

24-6914

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joanthony Johnson,

Petitioner,

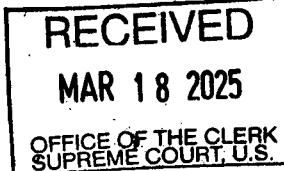
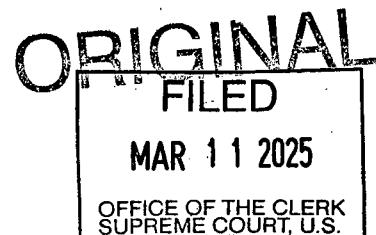
v.

Michael Shewmaker,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI



Joanthony Johnson, 1313533
South Central Correctional Center
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Licking, Missouri 65542

Pro se

QUESTION PRESENTED

The Missouri Court of Appeals, Western District, held Petitioner failed to raise a cognizable claim for post-conviction relief under Missouri Supreme Court Rule 29.15 and even if a cognizable claim existed, his argument was meritless. The United States District Court for the Western District of Missouri held that the state court's disposition of Petitioner's claim was entitled to deference under 28 U.S.C. §2254(d) and that a reasonable jurist would not find it's ruling debatable. The United States Court of Appeals for the Eighth Circuit reviewed the district court's application of §2254(d) to Petitioner's claim and denied a certificate of appealability.

This petition presents the following question:

Whether a reasonable jurist could debate whether 28 U.S.C. §2254(d) is applicable to a case in which the state court rejected the petitioner's claim on a procedural ground rather than resolving the merits of the claim. see Cone v. Bell, 556 U.S. 449 (2009).

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PARTIES TO THE PROCEEDING

The Petitioner is Joanthony Johnson, incarcerated at the South Central Correctional Center in Licking, Missouri. Petitioner proceeds pro se.

The Respondent is Michael Shewmaker, warden of the South Central Correctional Center. Respondent was represented by Missouri Assistant General Katherine Griesbach.

STATEMENT OF RELATED PROCEEDINGS

State v. Joanthony D. Johnson, No.16BA-CR00486, Boone County Circuit Court for the State of Missouri. Judgment entered July 7, 2017.

State v. Johnson, No. WD80945, 576 S.W. 3d 205 (Mo. Ct. App. 2019). Judgment entered March 5, 2019.

State v. Johnson, No. SC97891, Supreme Court of Missouri, Judgment entered May 25, 2019 (mem).

Johnson v. Missouri, No. 19-6154, 140 S. Ct. 472 (U.S. Nov. 4, 2019)(mem).

Joanthony D. Johnson v. State, No. 19BA-CV03849, Boone County Circuit Court for the State of Missouri. Judgment entered November 23, 2021.

Johnson v. State, No. WD85067, 674 S.W. 3d 22 (Mo. Ct. App. 2023). Judgment entered April 4, 2023.

Johnson v. State, No. SC100080, Supreme Court of Missouri. Judgment entered September 26, 2023 (mem).

Johnson v. Buckner, No. 2:23-CV-04215-SRB, United States District Court for the Western District of Missouri. Judgment entered April 4, 2024.

Johnson v. Buckner, No. 24-1779, United States Court of Appeals for the 8th Circuit. Judgment entered September 27, 2024, rehearing denied December 12, 2024.

PETITION FOR WRIT OF CERTIORARI

Petitioner Joanthony Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eighth Circuit denying a certificate of appealability (App. 13a) is unreported. The order of the United States Court of Appeals for the Eighth Circuit denying rehearing (App. 14a) is unreported but available at Johnson v. SCCC, 2024 U.S. App Lexis 31603. The decision of the United States District Court for the Western District of Missouri (App. 1a-12a) is unreported.

JURISDICTION

The United States District Court for the Western District of Missouri had jurisdiction over Petitioner's habeas case under 28 U.S.C. §2254. The United States Court of Appeals for the Eighth Circuit had jurisdiction over issues presented in an application for a certificate of appealability under 28 U.S.C. §2253. The judgment of the court of appeals denying a certificate of appealability was entered on September 27, 2024. The court of appeals denied a timely petition for rehearing en banc on December 12, 2024. Pursuant to 28 U.S.C. §1254(1), this Court has jurisdiction over all issues presented to the court of appeals under 28 U.S.C. §2253.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

The Sixth Amendment to the United States Constitution provides, in

relevant part: "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

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

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

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254 provides, in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

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

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

Missouri Supreme Court Rule 29.15 provides, in relevant part:

- (a) "A person convicted of a felony after trial claiming that the

conviction or sentence imposed violates ... the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel ... may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated."

STATEMENT

A. The Investigation, Conviction, and Appeal

The State of Missouri initially charged Petitioner with two counts of felony possession of a controlled substance with the intent to distribute and one count of first-degree rape stemming from a sexual encounter with M.V. back in February of 2016. The Boone County Circuit Court issued a search warrant on February 19, 2016 for a search of Petitioner's apartment in which an iPhone was seized. The iPhone could not be searched because it was locked. Doc. 8-7, p.8.

The warrant authorized both the seizure of Petitioner's phone and an off-premises examination/search for all data/software as defined by RSMo 556.063 pertaining to the distribution offense, RSMo 195.211, and the rape offense, RSMo 566.030. The warrant permitted law enforcement to use whatever techniques necessary to locate the described evidence and to continue any forensic examination beyond the time the return of the search warrant was made to the court. The court stated in the warrant that it had found probable cause for the issuance of the search warrant from the filed complaint and supporting affidavits. Doc 8-7, p.12.

The warrant was accompanied by an affidavit completed by Detective Patrick Corcoran of the Columbia Police Department in which it described the alleged rape of M.V. and instances of Petitioner allegedly providing controlled substances to other women, Corcoran further averred from his training and experience that cell phones can store illegal content and carry out illegal activity such as distribution and that M.V. had described an instance of Petitioner using his phone. Corcoran stated cell phones contain electronic capabilities similar to a computer, such as the ability to search the internet, obtain and send emails, take photos, and access social media applications.

Corcoran claimed the data sought was only available through a forensic examination of the phone. Doc. 8-7, pp. 12-14.

Petitioner believed his phone contained exculpatory evidence showing consensual sexual contact between himself and M.V. Doc. 8-14, pp.44-45. Based on this belief, Petitioner filed a motion to preserve electronic evidence and to allow his expert to extract and examine the phone data before the state's examination. Although Petitioner would get to extract the data first, both extractions would be done at once. Doc. 8-7, p.14.

Trial counsel requested that the state make the phone available so Petitioner could unlock it and the state agreed so long as Petitioner provided the state with access to the phone's contents. Doc. 8-7, p.16. The state had requested trial counsel make the passcode available for Jeff Adams if the passcode was to be made available to Petitioner's expert so he could do his analysis. Doc. 8-14, p.67. Jeff Adams was the mobile forensic examiner for the Columbia Police Department. Adams, accompanied by Corcoran, met with Petitioner, his counsel, and his expert at the Boone County Jail to conduct his examination of the phone. Doc. 8-7, p.16. At the time, Adams conducted his download of the phone's contents he understood that there was a search warrant authorizing that download and search. Adams identified the February 19, 2026 search warrant as the warrant he was aware was in effect and believed it to be valid for as long as he needed time to examine the phone. Doc. 8-1, pp.367-68.

After the state examined the phone, it claimed to have become aware of additional evidence. The state claimed it found videos and images of additional victims. The state argued for moving the trial setting because they did not have the time to do the necessary analysis on this newly discovered evidence. The state claimed to have found videos of approximately eight different women, in its view or representation, that could be used to corroborate M.V.'s

testimony because the jury could very readily not believe her. Trial counsel argued any such evidence was speculative as to whether it is criminal and could be investigated and charged at another time. The state admitted the video and photo evidence only possibly depicted criminal activity. Trial counsel argued that if the videos show consensual sex, then they are not criminal. The state's final argument was that it needed more time to investigate this evidence further to determine whether the videos depicted criminal activity. Doc. 8-1, pp.153-61!

Although the videos found on Petitioner's phone depicted sexual activity, there were challenges in identifying the women. Doc. 8-1, p.1341. The videos were short in length and none of the individual's faces in the videos were visible. Doc. 8-1, p.218. Adams analyzed the text messages and call logs as a part of his investigation into the videos. Doc. 8-1, pp.1340-47; Doc. 8-1, pp.1355-58. The women ultimately identified told law enforcement that they did not consent to the sex acts depicted on those occasions. Doc. 8-1, pp.803-04¹⁴; Doc. 8-7, pp.9-10.

Petitioner filed a motion to suppress challenging whether the warrant established probable cause, the manner in which the warrant was executed, and whether the evidence was improperly seized. Doc 8-2, pp.83-85. Counsel ultimately limited the motion's challenges to the trial court's ordering of Petitioner to unlock his phone and the sufficiency of the search warrant and affidavit. Doc. 8-1, pp.321-22. The trial court found that law enforcement acted in good faith reliance on the warrant in executing the seizure and search of Petitioner's phone and denied Petitioner's motion. Doc. 8-2, p.119.

The state openly admitted at Petitioner's trial that it had combed through Petitioner's cell phone data to identify and contact additional women. Doc. 8-1, p.782; Doc. 8-1, pp.793-94. Petitioner testified in his defense

that all the sexual encounters were consensual and denied attempting to commit sexual abuse. The jury found Petitioner guilty on all charges and sentenced him to twenty five years for the rape and sodomy counts to be run concurrent with four years for attempted sexual abuse. Doc. 8-7, pp.9-10.

The Missouri Court of Appeals, Western District affirmed Petitioner's conviction. State v. Johnson, 576 S.W. 3d 205 (Mo. Ct. App. 2019); Doc. 8-7. The court disagreed with Petitioner's claim that the trial court erred in denying his motion to suppress and found that the warrant was supported by probable cause, sufficiently particular, not overbroad, and not stale even after being executed eight months after the phone was seized. The court also found that the search of the phone complied with the warrant requirement and the issue of whether Petitioner gave consent for a search of the phone was moot. Doc. 8-7, pp.19-29.

B. Post-Conviction Motion and Post-Conviction Appeal

Petitioner filed a motion for post-conviction relief pursuant to Mo. S. Ct. R. 29.15. Joanthony D. Johnson v. State, No. 19BA-CV03849; Doc. 8-12, pp. 105-118. Petitioner alleged that trial counsel was ineffective for limiting her motion to suppress and waiving any argument that police exceeded the scope of their warrant. Petitioner argued that the probable cause and resulting warrant limited police to searching for evidence of the alleged rape of M.V. and drug distribution charge. Petitioner explained that the police executed the warrant in a general and overbroad manner, searching for unrelated crimes which they were not authorized to do. Petitioner alleged there was no reasonable trial strategy for failing to include the claim in the suppression hearing and had counsel challenged the execution of the search warrant, the trial court and/or court of appeals would have found the search unreasonable and the remedy would have been to exclude the fruits of the search and seizure that exceeded the

scope of the warrant. Petitioner made clear that without the evidence that exceeded the scope of the warrant, there is a reasonable probability that the jury would have found Petitioner not guilty. Doc. 8-12, pp.113-14.

Trial counsel believed it would have been a cognizable motion to suppress that police searched for evidence regarding other women. Trial counsel admitted she focused on other issues rather than the scope of the warrant and did not have a strategic reason for not including the execution claim. Doc. 8-14, pp. 41-44.

The Circuit Court of Boone County denied Petitioner's motion for post-conviction relief. Doc. 8-12, pp.136-52. The court concluded that the warrant did not limit police to searching for evidence pertaining to any specific date or victim and police were not required to ignore evidence of other crimes while looking in a place they were authorized to look. The court further concluded that the search of Petitioner's phone did not occur because of the search warrant but instead, Petitioner had consented to the search when he allowed the state to perform an extraction. Doc. 8-12, pp.146-48.

Petitioner appealed the denial of his post-conviction motion back to the Missouri Court of Appeals, Western Distirct. Doc. 8-15. Petitioner argued that the motion court erred in denying his Rule 29.15 motion and that he was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §18(a) of the Missouri Constitution. Petitioner reasserted that trial counsel limited her suppression motion thereby waiving the execution argument instead of preserving it. Petitioner explained that had counsel raised and preserved the argument (instead of waiving it), there was a reasonable probability that the evidence resulting from the for crimes not described in the warrant would have been suppressed, and Petitioner would have been found not guilty. Doc. 8-15,

pp.46-52.

While responding to Petitioner's ineffective assistance of counsel claim on appeal, the state characterized Petitioner's argument as "largely pertain[ing] to trial counsel's failure to preserve for appeal" his claim but conceded that Petitioner "makes a cursory statement that the trial court would have granted the motion to suppress had counsel raised a claim concerning the execution of the search warrant." The state argued "[a]ny claim that police exceeded the scope of the warrant" would have lacked merit. Doc. 8-16, pp.46-47.

The Missouri Court of Appeals, Western District affirmed the denial of Petitioner's motion for post-conviction relief. Johnson v. State, 674 S.W. 3d 22 (Mo. Ct. App. 2023); Doc. 8-17. The court cited to the Missouri Supreme Court in McLaughlin v. State, 378 S.W. 3d 328, 354-55 (Mo. banc 2012), for the rule that trial counsel's failure to preserve an issue for appeal is not a cognizable post-conviction claim. McLaughlin cited earlier Missouri precedent in Dickerson v. State, 269 S.W. 3d 889, 893 n.3 (Mo. banc 2008) establishing "To state a cognizable ineffectiveness claim under Rule 29.15, Dickerson must allege that trial counsel's failure to raise a meritorious objection denied him a fair trial. State v. Thompson, 955 S.W. 2d 828, 831 (Mo. App. 1997)". The court found Petitioner failed to raise a cognizable claim for post-conviction relief for ineffective assistance of counsel on a post-conviction motion. The court determined that Petitioner did not allege trial counsel's failure denied him a fair trial. The court did not reach Petitioner's argument that had counsel raised and preserved the execution argument (instead of waiving it), there was a reasonable probability that the verdict would have been different absent the excludable evidence. The court further noted that even if a cognizable claim existed, Petitioner was not prejudiced because the argument

that the execution of the search warrant violated his Fourth Amendment rights was meritless. Johnson, 674 S.W. 3d at 34-35; Doc. 8-17, pp.16-18.

Petitioner submitted an application for transfer to the Supreme Court of Missouri. Doc. 8-18. Petitioner pleaded that the court of appeals was erroneous in finding his claim not cognizable based on the state rule set out in McLaughlin. Petitioner pointed to the fact that he argued throughout his amended motion and brief on appeal that trial counsel's failure to include the execution argument prejudiced Petitioner at trial because the verdict would have been different absent the excludable evidence. Petitioner further alleged that he complied with both the state rule and prejudice standard set out by this Court in Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); Doc. 8-18, pp. 8-10. The Missouri Supreme Court denied transfer. Doc. 8-19.

C. Petition for Writ of Habeas Corpus

Petitioner filed a pro se petition for writ of habeas corpus challenging his state conviction. Johnson v. Buckner, No. 2:23-CV-04215-SRB; Doc. 1.

Petitioner argued that trial counsel was ineffective in failing to argue in her suppression motion regarding the cell phone evidence that the execution of the search warrant violated his Fourth Amendment rights against unlawful search and seizure. Doc. 1, p.7.

Respondent asked the United States District Court for the Western District of Missouri to deny Petitioner's petition for a writ of habeas corpus. Doc. 8. Respondent argued that the district court should deny Petitioner's ineffective assistance claim because it was meritless under 28 U.S.C. §2254(d). Respondent claimed that the state appellate court on post-conviction appeal, in affirming the judgment of the motion court, reasonably applied federal law and made apparent the reasons why Petitioner's claim lacked merit. Respondent argued the district court should give deference to the appellate court's

ruling as required under §2254(d) and deny Petitioner's claim. Doc. 8, pp.14-17.

Petitioner replied to Respondent and asked that the district court grant the writ. Doc. 12. Petitioner pleaded that the appellate court on post-conviction appeal incorrectly determined that Petitioner failed to raise a cognizable claim. Petitioner argued that both the Rule 29.15 amended motion and brief on appeal made clear that had trial counsel preserved the execution issue throughout the suppression motion process, the result of the trial would have been different. Petitioner argued that he did not actually violate the state procedural rule and effectively complied with the state rule. Petitioner also pointed to the fact that Respondent did not plead that Petitioner defaulted his claim. Doc. 8, p.18. Petitioner asked the district court not to give deference to the ruling of the state court. Doc. 12, p.19.

The district court denied Petitioner's petition and certificate of appealability. App. 1-12a; Doc. 13. The district court found Petitioner failed to establish by clear and convincing evidence that the state court's findings were erroneous. App. 6a; Doc. 13, p.6. The district court found that the state court's comments on the claims merits, following the state court's finding the claim was not cognizable, were not unreasonable. The district court cited to Schlepper v. Groose 36 F. 3d 735, 737 (8th Cir. 1994) in stating it would not re-examine a state court's interpretation of state law. The district court found the state court's determination as to Petitioner's ineffective assistance of counsel claim did not result in a decision falling under 28 U.S.C. §2254(d)(1) and (2). The district court denied the ground for relief and denied Petitioner a certificate of appealability concluding that Petitioner had not shown that "a reasonable jurist" would find his ruling on the constitutional claim "debatable or wrong." Tennard v. Dretke, 542 U.S. 274, 276 (2004). The case was dismissed. App. 9-12a; Doc. 13, pp.9-12.

Petitioner submitted a notice of appeal to the Eighth Circuit. Doc. 15. Petitioner presented his ineffective assistance of counsel claim to the court in an application for a certificate of appealability. The Eighth Circuit, Johnson v. Buckner, No. 24-1779, denied that application and the appeal was dismissed. App. 13a. A petition for rehearing and rehearing en banc was also denied. App. 14a.

This petition follows:

REASONS FOR GRANTING THE WRIT

I. REASONABLE JURIST COULD DEBATE WHETHER 28 U.S.C. §2254(d) IS APPLICABLE TO CASES IN WHICH THE STATE COURTS REJECTED THE PETITIONER'S CLAIM ON A PROCEDURAL GROUND RATHER THAN RESOLVING THE MERITS OF THE CLAIM.

The state court's disposition of Petitioner's ineffective assistance of counsel claim was procedural as opposed to an adjudication on the merits and not entitled to deference under 28 U.S.C. §2254(d). Respondent did not raise procedural default as a defense in opposition to Petitioner's petition for writ of habeas corpus. The district court's application of §2254(d) to Petitioner's claim is in conflict with the decisions of this Court and the majority of federal courts of appeal thus making the disposition of the claim debatable among jurist of reason. The Eighth Circuit erred in denying Petitioner leave to appeal the district court's decision. Petitioner is entitled to a certificate of appealability.

A. The State Court's Disposition of Petitioner's Ineffective Assistance of Counsel Claim Was Procedural As Opposed To An Adjudication On the Merits.

In disposing of Petitioner's claim, the state court clearly and expressly indicated its decision was based on Petitioner's failure to follow the procedures provided by Mo. Sup. Ct. R. 29.15. Specifically, the state court held, Petitioner "fails to raise a cognizable claim for post-conviction relief because he does not allege that trial counsel's failure to move to suppress the execution of the search warrant denied him a fair trial." see App. 25a; Johnson v. State, 674 S.W. 3d 22, 34-35 (Mo. Ct. App. 2023); Doc. 8-17, pp.16-18. Missouri's precedent requires specific allegations of prejudice be made in order for ineffective assistance of counsel claims to be cognizable under Mo. S. Ct. R. 29.15. see Dickerson v. State, 269 S.W. 3d 889, 893 n.3 (Mo. banc 2008) ("To state a cognizable ineffectiveness claim under Rule 29.15,

Dickerson must allege that trial counsel's failure to raise a meritorious objection denied him a fair trial."); McLaughlin v. State, 378 S.W. 3d 328,355 (Mo. banc 2012) ("To state a cognizable claim of ineffectiveness for failure to object or preserve an issue on appeal, Mr. McLaughlin must allege that trial counsel's failure denied him a fair trial."); Tisius v. State, 519 S.W. 3d 413, 425-26 (Mo. banc 2017)(same).

The Eighth Circuit has described Missouri Supreme Court Rule 29.15 as "'firmly established and regularly followed' state procedural rule that provides 'substantive, well-established procedures that movant's are required to follow in order to have their claims considered posttrial.'" Ogelsby v. Bowersox, 592 F. 3d 922, 925 (8th Cir. 2010), quoting Francis v. Miller, 557 F. 3d 894, 899 (8th Cir. 2009); see also Reese v. Delo, 94 F. 3d 1177, 1181-82 (8th Cir. 1996) ("We have previously rejected claims that Rule 29.15 is an inadequate state ground to bar federal review."); Oxford v. Delo, 59 F. 3d 741, 744 (8th Cir. 1995) ("Because Rule 29.15 is the exclusive procedure for post-conviction relief in Missouri, claims not properly asserted under the rule are procedurally defaulted."); Barnett v. Roper, 541 F. 3d 804, 808-11 (8th Cir. 2008)(Rule 29.15 pleading requirement "is firmly established and regularly applied and constitutes an independent and adequate ground that bars our review of Barnett's claims.").

Missouri's rule requiring Petitioner to allege specific prejudice in order to state a cognizable claim of ineffective assistance of trial counsel is not "as protective as the federal standard" and Petitioner's claim should not "be regarded as having been adjudicated on the merits." Johnson v. Williams, 568 U.S. 289, 301 (2013). This Court has clearly stated that "a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable

professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984).

In order to prevail on his claim, a defendant is required to "show" that both "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. This Court did not mandate defendant's "allege" prejudice but only require that they "show" prejudice.

This Court again explained that defendants must show prejudice in Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principle allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice."). While allegations of prejudice can demonstrate prejudice (or lack thereof) in certain situations, as this Court stated in Hill v. Lockhart, 474 U.S. 52, 60 (1985) ("We conclude that petitioner's allegations are insufficient to satisfy the Strickland v. Washington requirement of 'prejudice.'"), such allegations are not required. see, e.g., State v. Filholm, 848 N.W. 2d 571, 578 (Neb. 2014) ("[I]t is not an appellant's allegations of prejudice that have guided our review of ineffective assistance claims on direct appeal, but allegations of deficient conduct").

Missouri is fully aware of the distinction between alleging prejudice and showing prejudice. see McLaughlin, 378 S.W. 3d at 354 ("The motion court denied Mr. McLaughlin's claim, finding that he failed to present a cognizable claim for Rule 29.15 relief and had not shown a substantial deprivation of his right to a fair trial"). The state court was also aware of this distinction in Petitioner's case when it concluded that he was not prejudiced even if he had alleged prejudice as required by state law. App. 25a; Johnson, 674 S.W. 3d at 34-35 (Mo. Ct. App. 2023); Doc. 8-17, pp.16-18. This proves the state

court viewed Petitioner's failure to allege specific prejudice separately from whether Petitioner failed to show or prove prejudice, as required by this Court.

Petitioner's claim was a "challenge to the judgment on grounds of evidentiary insufficiency" and Petitioner asserted without the excludable evidence the verdict would have been different. Strickland, 466 U.S. at 694. see Doc. 8-12, pp.113-14; Doc 8-15, p.50. The state court should have applied Strickland's prongs directly to the record because it firmly establishes the requisite deficient performance and prejudice. Kimmelman, 477 U.S. 390. The state court chose to instead reject Petitioner's ineffective assistance of counsel claim under state law and in doing so, failed to resolve the merits of the federal claim.

B. The District Court's Application of §2254(d) To A Claim the State Court Disposed Of Procedurally Conflicts With Decisions Of This Court and A Majority of Federal Courts of Appeal.

The district court's decision to subject Petitioner's claim to a deferential standard of review flatly contradicts this Court's precedent. The state court did not reach the merits of Petitioner's claim and instead rejected the claim on procedural grounds. The state did not contend Petitioner's claim was procedurally barred in the district court and waived procedural default as an affirmative defense. This Court has explained that when the state court does "not reach the merits", "federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.' 28 U.S.C. §2254(d). Instead, the claim is reviewed de novo." Cone v. Bell, 556 U.S. 449, 472 (2009).

Had the district court adhered to this Court's decision in Cone, it would have owed no deference to the state court's disposition. Petitioner's claim

was arguably meritorious under de novo review and the district court's application of §2254(d) deference was outcome determinative. App. 9-11a. 28 U.S.C. §2253(c)(2) requires the issuance of a certificate of appealability upon a "substantial showing of the denial of a constitutional right". Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). The Eighth Circuit erred when it did not find the district court's disposition of Petitioner's claim to be reasonably debatable. A certificate of appealability should have issued where the reasonable minds of this Court had differed on whether §2254(d) was applicable under similar circumstances.

The district court's decision is not just in conflict with the reasonable minds of this Court, but also in conflict with the reasonable minds of the majority of the federal courts of appeal who have also differed on whether §2254(d) is applicable to claims under similar circumstances. Multiple federal courts of appeal have explicitly followed this Court's holding in Cone to find that when a state court "did not reach the merits" of a claim, "federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.' 28 U.S.C. §2254(d). Instead, the claim is reviewed de novo." see Sears v. Warden GDCP, 73 F. 4th 1269, 1280 (11th Cir. 2023); Evans v. Sec'y Pa. Dept. of Corr., 645 F. 3d 650, 655-56 (3d Cir. 2011); Panetti v. Davis, 863 F. 3d 366, 374-75 n.51 (5th Cir. 2017); Loza v. Mitchell, 766 F. 3d 466, 497-98 (6th Cir. 2014). see also, Browning v. Trammell, 717 F. 3d 1092, 1102 (10th Cir. 2013); James v. Murphy, 694 F. 3d 225, 234-35 (2d Cir. 2012); Ashburn v. Korte, 761 F. 3d 741, 750 (7th Cir. 2014); Runningeagle v. Ryan, 825 F. 3d 970, 978 (9th Cir. 2016); Waters v. Lockett, 896 F. 3d 559, 566 (D.C. Cir. 2018).

"[S]ection 2254(d) has deemed inapplicable to cases in which the state courts rejected the petitioner's claim on a procedural ground rather than

resolving the merits of the claim." Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure, 7th Edition, §32.2 (Matthew Bender).

One treatise has collected cases from the Second, Third, Fourth Fifth, Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal supporting Cone's rationale going back a quarter century. Id. at n.6.

Furthermore, there is support from jurist within the same district court that resolved Petitioner's claim for this Court's decision in Cone. see Guzman v. Denny, No. 5:14-06086-CV-RK, 2018 WL1440607, at *10 (W.D. Mo. Mar. 22, 2018).

Jurist of reason have read Cone, not to be a suggestion, but a mandate that obligates federal courts to subject claims to de novo review that have not adjudicated on the merits in the state courts. The Eighth Circuit should have issued a certificate of appealability because the district court's application of §2254(d) deference to Petitioner's claim was "debatable amongst jurist of reason." Miller-El, 537 U.S. at 336.

C. The District Court's Application Of §2254(d) To Contingent Observations Conflicts With Decisions of The Second Circuit Court of Appeals and Is Inconsistent With This Court's Precedent.

This Court has explained that "[t]he language of 28 U.S.C. §2254(d) makes it clear that this provision applies only when a federal claim was 'adjudicated on the merits in State court!'" Williams, 568 U.S. at 302. Mo. Sup. Ct. R. 29.15 became "a procedural barrier to adjudication of the claim on the merits" in Petitioner's case. Walker v. Martin, 562 U.S. 307, 315 (2011). The state court's subsequent utilization of the prefatory phrase: "Further, even if a cognizable claim existed", established the state court was fully aware of the procedural ground as a barrier to adjudicating the claim and was also evidence the state court neither forgave nor ignored its procedural ruling. The subsequent comments after the prefatory phrase were contingent observations

not entitled to §2254(d) deference. Consistent with this Court's decision in Cone, the district court should have reviewed Petitioner's claim de novo.

The Second Circuit has found similar prefatory phrases to be "contrary-to-fact construction[s]". Bell v. Miller, 500 F. 3d 149, 155 (2d Cir. 2007). The court in Bell held that the discussion of a claims merits in a state court opinion, which was preceded by the contrary-to-fact construction: "if the merits were reached, the result would be the same", was not the same as an "alternative holding" and not entitled to deference under §2254(d) because "the wording of the opinion reflects that the disposition was not premised on the court's view of the merits" but rather on it's procedural ruling. Bell, 500 F. 3d at 153-55. The state court's observations concerning the merits of a claim following the contrary-to-fact construction were regarded as contingent observations which the court then "decline[d] to read a contingent observation as an 'adjudication on the merits.'" Bell, 500 F. 3d at 155.

The Second Circuit would find another contrary-to-fact construction following a decision which relied on a procedural ground: "if the court were to consider the defendant's claims ... the motion would similarly be denied", did not "constitute a decision on the merits for the purposes of 28 U.S.C. §2254(d)". Fulton v. Graham, 802 F. 3d 257, 265 (2d Cir. 2015). The court stated "[b]y employing this 'contrary-to-fact construction', the state court announced that it was not basing it's judgment on the merits of the federal claim, but rather on a state procedural bar." Id. The court clarified that the "analysis served merely to address the counter-factual supposition, rather to act as an alternative holding." Id. at 265 n.2. This Court's precedent supports the rationale of the Second Circuit.

A "judgment on the merits" is a judgment based on the evidence rather than on technical or procedural grounds". Black's Law Dictionary (11th ed. 2019).

This Court has defined "merits" as used in §2254(d)'s provisions as "[t]he intrinsic rights and wrongs of a case as determined by matters of substance ... in contradistinction to extraneous points such as the competence of the tribunal or the like ... [and] unobscured by procedural details[.]" Williams, 568 U.S. at 302-03(citations omitted). The judgment delivered by the state court in Petitioner's case was not based on the intrinsic right and wrong of the matter, nor was it in contradistinction to a judgment based on a procedural ground because it was a judgment based on a procedural ground. Had the state court's contingent observations discussed reasons why Petitioner's claim was meritorious rather than meritless (or had no discussion at all), the disposition of the claim would have been the same. The contingent observations were not the basis for the state court's judgment, Mo. Sup. Ct. R. 29.15 was.

This Court has made clear that "[i]t remains the duty of the federal courts ... to determine the scope of the relevant state court judgment." Coleman v. Thompson, 501 U.S. 722, 739 (1991). Missouri's precedent supports the conclusion that the contingent observations were not necessary to the state court's judgment nor a part of it's holding. Missouri has long held that the "expressions of opinion, not in anywise necessary for the actual decision of any question before the court" are dicta. State ex rel. Anderson v. Hostetter, 346 Mo. 249, 140 S.W. 2d 21, 24 (Mo. banc 1940). Dicta is described as "not essential to the court's decision" and "not precedent that is binding". Swisher v. Swisher, 124 S.W. 3d 477, 482 (Mo. Ct. App. 2003). Applying §2254(d) deference to the contingent observations, dicta, creates inconsistency between the respect a federal court owes to a state judgment and the respect a state court owes to it's own. The state court had no authority to adjudicate the claim under Mo. Sup. Ct. R. 29.15 and the district court had no duty to afford its subsequent observations deference.

What'smore, applying §2254(d) deference to the contingent observations in Petitioner's case leads to an odd result. It requires deference to those observations under §2254(d) while simultaneously nullifying the exceptions to deference in §2254(d)(1) and (2) because the "decision" was not a result of those observations but of the procedural ruling. This theoretically bars habeas relief no matter how unreasonable those contingent observations might be. The state would undoubtedly always waive procedural default as an affirmative defense in cases with contingent observations because a federal court would be bound to find those observations did not result "in a decision" falling under the exceptions to deference and thus habeas relief unavailable. see App. 9-11a; Doc. 13, pp.9-11.

The district court should have followed this Court's decision in Cone and not subjected Petitioner's claim to §2254(d)'s deferential standard when the basis of the state court's judgment was solely on a procedural ground. Petitioner was entitled to have his claim resolved without §2254(d)'s deferential constraint and thus his claim is worthy of an unencumbered review in the Eighth Circuit. At the very least, the district court's application of §2254(d) resulted in a "resolution" "debatable amongst jurist of reason" because the Second Circuit has found contingent observations not to be decisions on the merits for the purposes of §2254(d) for nearly twenty years. Miller-El, 537 U.S. at 336-37. Where Petitioner's entitlement to habeas relief turns on whether his claim is entitled to deference under §2254(d), it would be an unjust result for the applicability of that provision to depend solely on which federal court resolves the claim.

This Court should grant the writ because if the question presented goes unresolved, the Eighth Circuit will have contravened this Court's precedent by denying a certificate of appealability when reasonable minds have differed on

§2254(d)'s applicability to claims that have not been adjudicated on the merits in state court. "An 'adjudication on the merits' is best understood by stating what it is not: it is not a resolution of a claim on procedural grounds." Williams, 568 U.S. at 308 (Scalia, J., concurring) (quoting Muth v. Frank, 412 F. 3d 808, 815 (7th Cir. 2005)). The state court chose to reject Petitioner's claim under Mo. Sup. Ct. R. 29.15 and §2254(d) "should not constrain a final decision in federal court about whether he deserves habeas relief". Medellin v. Dretke, 544 U.S. 660, 679-80 (2005) (O'Connor, J., dissenting from dismissal of certiorari as improvidently granted, joined by Stevens, Souter, and Breyer, JJ). If the Eighth Circuit is allowed to continue to disregard how it's district court's apply §2254(d) to claims which were rejected on procedural grounds by state courts, habeas relief will be unjustly restricted beyond the language of the provision and this Court's precedent. This Court's intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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