the district court below. *Johnson v. Vandergriff*, 4:23-CV-00845, Doc. 3 (E.D. Mo. June 30, 2023). The federal district court denied Johnson's petition on July 17, 2023. *Johnson v. Vandergriff*, 4:23-CV-00845, Doc. 23 (E.D. Mo. July 17, 2023). After waiting *five more* days, Johnson filed his application for stay and application for a certificate of appealability in the Eighth Circuit. In total, Johnson delayed 54 of the 104 total days between the issuance of the warrant and the date of his scheduled execution.

At bottom, Johnson has constructed and executed a strategy of extreme delay. Missouri—and more importantly the victims of Johnson's crime—have "an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)); 18 U.S.C. § 3771(a)(7). Johnson's strategy 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. Johnson cannot receive relief because he is asking this court to fashion a new rule of criminal procedure in a collateral review proceeding.

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. 17. 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 purposed. That, in turn, makes this a poor vehicle for the Court's consideration of the questions presented.

II. Johnson's complaints about the Eighth Circuit's application of 28 U.S.C. § 2253 fail to implicate a circuit split and are otherwise unworthy of review.

In his petition and application for stay, Johnson expends considerable time and effort complaining about the Eighth Circuit's process for granting, denying, and adjudicating applications for certificates of appealability and related stays. Pet. 18–30; App. for Stay 10–12. But Johnson never contends that his complaints invoke any of the traditional reasons for granting certiorari review under Rule 10. Pet. 1–41; App. for Stay 1–18. Instead, Johnson argues that the Court should remake AEDPA's statutory scheme for granting certificates of appealability and order the lower federal

courts to allow habeas appeals in all cases where a single judge concludes that the prisoner has presented a question that is debatable among jurists of reason. *See, e.g.,* Pet. 19. But that is not the law.

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

Several times in his petition, Johnson complains that he did not receive a certificate of appealability when a majority of the Eighth Circuit en banc concluded that "Johnson has not made a substantial showing of a denial of a constitutional right." *See, e.g.,* Pet. 19 ; Pet. App. 135a (Opinion of Gruender, J., concurring). Johnson's arguments are based on a fundamental misunderstanding of the certificate of appealability standard, and Johnson presented similar arguments to this Court in a prior certiorari petition, and this Court denied them.[4]

Section 2253 provides that either a circuit justice or judge may issue a certificate of appealability. § 2253(c)(1). The circuit courts have adopted administrative rules to govern how those courts process applications for certificates of appealability. The circuit courts may promulgate procedural rules about certificates of appealability because Federal Rule of Appellate Procedure 22(b) provides that authority. Fed. R. App. P. 22(b)(2) ("A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes."). This Court has agreed, holding "[i]t is more consistent with the Federal Rules and the uniform practice of the courts of appeals to construe § 2253(c)(1) as conferring the

[4] *Johnson v. Blair*, No. 22-5542, 143 S. Ct. 430 (Mem.) (Nov. 14, 2022).

jurisdiction to issue certificates of appealability upon the court of appeals rather than by a judge acting under his or her own seal." *Hohn v. United States*, 524 U.S. 236, 245 (1998); *accord* Randy Hertz & James S. Liebman, § 35.4 Initiating the Appeal, Federal Habeas Corpus Practice and Procedure (2022 ed.). That holding is consistent with this Court's practice: when an application for a certificate of appealability is submitted to the circuit justice in a capital case, he or she will refer the application to the entire court. *See, e.g., Roberts v. Lubbers*, 534 U.S. 946 (2001); *Mathis v. Thaler*, 564 U.S. 1031 (2011); *Taylor v. Bowersox*, 571 U.S. 1233 (2014); *Stoutamire v. La Rose*, 140 S. Ct. 128 (2019); *DeBenedetto v. Lumpkin*, 141 S. Ct. 2697 (2021).

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

Against this history, tradition, and straightforward application of appellate principles, Johnson offers little.

First, Johnson complains that because some judges would have granted a certificate of appealability, that must mean that his claim is debatable among jurists of reason, and therefore, he must receive a certificate of appealability. Pet. 20–22.

Johnson cites no cases—from this Court or any other—that hold that a dissent from a single federal judge means a certificate of appealability must issue. Such a formalistic rule would move certificate of appealability analysis from an objective standard to a subjective standard, in violation of this Court's precedent. *See, e.g., Giffin v. Sec'y, Fl. Dept. of Corr.*, 787 F.3d 1086, 1095 (11th Cir. 2015), *cert. denied sub nom. Giffin v. Jones*, 136 S. Ct. 825 (2016) (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011) and *Williams v. Taylor*, 529 U.S. 362, 409–10 (2000) (opinion of O'Connor, J.)).

Moreover, disagreement within a panel or within a court en banc does not automatically satisfy the statutory requirement for a certificate of appealability. Under the statutory standard, the court en banc was asked to consider whether Johnson made "a substantial showing of the denial of a constitutional right." 2253(c)(2). The court en banc concluded Johnson had not. Pet. App. 130a; 135a. Under cases interpreting this standard, courts look to see whether "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A majority of the court en banc determined that Johnson had not. Johnson's arguments to the contrary are really a request for this Court to overturn its prior practice and lower court cases and hold that if any judge of the court of appeals or this Court believes that a certificate of appealability should issue, then it must issue. But that is not the law. *See, e.g., Giffin*, 787 F.3d at 1095.

Second, Johnson raises complaints about the state court procedures under which Missouri adjudicates capital habeas petitions. Pet. 22–24. Johnson passingly suggests that he did not receive due process when the Missouri Supreme Court required him to present his habeas petition to the Supreme Court of Missouri in the first instance because Johnson seemingly believes it is unfair for the Supreme Court of Missouri to act as the finder of fact and concluder of law. Pet. 23–24. To the extent that Johnson complains he "has not had any state appellate process" (Pet. 24), there is no due process right to a direct appeal. *McKane v. Durston*, 153 U.S. 684, 687 (1894). And there is no due process right to appellate procedures in post-conviction review. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (citing *United States v. MacCollom*, 424 U.S. 317, 323 (1976) (plurality opinion)). More importantly, Johnson has *never* raised a freestanding claim in *any* federal court that the Missouri Supreme Court's process was unconstitutional. He cannot do so now. Of course, Johnson did receive due process. He had notice and opportunity to be heard before a neutral fact finder. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The fact that Johnson disagrees with the fact finder's conclusion does not mean he was denied due process.

B. Johnson's complaints that the Eighth Circuit granted en banc review are meritless and do not justify this Court's extraordinary intervention.

Johnson's next collection of complaints concern his disagreement with the Eighth Circuit en banc's decision to grant rehearing (Pet. 25, 27), and his misunderstanding of the standard of review once a court grants rehearing en banc (Pet. 26–30). Neither argument justifies this Court's extraordinary intervention.

Johnson's disagreement with the Eighth Circuit's decision to grant rehearing en banc states no legal reason for this Court to grant certiorari review. Pet. 25–30. Johnson cites no case where this Court has granted certiorari review to chastise the court of appeals' decision to grant rehearing en banc in such a circumstance. Nor can he.[5] In the Eighth Circuit, the decision to grant or deny rehearing en banc "is a pure exercise of discretion." *See Cottier v. City of Martin*, 604 F.3d 553, 556 (2010). This Court has explained that the statue authorizing rehearing en banc "is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 259 (1953). Johnson's complaints here amount to little more than an unadorned request for error correction—and error correction over the standards for granting en banc review no less. This Court's certiorari review is not typically an avenue for mere error correction. *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Johnson's second argument—that the court of appeals disregarded this Court's standards for vacating a stay of execution—is completely meritless. When the Eighth Circuit en banc granted rehearing en banc, it vacated the panel's opinion such that

[5] Johnson's claim is altogether different from the issue in *Yovino v. Rizo*, 139 S. Ct. 706 (2019), where this Court interpreted 28 U.S.C. § 46 to determine that a judge who has passed away before issuance of a decision cannot, under the terms of the statue, participate after the judge's death.

the entire litigation was present before the full court. Pet. App. 129a–130a. When the court en banc issued its decision, it denied the application for certificate of appealability and denied the stay. Pet. App. 130a. In other words, because the court en banc granted rehearing en banc and denied both of Johnson's requests, it vacated the panel opinion. *See, e.g., Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 556–57 (8th Cir. 1993) (en banc). As such, the court en banc owed no deference to the vacated panel's decision to grant a stay. Accordingly, Johnson's arguments that the Eighth Circuit en banc's decision conflicted with this Court's stay-of-execution precedent are meritless. *See* Pet. 26–30.

And there is a second reason Johnson's arguments are meritless: the panel's decision was unexplained, and this Court has given no deference to unexplained stay orders. *Bowersox v. Williams*, 517 U.S. 345, 346 (1996). The Warden relied on *Williams* when he petitioned for rehearing en banc, and Johnson's failure to cite to *Williams* in this Court is inexplicable. Nevertheless, Johnson's complaints about the en banc court's actions are squarely foreclosed by *Williams*, which provides for de novo review of unexplained stay orders because, "When a court of appeals fails to articulate its reasons for granting a stay, we lose the benefit of that court's views and must resort to other portions of the record in evaluating whether to vacate the stay." *Id*. at 346.

III. Johnson's contention that he should be granted a certificate of appealability is little more than an unadorned request for error correction, and the Eighth Circuit en banc's decision was not error.

In his final basis for certiorari review, Johnson raises an unadorned request for error correction; he contends that the Supreme Court of Missouri, the United States District Court for the Eastern District of Missouri, and the United States Court of Appeals for the Eighth Circuit, en banc, each erred when they denied him relief. Pet. 30–40. That is not a valid basis for invoking this Court's extraordinary intervention. *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.").

Moreover, Johnson's arguments here are meritless. Johnson contends that the Supreme Court of Missouri's decision was contrary to clearly established federal law (Pet. 30–32), that it was an unreasonable application of clearly established federal law (Pet. 32–36) , and that it was based on an unreasonable determination of the facts (Pet. 36–40). Johnson is wrong.

As a threshold matter, Johnson improperly attempts to expand the record before this Court. Under AEDPA, Johnson is bound to the record presented to the Supreme Court of Missouri. 28 U.S.C. § 2254(e); *Cullen*, 563 U.S. at 181–82. Johnson attempted to expand the record before the Eighth Circuit, and Missouri objected. Now, Johnson renews his efforts before this Court. In Johnson's appendix, pages 56a through 57a, pages 82a through 87a, and pages 91a through 102a, include records that were not presented to the Missouri Supreme Court before it denied Johnson's

claim.[6] Johnson may argue that he presented additional records to the Missouri Supreme Court weeks later in a motion to recall the mandate. Pet. 38 at n.7. But Johnson cannot use a procedurally invalid state court motion to recall the mandate in order to expand the record in federal court, especially *after* he filed a federal habeas petition in district court, in order to bootstrap additional information into the state court record. *See, e.g., Wampler v. Dir. of Revenue,* 48 S.W.3d 32, 35 (Mo. 2001) ("that a document or record is 'admissible' does not mean it is automatically admitted into evidence merely because it has been filed in a case or attached to a pleading."); *see also Cullen*, 563 U.S. at 182 (AEDPA's "backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the

[6] Johnson is likely to argue in reply, as he has elsewhere, that the Department of Corrections delayed in providing him records. For reasons unknown to counsel, Johnson sent all records requests to an email for receiving FOIA requests until July 10, 2023. When Johnson sent a records request to counsel for the Department on July 10, he requested that the records be provided on July 12. Counsel for the Department fulfilled his request, and pointed to dates where it appeared that Johnson had not been to medical, and requested that Johnson's counsel let the Department's counsel know if this was in error. Johnson's counsel followed up on Saturday, July 15, and counsel for the Department responded that same day, indicating he would follow up on Monday, and further informing Johnson that the employees that typically handled such requests were out of the office. Nevertheless, counsel for the Department provided records on July 20. When Johnson did not acknowledge receipt, counsel for the Department followed up on July 21 to confirm that Johnson received the updated records. Johnson did not make any additional records requests until July 31 at 9:28 CDT, which was four minutes after Johnson's counsel filed this petition for writ of certiorari review. To prevent any misunderstanding, or arguments that the Department has concealed these new records, counsel for the Department has included these new records in the Respondent's Appendix. *See* Resp. App. A28–A42. Some material is duplicated in the Respondent's Appendix because Respondent is including a complete copy of the materials sent to Johnson today.

record under review is limited to the record in existence at that same time i.e., the record before the state court.").

Johnson selectively provides this Court with records, omitting records that run counter to his arguments of incompetency. For example, Johnson's petition before this Court discusses a June 27, 2023 appointment in which Johnson discussed auditory and visual hallucinations and "contact" with demons. Pet. 20. But, Johnson does not provide Johnson's more recent mental health records, namely a report from July 17, 2023, which states that Johnson "said he's doing a lot better. That Johnson said the 'brain shocks' have gotten better." Resp. App. A29. And that Johnson "admits he had been hearing voices last week but reports none currently." *Id.* That more recent medical record also states that Johnson did not "appear to be responding to internal stimuli and did not display bizarre thinking." *Id.* The report further states that Johnson is taking his medication and that he denied "additional concerns." *Id.*

Further, in another contemporaneous record from July 10, 2023, Johnson reported that:

> he is doing better now, that the start of olanzapine caused the voices to essentially disappear, and denied that any appearance of being distracted during our interaction was response to a hallucinatory stimulus. He denied feeling like AVH or demons were driving his behaviors or otherwise intruding beyond the frustration noted above.

Resp. App. A23. Another record indicated that Johnson "was with attorneys all weekend[,]" and that it was "unclear if this was somehow relevant to these developments." Resp. App. A25. Johnson's omission of these records, which he

received on July 20, 2023, undercuts the credibility of every argument included in his petition.

Further, records requested today and received today by Johnson show that 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'" and laughed about the situation. 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*.

Returning to Johnson's claims in the petition, Johnson first argues that the Supreme Court of Missouri's decision was contrary to *Panetti*, because, in Johnson's view, the facts of his case and *Panetti* are materially indistinguishable. Pet. 30–32. The United States District Court for the Eastern District of Missouri rejected that argument, holding that Johnson's case is meaningfully different from *Panetti* because in *Panetti*, the parties agreed the petitioner had made the threshold showing, that in *Panetti*, the petitioner presented evidence from two experts the day before his scheduled execution, but Johnson presented evidence from one expert who interviewed Johnson months before his scheduled execution, and unlike in *Panetti*, in this case the State presented conflicting evidence. Pet. App. 116a. Those are important differences, not materially indistinguishable facts.

In addition, in this case and unlike in *Panetti*, the Missouri Supreme Court made credibility determinations, including that Johnson's evidence was insufficient to the meet the legal standard. *Johnson*, 668 S.W.3d at 579 ("This Court finds Johnson's evidence lacks credibility, particularly when viewed in light of the State's evidence, to demonstrate a substantial threshold showing of insanity.").[7] That too is an important difference, especially when—as here—such 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."). On en banc review, the Eighth Circuit emphasized that the Missouri Supreme Court's decision was not contrary to *Panetti* because the Missouri Supreme Court "afforded Johnson over and above that which *Panetti* required." Pet. App. 133a (opinion of Gruender, J., concurring).

Johnson next argues that the decision of the Missouri Supreme Court was an unreasonable application of *Ford*, *Panetti*, and *Madison v. Alabama*. Pet. 32–36. Johnson's arguments here are largely a collection of complaints about Ashley Skaggs. *See, e.g.,* Pet. 33–35. Again, Johnson erroneously argues that Missouri presented only the affidavit from Skaggs. Pet. 33 ("Rather, it only determined that Mr. Johnson did not meet the threshold standard *in light of* Skaggs's affidavit . . . ."). But what the

[7] Throughout his petition, Johnson implies that the *only* evidence Missouri presented was Skaggs's affidavit. But that is not correct. Missouri also presented medical records, and the Missouri Supreme Court relied on those records. *Johnson*, 668 S.W.3d at 578–79.

Missouri Supreme Court actually held was "This Court finds Johnson's evidence lacks credibility, particularly when viewed in light of the State's evidence, to demonstrate a substantial threshold showing of insanity." Pet. App. 110a. Missouri presented *both* Skaggs's affidavit *and* Johnson's medical records, as Johnson concedes in his petition. Pet. at 9. In other words, the Missouri Supreme Court found that Johnson's evidence "lacked credibility" and that its finding was buttressed by Skaggs's affidavit *and* Johnson's medical records. Pet. App. 110a. The clause "particularly when viewed in light of the State's evidence" means that "the State's evidence" amplified the Court's finding that "Johnson's evidence lacks credibility . . . ." *Id.*

The district court rejected Johnson's argument as well. The district court began by pointing out that under the "unreasonable application of" prong of AEDPA, Johnson must show that the state court's decision is "objectively unreasonable" which is a higher standard than clear error. Pet. App. 117a (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). That, in turn requires showing that the Missouri Supreme Court's decision "was so lacking in justification that there was an error well stood and comprehended in existing law beyond any possibility for fairminded disagreement." Pet. App. 117a (quoting *Harrington,* 562 U.S. at 103). The district court then found that because the Eighth Circuit had previously authorized the procedures used in this case, no federal court could say that the decision was an unreasonable application of United States Supreme Court precedent. Pet. App. 119a. The Eighth Circuit en banc agreed. Pet. App. 133a. Because one circuit of the court of appeals has reached

a similar holding, federal courts cannot say the decision is both wrong and unreasonable. *Colvin v. Taylor*, 324 F.3d 583, 591 (8th Cir. 2003).

Finally, Johnson argues that the Missouri Supreme Court's decision is based on an unreasonable determination of the facts. Pet. 36–40. Johnson begins his argument by claiming that the federal courts are not required to give any deference to the Missouri Supreme Court's factfinding. Pet. 36. Johnson relies on *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002), but his reliance is misplaced. In *Killian*, the Ninth Circuit held that "For claims for which no adjudication on the merits in state court was possible, however, AEDPA's standard of review does not apply." *Id*. at 1208. Assuming, for the sake of argument, that *Killian* is correct, it does not apply here because an adjudication on the merits was possible in this case. The Missouri Supreme Court allowed Johnson to present all the evidence he had and to present legal argument. He did so. The Missouri Supreme Court then considered the evidence presented and the arguments of counsel. Johnson cannot credibly argue that an adjudication on the merits was impossible.

Turning to the merits, state court fact finding is "presumed to be correct" and a federal court may set aside state court fact finding only by "clear and convincing evidence." § 2254(e)(1). A factual determination is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Moreover, the existence of some contrary evidence in the record does not demonstrate that the state court's factual determination was unreasonable. *See id*. at 302–03.

Johnson presents little more than what he says is contrary evidence in the record. Pet. 36–40. But, under *Wood*, even if Johnson is right that there is contrary evidence in the record, that is not enough to entitle him to set aside the state court fact findings. *See id.* at 302–03. Johnson relies on the dissenting judges from the Eighth Circuit, but as the majority points out "[t]he dissenting judges do not apply these [AEPDA] principles. . . ." Pet. App. 133a. At bottom, the Missouri Supreme Court was presented with Johnson's medical records, with a report from Dr. Agharkar, and with an affidavit from Ashley Skaggs. The Missouri Supreme Court determined that Johnson's evidence "lacked credibility." Pet. App. 110a. Johnson has not and cannot establish that the Missouri Supreme Court's factual finding was unreasonable by clear and convincing evidence. Of course, this Court and other courts have, like the Missouri Supreme Court did here, rejected Dr. Agharkar's opinions. *See* 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. AEPDA constrains this Court's ability to supervise state court opinion writing and decision making, *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), and Johnson has simply not met his burden under AEDPA. AEDPA's burden is "difficult to meet" "because it was meant to be." *See Harrington*, 562 U.S. at 103.

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 four *Hill* factors weigh in his favor or even that any do. In *Hill*, the United States Supreme 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, 547 U.S. at 584 (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*, 139 S. Ct. at 1133 (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 *supra*, Johnson cannot make a strong showing of a strong likelihood of success on the merits. Even if this Court disagrees with the decision that the Missouri Supreme Court reached, Johnson has not and cannot show that the Missouri Supreme Court's decision is so wrong as to be "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. In other words, this factor does not weigh in Johnson's favor because he cannot show a strong likelihood that he will prevail *under ADEPA*, which is the showing he must make. The question before this Court is not whether reasonable jurists could disagree with the Missouri Supreme Court on a blank canvas, but whether jurists of reason could disagree with the district court's decision under AEDPA's highly deferential standard. *Miller-El*, 537 U.S. at 336. The answer to that question is "no."

In addition, the records requested by Johnson today and received by Johnson today show that Johnson is not incompetent to be executed. After the stay was entered, Johnson told the mental health provider that he "feels 'alright'" and laughed about the situation. 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 an appeal of a claim that is meritless under AEDPA's deferential standard.

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. at 1730 (quoting The Federalist No. 39, p. 245 (J. Madison) (Clinton Rossiter ed. 1961)); *see also Gamble v. United States*, 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). "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. at 556). "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 explains, 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.[8]

And even setting those factors aside, Johnson's strategy of delay weighs against a stay. Nearly a month after the Missouri Supreme Court issued its execution warrant, Johnson filed his state-court petition asserting, *inter alia*, that he was incompetent to be executed under *Ford* and *Panetti.* Johnson waited for nearly a month to file his petition, despite the fact that his expert visited Johnson in February 2023. 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 *another twenty-two* days before filing a federal habeas petition in the district court below. *Johnson v. Vandergriff*, 4:23-CV-00845, Doc. 3 (E.D. Mo. June 30, 2023). The federal district court denied

[8] 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).

Johnson's petition on July 17, 2023. *Johnson v. Vandergriff*, 4:23-CV-00845, Doc. 23 (E.D. Mo. July 17, 2023). After waiting *five more* days, Johnson filed his application for stay and application for a certificate of appealability in the court of appeals.

At bottom, Johnson could have presented his claims in a more timely fashion, and his contention that he has not engaged in dilatory tactics in this proceeding ignores the reality that he has delayed more than half of the days that have passed since the Missouri Supreme Court issued its execution warrant. Johnson is not entitled to a stay.

Conclusion

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

Respectfully submitted,

ANDREW BAILEY
Missouri Attorney General

Gregory M. Goodwin
Chief Counsel, Public Safety Section
Missouri Bar No. 65929
Counsel of Record

/s/ Andrew J. Clarke
Andrew J. Clarke
Assistant Attorney General
Missouri Bar. No. 71264

P.O. Box 899
Jefferson City, MO 65102
Telephone: (573)751-7017
Facsimile: (573)751-2096
Gregory.Goodwin@ago.mo.gov
Attorneys for Respondent