No. 24-6914

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 REHEARING

****

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Pro se

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Pursuant to this Court's Rule 44.2, Petitioner Joanthony Johnson respectfully petitions for rehearing of this Court's May 5, 2025 order denying certiorari in this case.

GROUNDS FOR REHEARING

Incidental to the determination of the question urged in the petition for certiorari are questions subject to debate and/or currently dividing the Federal Courts of Appeals. Petitioner respectfully asks this Court, pursuant to this Court's Rule 44.2, to consider these "other substantial grounds not previously presented."

THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION WHETHER FAILURE TO SATISFY A STATE PLEADING REQUIREMENT CONSTITUTES A DECISION ON THE MERITS

In his motion for post-conviction relief under Missouri Supreme Court Rule 29.15, Petitioner asserted that trial counsel was ineffective for waiving the argument that police exceeded the scope of their search warrant when executing the search of his cell phone. Petitioner asserted that had the argument been made in her suppression motion, the trial court would have excluded the fruits of the search and seizure that exceeded the scope of the warrant and there was a reasonable probability that the jury would have found him not guilty. Petitioner pleaded that trial counsel's failure was in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The trial court denied the motion on the merits.

Petitioner, in appealing the denial of his post-conviction motion argued that had trial counsel raised the argument that officers exceeded the scope of their warrant, there is a reasonable probability that the fruits of the search unrelated to the crimes specified in the search warrant would have been suppressed, and Petitioner would have been found not guilty. Respondent unmistakably understood Petitioner as having made an argument that the trial court would have granted the motion to suppress had counsel raised a claim

concerning the execution of the search warrant.

The Missouri Court of Appeals seen it differently. In affirming the trial court's decision to deny Petitioner's motion for post-conviction relief, the appellate court acknowledged that Petitioner alleged that trial counsel's failure was "to move to suppress the execution of the search warrant" but flatly stated that Petitioner "fails to raise a cognizable claim for post-conviction relief because he does not allege that trial counsel's failure ... demied him a fair trial." Johnson v. State, 674 S.W. 3d 22, 35 (Mo. Ct. App. 2023).

Under Missouri law, "To state a cognizable claim of ineffectiveness for failure to ... preserve an issue on appeal, [a defendant] must allege that trial counsel's failure denied him a fair trial." McLaughlin v. State, 378 S.W. 3d 328, 354-55 (Mo. banc 2012). In McLaughlin, before considering the merits of the defendant's claim , the court focused on how the claim was plead. The court first determined that the defendant "asserts that his right to a fair trial was violated". Id. at 354. The court then determined that because the defendant "alleges that his right to a fair trial was violated ... he presents a cognizable claim"and then addressed the claims merits. Id. at 355-357.

The appellate court similarly focused on how Petitioner plead his claim that trial counsel was ineffective for failing "to move to suppress the execution of the search warrant". Petitioner claimed that (1) had trial counsel argued the execution of the warrant in her motion to suppress to the trial court, (2) the trial court would have found the search unreasonable, (3) the trial court would have excluded the fruits of the search and seizure that exceeded the scope of the warrant, and (4) the jury would have found Petitioner not guilty without the excluded evidence. Despite these claims, the appellate court concluded that Petitioner "does not allege that trial counsel's failure ... denied him a fair trial". The appellate court required some near perfect

conformity with the McLaughlin pleading formula, refusing to consider Petitioner's assertion challenging the reliability of the verdict as challenging the fairness of the trial.

Under Missouri Constitution Article V, §5,"the supreme court may establish rules relating to practice, procedure, and pleading for all courts ... [t]he rules shall not change substantive rights[.]""The right to collaterally attack a conviction of sentence is a substantive right. ... [Missouri Supreme Court Rule] 29.15 does not create such a right. It is procedural, rather than substantive. It 'prescribes a method of enforcing rights or obtaining redress for their invasion.' Rule 29.15 is the 'exclusive' procedure to obtain such relief." Schleeper v. State, 982 S.W. 2d 252, 254 (Mo banc 1998). "To state a cognizable ineffectiveness claim under Rule 29.15, [a defendant] must allege that trial counsel's failure to raise a meritorious objection denied him a fair trial." Dickerson v. State, 269 S.W. 3d 889, 893 n.3 (Mo banc 2018).

This Court has stated that "[t]he Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. It's protections are not designed simply to protect the trial[.]" Lafler v. Cooper, 566 U.S. 156, 165 (2012). If the application of the McLaughlin pleading requirement governing ineffective assistance of counsel claims under Rule 29.15 was intended to impose a substantive requirement, it would be inconsistent with this Court's statement in Lafler and the Missouri constitutional prohibition on changing substantive rights under Article V, §5.

There is a split among the federal courts of appeals on whether the failure to satisfy a state pleading requirement constitutes a decision on the merits. The Eleventh Circuit has determined that it does. See Borden v. Allen, 646 F. 3d 785, 816 (11th Cir. 2011)(Alabama court's consideration of the sufficiency of the pleadings concerning a federal constitutional claim contained in a

Rule 32 petition necessarily entails a determination on the merits of the underlying claim). See also Jones v. Sec'y Fla Dep't of Corr., 834 F. 3d 1299, 1318 n.10 (11th Cir. 2016)("failure to satisfy a 'specific pleading' requirement constitutes a decision on the merits.").

Other Circuits have found specific pleading requirements to be independent and adequate state grounds. See Hodge v. Haeberlin, 579 F. 3d 627, 638-39 (6th Cir. 2009)(petitioner's failure to comply with "specificty requirement", a state rule requiring movant to specify the grounds on which the sentence is being challenged and the facts on which movant relies in support of such grounds, constitutes a procedural default and is an adequate and independent ground for denying the claim). See also Weller v. Hayes, No. 23-3549, 2024 WL4119372 (9th Cir. Wash., Sept. 9, 2024)(state rule denying ineffective assistance of counsel claim for having no apparent basis in provable fact did not require an antecedent ruling on the merits of the claim and was thus independent of federal law), cert denied, Speer v. Weller, 145 S. Ct. 1313 (U.S. Mar. 3, 2025).

The Seventh Circuit has found when the state court has "focused entirely on the adequacy of [a defendant's] pleading; nowhere is there a finding as to the merits of his ineffectiveness claim." Triplett v. McDermott, 996 F. 3d 825, 829-30 (7th Cir. 2021). "A state ground is independent of federal law if it does not depend on the merits of petitioner's claim", even when the court must "examine the substance of the underlying claim to determine whether it is sufficiently pleaded." Whyte v. Winkelski, 34 F 4th 617, 628 (7th Cir. 2022).

McLaughlin, as applied to Petitioner, did not impose a substantive requirement. McLaughlin required Petitioner to conform to it's pleading formula. That pleading formula was independent of Petitioner's obligation to satisfy the substantive prejudice and performance requirements of Strickland v.

Washington, 466 U.S. 668, 687 (1984). This issue is substantially significant to the application of 28 U.S.C. §2254(d), has divided the Federal Courts, and is incidental to the determination of the question urged in the petition for certiorari. This Court should grant rehearing and grant the writ to resolve the split among the federal courts.

THE DISTRICT COURT'S APPLICATION OF 28 U.S.C. §2254(d) TO PETITIONER'S CLAIM IS IN CONFLICT WITH DEFERENCE OWED TO THE STATE COURT'S FACTUAL FINDINGS UNDER §2254(e)(1)

The agreement that Petitioner's counsel made with the state was for Petitioner to provide the state with access to his phone's contents so Jeff Adams could do his analysis pursuant to the February 19, 2026 search warrant. Petitioner argued that trial counsel was ineffective for waiving the argument that police exceeded the scope of their search warrant in her motion to suppress to the trial court.

The Missouri court of appeals expressly stated that Petitioner failed to raise a cognizable claim for post-conviction relief under the McLaughlin pleading formula. Johnson, 674 S.W. 3d at 35. The court then assumed, contrary to that factual determination, that a cognizable claim existed. The court then determined that Petitioner's claim that trial counsel's failure "to move to suppress the execution of the search warrant""violated his Fourth Amendment right is meritless."

The court determined that it had explained somewhere in it's opinion that Petitioner knowingly and voluntarily consented to the search of the data on his phone through the extraction agreement that trial counsel made with the state (it did not) and that the search of the phone's content did not occur because of the search warrant. The court then again assumed, contrary to that factual determination, that a search of the cell phone occurred pursuant to the warrant. The court determined that it's previous holding, in Petitioner's

direct appeal, clearly addressed Petitioner's Fourth Amendment contention (it did not). The court determined, because of these factual determinations, that Petitioner was not prejudiced by counsel's failure to move to suppress the execution of the search warrant.

The United States District Court for the Western District of Missouri determined that Petitioner had failed to establish by clear and convincing evidence, as required by 28 U.S.C. §2254(e)(1), that the state court findings were erroneous and the court adopted those factual conclusions. In addressing Petitioner's ineffective assistance of counsel claim, the district court determined that it was not unreasonable for the state courts to find that the search was conducted pursuant to the extraction agreement to which Petitioner knowingly and voluntarily consented and that the scope of the search warrant would not have been exceeded even if the search was conducted pursuant to the warrant. The district court stated it would not re-examine the state court's interpretation or application of McLaughlin to Petitioner's case.

The district court denied Petitioner's ineffective assistance of counsel claim. The district court concluded that the determination of the state court did not result 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 in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. See 28 U.S.C. §2254(d)(1) and (2).

Whether a reasonable jurist could find the disposition of Petitioner's habeas petition debatable depends on whether §2254(d) is applicable to his case and that question in turn depends on whether the state court resolved his claims on the merits. Incidental to that determination is whether the state court's contrary to fact presumptions resolved Petitioner's claim and are afforded

deference under §2254(d).

This Court has not yet resolved "the question of how §§2254(d)(2) and (e)(1) fit together[.]" Wood v. Allen, 558 U.S. 290, 300 (2010). This Court did acknowledge that the Federal Courts were "divided" on the issue. Id. at 299. However, any "factual determination is binding on the federal courts, including this Court, in the absence of clear and convincing evidence to the contrary." Tharpe v. Sellers, 583 U.S. 33, 34 (2018). The state court found Petitioner failed to raise a cognizable claim because he failed to conform to the McLaughlin pleading formula. The district court determined Petitioner had not rebutted the state court's determination. The district court was bound by the determination of the state court.

Requiring the district court to be bound to any infinite number of counterfactuals that a state court could dream up would render §2254(e)(1) meaningless. The evaluation of a decision is based on whether it's produced by an "unreasonable determination of the facts", see §2254(d)(2), and counterfactuals, by definition, are not facts.

§2254(e)(1) required deference to the state court's McLaughlin determination. The district court's application of §2254(d) to the state court's counter-factuals would be inconsistent with that required deference. This Court should grant rehearing and certiorari to resolve the incidental question of how §§2254(d)(2) and (e)(1) fit together.

§2254(d) SHOULD NOT APPLY TO COMMENTS WHICH ARE AT MOST, DICTUM

Petitioner insists that the state appellate court did "not reach the merits" of his claim and the deferential standard that applies under §2254(d) was inapplicable and that de novo review was appropriate. Cone v. Bell, 556 U.S. 449, 472 (2009). Cone relied on this Court's decision in Rompilla v. Beard, 390 U.S. 374, 390 (2005). This Court relied on Rompilla in POrter v.

McCollum, 558 U.S. 30 (2009)(per curiam). This Court assumed that a stray comment addressed the question of counsel's deficiency but stated it "was at most dictum" based on the state courts "expressly" declining to answer the question. Id. at 37 n.6. This Court then went on to say that "[b]ecause the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's Strickland claim de novo." Id. at 39.

Under Missouri Constitution Article V, §2, "The supreme court shall be the highest court in the state. ... It's decisions shall be controlling in all other courts." The Missouri courts have interpreted this to mean that the courts themselves have "no authority to determine ... claims" and "no authority to overrule decisions of Missouri's supreme court" "[i]n light of the clear directive of the [Missouri] Supreme Court". State ex rel. Wratchford v. Fincham, 521 S.W. 3d 710, 713-14 (Mo. App. Ct. 2017).

When the court of appeals expressly stated that Petitioner had failed to raise a cognizable claim for post-conviction relief under the McLaughlin pleading formula, the court implicitly stated it had no authority to determine the claim. If the appellate court's subsequent barrage of counterfactuals were determining the claim, the appellate court would have acted ultra vires. It is perhaps better to assume those counterfactuals were at most dictum and not the state court deciding Petitioner's claim. With no decision to apply §2254(d) to, and Respondent never relying on McLaughlin as an adequate state ground, a de novo review of Petitioner's claim was warranted.

This Court believed the state court in Porter when it said it would not decide the claim. Petitioner insists that if we should believe a state court when it says it will not decide a claim, we should believe a state court when it says it cannot. This Court should grant rehearing and certiorari to resolve the incidental question of whether §2254(d) should apply to comments which are

at most, dictum.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

Joanthony Johnson

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