

No. _____

CAPITAL CASE

**Execution set for August 1, 2023
at 6:00 p.m. CDT**

**IN THE
SUPREME COURT OF THE UNITED STATES**

JOHNNY JOHNSON,

Petitioner,

vs.

**DAVID VANDERGRIFF, Superintendent,
Potosi Correctional Center**

Respondent.

**On Petition for A Writ Of Certiorari
To The Missouri Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

KENT E. GIPSON, #34524*
Law Office of Kent Gipson, LLC
121 E. Gregory Blvd.
Kansas City, Missouri 64114
816-363-4400 • Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

LAURENCE E. KOMP, #40446
DANIEL E. KIRSCH, #57022
Federal Capital Habeas Unit
1000 Walnut St., Suite 600
Kansas City, MO 64106
816-471-8282 • Fax 816-471-8008
Laurence_komp@fd.org
Daniel_kirsch@fd.org

***Counsel of Record**

QUESTIONS PRESENTED

Petitioner Johnny Johnson, a Missouri death row inmate, filed an original petition for a writ for habeas corpus before the Missouri Supreme Court alleging that his execution, scheduled for August 1, 2023, would violate the Eighth Amendment because he is mentally incompetent to be executed under this Court's decisions in *Ford v. Wainwright*, 477 U.S. 399 (1985), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). Petitioner's constitutional claim was based upon a face-to-face mental evaluation and a lengthy report issued by a qualified neuropsychiatrist who found that, due to petitioner's severe mental illness and resulting irrational delusions, he lacked a rational understanding of the reasons for his execution. The only rebuttal evidence the state submitted to the Missouri Supreme Court was an affidavit from a prison mental health counselor and an incomplete set of petitioner's prison mental health records.

Approximately three weeks after the petition was filed, the Missouri Supreme Court denied all relief based upon a paper record without affording petitioner an evidentiary hearing or any other adversarial process to litigate his claim. After the petition was denied, new records were disclosed to petitioner's counsel which called into serious question the accuracy and veracity of the state's rebuttal evidence. Based upon this new evidence, petitioner filed a motion to recall the mandate in the Missouri Supreme Court seeking reconsideration of the court's prior denial of his habeas petition, which was summarily denied.

Based on the foregoing facts, this petition presents the following questions:

1. Whether a report from a qualified neuropsychiatrist that a condemned prisoner is incompetent for execution that is not contradicted by any qualified expert by the state, provides sufficient evidence to establish a substantial threshold showing of insanity to require a "fair hearing in accord with fundamental fairness" as mandated by this Court's decisions in *Ford* and *Panetti*.
2. Whether the Missouri Supreme Court's practice issuing findings of fact and credibility determinations based entirely on a paper record and issuing final adjudications on the merits of condemned prisoners' *Ford/Panetti* claims without permitting discovery or an evidentiary hearing in an expedited manner violates procedural due process.

3. Whether the Missouri Supreme Court's disparate treatment of habeas corpus petitions from condemned men raising *Ford/Panetti* claims with the petitions of other prisoner's state habeas petitions in situations where the record is not adequately developed by affording all other habeas petitioners an evidentiary hearing before a Special Master, violates due process and equal protection.

TABLE OF CONTENTS

TABLE OF AUTHORITIESv

QUESTIONS PRESENTED..... ii

PETITION FOR A WRIT OF CERTIORARI 1

 OPINIONS BELOW1

 JURISDICTIONAL STATEMENT1

 CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED2

STATEMENT OF THE CASE.....2

 A. PROCEDURAL HISTORY2

 B. FACTS RELEVANT TO THIS PETITION5

REASONS FOR GRANTING THE WRIT.....29

 I. CERTIORARI SHOULD BE GRANTED TO PERMIT THE COURT TO CLARIFY THE QUANTUM OF PROOF THAT A MENTALLY ILL CONDEMNED PRISONER MUST PRESENT TO MAKE “A SUBSTANTIAL THRESHOLD SHOWING OF INSANITY” IN ORDER TO OBTAIN A “FAIR HEARING” THAT COMPORTS WITH FUNDAMENTAL FAIRNESS AS REQUIRED BY *FORD* AND *PANETTI*.
.....29

 II. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE MISSOURI SUPREME COURT’S PRACTICE OF ISSUING FINDINGS OF FACT AND CREDIBILITY DETERMINATIONS BASED UPON A PAPER RECORD IN ADJUDICATING WHETHER A MISSOURI DEATH ROW INMATE IS MENTALLY COMPETENT TO BE EXECUTED VIOLATES DUE PROCESS.
.....33

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE MISSOURI SUPREME COURT’S DISPARATE TREATMENT OF HABEAS PETITIONS FROM CONDEMNED MEN RAISING COMPETENCE TO BE EXECUTED CLAIMS WITH THE PETITIONS OF OTHER PRISONER’S STATE HABEAS CASES VIOLATES DUE PROCESS AND EQUAL PROTECTION.

.....36

CONCLUSION.....39

TABLE OF AUTHORITIES

CASES

<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986).....	31
<i>Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	37
<i>Cole v. Griffith</i> , 467 S.W.3d 349 (Mo. banc 2015)	34
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986).....	passim
<i>Hicks v. Oklahoma</i> , 447 U.S. 343 (1980)	37
<i>Johnson v. Blair</i> , 143 S. Ct. 430 (2022)	4
<i>Johnson v. Missouri</i> , 127 S. Ct. 2880 (2007)	3
<i>Johnson v. State</i> , 388 S.W.3d 159 (Mo. banc 2012)	3
<i>McDonnell Douglas v. Green</i> , 411 U.S. 792 (1986)	31
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	passim
<i>State ex rel. Carnes v. Buckner</i> , No. SC98736.....	37
<i>State ex rel. Clemons v. Larkins</i> , 475 S.W.3d 60 (2015).....	37
<i>State ex rel. Johnson v. Vandergriff</i> , 668 S.W.3d 574 (Mo. banc 2023).....	1
<i>State ex rel. Woodworth v. Denney</i> , 396 S.W.3d 330 (2013).....	37
<i>State v. Johnson</i> , 207 S.W.3d 24 (Mo. banc 2006)	3
<i>Wedlow v. State</i> , 841 S.W.2d 214 (Mo. banc 1992).....	31

STATUTES

28 U.S.C. § 1257(a)1
28 U.S.C. § 2201(c)1

OTHER AUTHORITIES

Mo. S. Ct. Rule 91.....1
Rule 29.153

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Johnny Johnson, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Supreme Court which denied petitioner's petition for a writ of habeas corpus pursuant to Mo. S. Ct. Rule 91 that advanced Eighth and Fourteenth Amendment challenges to his Missouri death sentence based upon his history of serious mental illness and his resulting inability to rationally understand the reason for his execution.

OPINIONS BELOW

The June 8, 2023, opinion and judgment of the Missouri Supreme Court denying petitioner's habeas corpus petition is reported as *State ex rel. Johnson v. Vandergriff*, 668 S.W.3d 574 (Mo. banc 2023) and it is published in the appendix as A-1. The July 29, 2023, order of the Missouri Supreme Court denying petitioner's motion to recall the mandate in the above-cited state habeas corpus action is unpublished and is published in the appendix at A-10.

JURISDICTIONAL STATEMENT

The Missouri Supreme Court issued its judgment on June 8, 2023. Under 28 U.S.C. § 2201(c) and Rule 13.1, the present petition for a writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution that states, in pertinent part: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution which provides in pertinent part: “No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Johnny Johnson, is a Missouri prisoner under a sentence of death who was convicted in 2005, in the Circuit Court of St. Louis County, Missouri of first-degree murder and other charges involving the July 26, 2002 murder of Casey Williamson in Valley Park, Missouri. Petitioner is currently incarcerated at the Potosi Correctional Center in the custody of respondent, Superintendent David Vandergriff.

On January 10, 2005, the case proceeded to trial before a St. Louis County jury and Judge Mark Seigel. On January 17, 2005, Petitioner was found guilty on all charges. (Tr. 1971-1972). On January 18, 2005, the jury returned its verdict after the

penalty phase recommending a sentence of death. (*Id.* at 2318). On March 7, 2005, pursuant to the jury's recommendation, Petitioner was sentenced to death for murder in the first degree. The Court also imposed three consecutive sentences of life imprisonment for the offenses of armed criminal action, kidnapping, and attempted forcible rape. (L.F. 884-888).

On November 7, 2006, Petitioner's conviction and sentence of death were affirmed on direct appeal by the Missouri Supreme Court in *State v. Johnson*, 207 S.W.3d 24 (Mo. banc 2006). This Court, thereafter, denied certiorari on May 29, 2007. *Johnson v. Missouri*, 127 S. Ct. 2880 (2007). Petitioner, in the meantime, filed his *pro se* motion for post-conviction relief on March 16, 2007, under Missouri Supreme Court Rule 29.15. Counsel was then appointed for petitioner, who filed an amended motion under Rule 29.15. (29.15 L.F. at 27-306).

The motion court held an evidentiary hearing on November 30, 2009, December 1 and 2, 2009, and July 30, 2010, and subsequently denied relief on April 5, 2011. (*Id.* at 608-655). The Circuit's Court's ruling was affirmed on appeal by the Missouri Supreme Court in *Johnson v. State*, 388 S.W.3d 159 (Mo. banc 2012).

Petitioner initiated his federal habeas proceeding pursuant to 28 U.S.C. § 2254 by filing a motion for appointment of counsel on February 13, 2013, in the United States District Court for the Eastern District of Missouri. (Doc. 1). Thereafter, a timely petition for a writ of habeas corpus was filed on petitioner's behalf by CJA appointed

counsel on January 28, 2014. (Dist. Ct. Doc. 11). On February 28, 2020, Judge Henry Autrey denied petitioner federal habeas relief and ordered that a COA would not issue. (A-2-54).

Petitioner timely filed a notice of appeal on October 27, 2020. (Doc. 91). By a two-to-one vote, a panel of the Eighth Circuit summarily denied petitioner's application for a COA and dismissed the appeal. Thereafter, the Eighth Circuit denied petitioner's motion for rehearing or rehearing en banc on April 8, 2022. (A-55).

Petitioner, thereafter, filed a petition for a writ of certiorari seeking review of the Eighth Circuit's judgment denying a COA. This Court denied the petition on November 14, 2022. *Johnson v. Blair*, 143 S. Ct. 430 (2022).

On April 19, 2023, the Missouri Supreme Court set petitioner's execution for Tuesday, August 1, 2023, at 6:00 p.m. CDT. On May 16, 2023, petitioner filed an original petition for a writ of habeas corpus in the Missouri Supreme Court pursuant to Mo. S. Ct. R. 91.01. Based upon the undisputed fact that petitioner has a long history of suffering from serious mental illness, this state habeas corpus petition raised three claims for relief, including a claim that he is mentally incompetent for execution. In tandem with his state habeas petition, petitioner also filed a motion for a stay of execution and a request that the court appoint a Special Master, pursuant to Mo. S. Ct.

Rule 68.03, to provide him an evidentiary hearing to fully develop the facts supporting these three Eighth and Fourteenth Amendment claims.

On June 8, 2023, the Missouri Supreme Court issued an opinion and judgment denying the petition. A-1-9. In the same opinion, the court also denied petitioner's motions for a stay of execution and his request for an evidentiary hearing before a Special Master. *Id.* The court further ruled that Mr. Johnson could not file a petition for rehearing. *Id.* at n.8.

After obtaining newly discovered evidence and additional prison mental health records on July 12 and July 20, 2023, that were not previously made available to petitioner or his counsel, petitioner filed a motion to recall the mandate in the Missouri Supreme Court on July 21, 2023, requesting that the court recall its mandate in the above-noted state habeas action, stay his execution, and appoint a Special Master to hear evidence on petitioner's *Panetti* claim. On July 29, 2023, the Missouri Supreme Court summarily denied this motion. A-10.

B. Facts Relevant to this Petition

As set forth in the underlying state habeas petition, petitioner was diagnosed with severe developmental and learning disabilities during early childhood. As a result, he was placed in special education and classes designated for those with learning disabilities throughout elementary and secondary school. Beginning in his early adolescence, petitioner has an extensive documented history of suffering from

serious mental illness and seeking treatment at various mental health facilities which prescribed him a wide variety of anti-psychotic medication over the years.

Mr. Johnson's first admission to a psychiatric clinic was when he was 14 years old. By the time Mr. Johnson was 18 years old, he had been admitted for psychiatric care due to suicidal ideation, suicide attempts, threats, and gestures, four times. Pet. Exh. 7 (2003-03-14 St. John's Mercy Records) at 18-23, 26, 30, 57, 78-79, 81, 251-59, 253-54, 257, 259, 301-03, 324, 348, 360-65, 386. After he turned 18, he continued to experience symptoms of his severe, debilitating mental illness. The instances are documented in reports from his hospitalizations and treatment in carceral settings and set forth in greater detail in his habeas petition.¹

Mr. Johnson's first psychiatric admission took place on April 23, 1992. *Id.* at 251, 253-54, 257, 324. He was admitted to St. John's Mercy due to a suicidal gesture. Mr. Johnson turned 14 one month before this hospitalization. *Id.* at 253-54. He reported that he had been thinking about killing himself for six months. *Id.* at 324. Dr. Alberto Soto diagnosed him with Depression and Attention Deficit Disorder with Dyslexia and ordered Tofranil and Benadryl at bedtime. *Id.* at 252, 254, 263.

On June 19, 1996, Mr. Johnson, now 18 years old, voluntarily admitted himself to the Southeast Missouri Mental Health Center. Pet. Exh. 8 (Johnny

¹ Due to page limitations, petitioner cannot list all of his prior hospitalizations and diagnoses. These facts are set forth in greater detail in his habeas petition.

Johnson Misc. Records) at 153, 156. He appeared after being referred to the facility by the Washington County Hospital Emergency Room for further evaluation of his suicidal tendencies. *Id.* at 156. He was accompanied by his grandmother, who he was living with at the time. *Id.* Mr. Johnson reported that he had a “blackout,” was hearing voices, and seeing his dead friends telling him to kill himself. *Id.* The day before he was admitted, he ran to the back of the house with a knife, and before his grandmother could get to him, he cut his wrist. *Id.* at 156, 161. “Low intellect and self-esteem” were noted in the initial screening. *Id.* at 153, 161. He had been staying with his grandmother for a couple of weeks. *Id.* at 161. When he cut himself with the knife, he said he wanted to join his dead friends, both of whom were drug dealers who had committed suicide. *Id.*

His diagnoses were Major Depression, recurrent; Psychotic Disorder, NOS; and Polysubstance Dependence. *Id.* at 152. He was prescribed Paxil 20 mg per day. During his admission, he was also evaluated to determine his intellectual functioning. *Id.* at 159. On the abbreviated version of the Wechsler Adult Intelligence Scale-Revised, he received a full-scale equivalent of 93. *Id.* at 159. On both the Verbal Score subtests, Vocabulary and Arithmetic, Mr. Johnson’s scaled score was at least one standard deviation below the mean, “suggesting he possesses a significant cognitive weakness in his verbal abilities as a whole.” *Id.*

On October 13, 1996, Mr. Johnson was admitted to the Malcolm Bliss Mental Health Center at the Metropolitan St. Louis Psychiatric Center. Exh. 8 at 70-73, 95, 98, 130. The chief complaint was listed as, “I want to cut my jugular so I can die.” *Id.* at 70. The diagnoses when admitted were Depression, NOS; Ethanol and Marijuana Dependence; History of Crack Cocaine, LSD and Amphetamine Abuse; and Conduct Disorder and Borderline Personality Traits. *Id.* at 73. He did well until October 27, 1996, when “he had an episode where he was crying and very upset, again requiring sedative medication, but nothing in terms of physical restraint was required.” *Id.* On October 29, 1996, he was discharged to Athena House and was being treated with Haldol 5 mg. *Id.* at 69.

Mr. Johnson received a psychological referral and was seen on April 26, 1997, while at the St. Louis County Jail. Pet. Exh. 9 (Jail and prison records) at 83. The reason for the referral was that Mr. Johnson punched his right fist through a window and required sutures. “He stated that he always wanted to kill himself but promised not to make an attempt while he was here.” *Id.* On November 29, 1997, Mr. Johnson was moved to suicide watch when an officer heard banging sounds and discovered the sound was from Mr. Johnson banging his head against the wall. *Id.* at 57. An officer tried to talk with him, “but he was unresponsive and seemed confused.” *Id.* A small puncture was on his wrists which residents told the staff was self-inflicted. *Id.* at 57-58. On December 10, 1997, St. Louis County Jail moved Mr. Johnson to

another cell after “he continued to hear voices telling him to kill himself.” *Id.* at 54. Mr. Johnson was provided a paper gown and referred to Dr. Krasnoff for further review. *Id.* The incident report reflects Mr. Johnson was “beating his head against a wall ... [and] was also observed putting a pencil to his head threatening to puncture himself ...” *Id.* at 55. The officer reported he was picking his skin at his wrist, climbing on the sink threatening to jump, climbing up around the light fixture threatening to find something blunt or sharp to hurt himself and said voices were telling him to kill himself. *Id.* at 56. On December 29, 1997, Mr. Johnson was again placed in a single cell when staff were informed by residents that Mr. Johnson was seeing things and feeling faint. *Id.* at 63.

Mr. Johnson was moved to Fulton Reception and Diagnostic Center on March 17, 1998. Pet. Exh. 10 (Missouri Department of Corrections medical records) at 120-21, 123. When he complained of auditory and visual hallucinations, he was referred by an officer in Five House for an assessment. *Id.* at 123. Mr. Johnson’s main complaint was depression and hearing intrusive voices. *Id.* at 120. He described the voices as being derogatory and saying things like, “Kill yourself or hurt others.” *Id.* Dr. Ahsan Syed noted that Mr. Johnson had multiple previous psychiatric hospitalizations, most always due to depression and hearing voices. *Id.* Mr. Johnson had been placed on Thorazine, which he thought worked better than Haldol, but he was still hearing voices. *Id.* Dr. Syed noted that the voices were “command in nature,

and at times, telling him to hurt himself or that he is worthless.” *Id.* Mr. Johnson appeared to be functioning in the borderline range of intellectual abilities. *Id.* Dr. Syed’s diagnostic impression was Major Depression with psychotic features, Cannabis and Alcohol Abuse by history. *Id.* Dr. Syed prescribed 50 mg of Thorazine 3 times a day, 20 mg of Paxil every morning and requested a follow up in 30 days’ time. *Id.*

On April 24, 1998, Mr. Johnson was placed on suicide watch when he was seen crying frequently and reported that he was having auditory and visual hallucinations. *Id.* at 122. Mr. Johnson requested a change in medication to decrease the hallucinations. *Id.* Dr. Syed performed the follow-up evaluation, on an emergency basis because of Mr. Johnson’s placement on suicide watch. *Id.* at 105. “[Mr. Johnson] was very distraught and said, ‘They were coming to get him.’” *Id.* Dr. Syed’s diagnostic impression remained unchanged, but he increased the Thorazine to 100 mg in the morning and evening, continued the 20 mg of Paxil in the morning, and added .5 mg of Ativan twice daily. *Id.* at 105-06. Though Mr. Johnson reported still “seeing things” and had an elevated score on a thought-disturbance scale, evaluators discontinued all psychotropic medications. *Id.* at 18, 107.

Mr. Johnson was, thereafter, admitted to Hillside Manor, a residential care facility in Bonne Terre and arrangements were made for him to be discharged there.

Pet. Exh. 11 (2004-05-10 Des Peres Hospital records) at 37, 49. Mr. Johnson was discharged on September 8, 1998. *Id.* at 40. The discharge diagnoses were Schizoaffective Disorder and probable Mild Mental Retardation. *Id.* at 9, 40. According to a discharge summary by William Clendenin, M.D., Mr. Johnson was “markedly psychotic” and admitted to the hospital for treatment for this reason. Mr. Johnson’s mental status was “consistent with paranoid psychosis.” *Id.* at 40. Dr. Clendenin reported that “[d]ue to his seeming retardation and severe psychotic symptoms, it was felt that he belonged in a boarding home. We arranged for him to go [to] the boarding home in Bon [sic] Terre and he was released.” *Id.* His discharge medication was 2 mg of Risperdal at bedtime. *Id.*

In August 2001, Mr. Johnson was in the St. Louis County Jail, and staff called Dr. Karen Cotton-Williger to evaluate Mr. Johnson due to concerns he was suicidal. Trial Tr. 1766. Dr. Cotton-Williger was the clinical psychologist at the St. Louis County Jail and did evaluations in intake and on the floors to determine if people have mental health issues that require special placement within the jail. *Id.* at 1764-65. She diagnosed him as suffering from Schizophrenia, Post Traumatic Stress Disorder, and Borderline Personality Disorder. *Id.* at 1775.

On November 16, 2001, during his admission to the St. Louis Psychiatric Rehabilitation Center, Dr. John Rabun, a psychiatrist who was a Certified Forensic Examiner, interviewed Mr. Johnson. Pet. Exh. 13 (Report of Dr. John Rabun) at 3.

Rabun reported his findings on December 7, 2001. Though Mr. Johnson was not experiencing symptoms at the time of the 2001 evaluation by Rabun, likely because he was taking Zyprexa, Mr. Johnson's previous symptoms included hearing both female and male voices who sometimes spoke in normal tones and other times addressed him in a derogatory way. *Id.* at 6. He said the voices sounded like they were coming from outside of his head, were intermittent rather than continuous, and could be temporarily interrupted by activities such as listening to music. *Id.* Mr. Johnson also reported having had delusions that people were trying to harm him or that people could read his mind. *Id.* at 6-7. Dr. Rabun diagnosed Mr. Johnson as suffering from Schizophrenia, Undifferentiated Type, Episodic with no Interepisode Residual Symptoms and Alcohol Dependence, Sustained Full Remission. Dr. Rabun concluded that "the examiner is of the opinion, with reasonable medical certainty, that Mr. Johnson is afflicted by a mental disease." *Id.*

Dr. Rabun recognized that Mr. Johnson had displayed paranoid delusions as a component of his illness. *Id.* at 8. Dr. Rabun concluded that if psychiatric deterioration became evident, Mr. Johnson should be voluntarily or involuntarily hospitalized. *Id.* at 8-10.

After he was released from jail on probation, a mental health assessment noted a prior diagnosis that Mr. Johnson suffered from Schizophrenia, Paranoid Type. Pet. Exh. 8 at 201. At this point, his current medications were listed as 10 mg of Zyprexa,

100 mg of Trazadone, and 20 mg of Paxil. *Id.* at 202, 225. Also noted were Mr. Johnson's limited coping skills and a common predictor of crisis of non-compliance with his medications and traumatic events. *Id.* at 213. Mr. Johnson was assigned to Community Support Worker ("CSW") Dahley G. Dugbatey on February 12, 2002. *Id.* at 261. He was also assigned to Dr. Jitendra Patel and in Dr. Patel's April 10, 2002, notes, he diagnosed Mr. Johnson with suffering from Schizoaffective Disorder and Marijuana Abuse, Full Remission. *Id.* at 216. Mr. Johnson's current medications were listed as 10 mg of Zyprexa and 20 mg of Paxil. *Id.* at 217. Dr. Patel changed Mr. Johnson's prescription to 10 mg of Zyprexa and 10 mg of Trazadone on April 23, 2002. *Id.* at 224.

Mr. Johnson stayed in this program until he stopped seeing his clinical CSW the month before Casey Williamson was killed. He began missing psychiatrist appointments at the beginning of June 2002. *Id.* at 218. The last meeting Mr. Johnson attended with his caseworker was on June 28, 2002. *Id.* at 233. His CSW spoke with him on July 10, 2002, when he informed her he could not go to his appointment with her. *Id.* at 232. A letter dated July 15, 2002, was sent to Mr. Johnson regarding the cancelled or missed appointment with his CSW and requesting he contact the program director. *Id.* at 268. Casey Williamson was killed on the morning of July 26, 2002.

Following his arrest for Casey Williamson's murder, Mr. Johnson was admitted to the St. Louis County Jail on July 27, 2002, at 2:10 in the morning. Pet. Exh. 14 (2003-01-24 St. Louis County Justice Center Medical records) at 32. Two correctional officers from intake assisted him. *Id.* At the St. Louis County Jail, Mr. Johnson was immediately started on 10 mg of Zyprexa by mouth at bedtime and staff were ordered to give him a dose at 6:50 a.m. on July 27, 2002. *Id.* at 13. On July 28, 2002, a nurse at the jail reported Mr. Johnson "appears paranoid today" and appears to be in a "daze." *Id.* at 31. Dr. Cotton-Williger evaluated Mr. Johnson on July 29, and he told her that he wanted the death penalty. Trial Tr. 1773-74. Because of her prior evaluation and diagnoses, Dr. Cotton-Williger determined Mr. Johnson needed to stay in the infirmary. *Id.* at 1767-68, 1773-74.

On July 30, 2002, a nurse saw Mr. Johnson is in his cell "crying and fearful." Pet. Exh. 14 at 31. Mr. Johnson denied feeling suicidal but stated that he sees "demons." *Id.* He told the nurse "he feels guilty and 'I am a bad person because of what I did.'" *Id.*

On September 9, 2002, Mr. Johnson reported to staff he was having increased nightmares of people chasing and hitting him. *Id.* at 29. On January 19, 2003, Mr. Johnson's medication was changed from Zyprexa to Zoloft 50 mg by mouth per day, Tofranil 75 mg by mouth at bedtime, and Colace 100 mg. twice a day. *Id.* at 23.

On February 28, 2003, psychiatrist Dr. Ajans saw Mr. Johnson. Pet. Exh. 15 (2007-05-14 Potosi MH Records) at 4-6. She reported Mr. Johnson had a bland affect. *Id.* at 5. He reported to her that voices tell him to “kill, kill, kill.” *Id.* Dr. Ajans prescribed Elavil 50 mg, for one week, and increased the dose after one week to 75 mg at bedtime; increased his Loxitane to 10 mg in the morning and 25 mg in the evening; and continued his Cogentin .5 mg. *Id.*

On November 19, 2003, Stephen Becker and Byron English reported results of their pre-trial examination Mr. Johnson at the Southeastern Missouri Correctional Center. Becker did the interview and testing while English provided supervision and oversight. Pet. Exh. 18 (Reports of Becker and English) at 2. Becker administered the Weschler Adult Intelligence Scale, III (“WAIS-III”) resulting in a Full-Scale IQ of 70. *Id.* at 8. Becker also administered an achievement test revealing a third-grade reading level and a first-grade math level. *Id.* Mr. Johnson could read only on a very elementary level and perform very basic math calculations. *Id.* Mr. Johnson reported prior episodes of seeing “little people - three inches tall and they give me weird looks” and also having auditory hallucinations in which voices told him to hurt himself. *Id.* at 8-9. He was medicated at the time of the evaluation and reported no current psychotic symptoms. *Id.* Diagnoses included Major Depressive Disorder, Recurrent, Severe, with Psychotic Features, in partial remission; Polysubstance

Dependence, in remission, within a controlled environment; and Borderline Intellectual Functioning. *Id.* at 9.

On February 17, 2004, defense expert Delany Dean, PhD, reported the results of her pre-trial evaluation. Pet. Exh. 19 (Report of Dr. Delany Dean) at 1-12. She evaluated Mr. Johnson on four days: March 10, 2003, September 30, 2003, December 2, 2003, and February 5, 2004. On all occasions, Mr. Johnson was taking antipsychotic medication. Dr. Dean noted that Mr. Johnson “expressed the belief that ‘when I was born the world was created, and when I die the world will die.’” *Id.* at 9. She diagnosed Mr. Johnson as suffering from Schizophrenia (paranoid type, sub chronic with acute exacerbation), Generalized Anxiety Disorder, Psychoactive Substance Abuse, Paranoid Personality Disorder, and Schizotypal Personality Disorder with Depressive and Avoidance Personality Traits. *Id.*

On June 7, 2004, Becker and English performed a second evaluation. Exh. 18 at 12. Their diagnoses changed from the first time and now were Methamphetamine Intoxication, with Perceptual Disturbances; Polysubstance Abuse (Alcohol, Cannabis, Methamphetamine, Hallucinogens, Cocaine, and Inhalants) in Remission Within a Controlled Environment; Schizoaffective Disorder, Depressive Type; Malingering, Partial; and History of Learning Disorder, NOS. *Id.* at 25.

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

Mr. Johnson was transferred to Potosi Correctional Center on January 19, 2005, after he was convicted. Pet. Exh. 16 (Vol. 4 Dept. of Corrections MH Records) at 55. Mental health staff were informed that Mr. Johnson indicated he planned to harm himself earlier in the day. *Id.* On January 21, 2005, Mr. Johnson was seen by Dr. Ahmed Basheer for his initial psychiatric contact. *Id.* at 53. Mr. Johnson was delusional during this visit and told Dr. Basheer “I think I’m the 7th sign. I’m the end of the world when I die.” *Id.* He also reported he has believed this since he was 19.

Kimberly Weitzl, PsyD, evaluated Mr. Johnson as a new arrival at Potosi Correctional Center on March 20, 2005. Pet. Exh. 15 at 119. She administered the WAIS-III. *Id.* at 122. Mr. Johnson’s Full-Scale IQ was 78. *Id.* Her diagnoses included Schizoaffective Disorder, per history; Alcohol Dependence, in a controlled environment; and Antisocial Personality Disorder. *Id.* at 124; Ex. 10 at 378. She also reported his level of intellectual functioning fell in the Borderline Intelligence range. Ex. 15 at 123.

Dr. Pablo Stewart, a psychiatrist employed by the University of California at San Francisco, School of Medicine, as a clinical professor in psychiatry with his own

private consulting practice, evaluated Mr. Johnson for the defense during his 29.15 action on April 27, 2007. PCR Tr. 8, 190. Dr. Stewart noted during his evaluation that Mr. Johnson's hygiene was not the best, had slow speech, and was responding to internal stimuli. PCR Tr. 191. During the evaluation, Mr. Johnson became distressed when talking about hearing voices and became psychotic right in front of Dr. Stewart. PCR Tr. 191. Dr. Stewart diagnosed Mr. Johnson with chronic psychotic disorder not otherwise specified, Post Traumatic Stress Disorder, and cognitive disorder not otherwise specified. PCR Tr. 196-98.

Another defense expert, Dr. Craig Beaver, a licensed psychologist who specializes in clinical psychology, neuropsychology, and forensic psychology, evaluated Mr. Johnson two times, once on February 25, 2007, and once in April of 2007. PCR Tr. 584, 603. Dr. Beaver testified that Mr. Johnson has a psychotic disorder that manifests itself in several different ways. Mr. Johnson has steady auditory hallucinations and identity preference. Both times Dr. Beaver met with Mr. Johnson, Mr. Johnson told him sometimes "it would be better if he was just executed because he believes that because he has special powers that that will create some positive changes in the world." PCR Tr. 631. Dr. Beaver testified at petitioner's 29.15 hearing to a reasonable degree of neuropsychological certainty that Mr. Johnson has organic brain syndrome combined with significant psychiatric disorders that are permanent conditions for him. PCR Tr. 641. These conditions affect Mr.

Johnson's ability to think, act rationally, to deal with stress, and to make appropriate decisions. PCR Tr. 641.

On November 21, 2007, Mr. Johnson reported to Dr. Angeline Stanislaus, a psychiatrist at the prison, that he was hearing voices again telling him that his family was dead. Pet. Exh. 17 (2022-10-31 Medical History records) at 1-2. Mr. Johnson was also having nightmares about the crime again. *Id.* Mr. Johnson agreed to medication changes on this date. Mr. Johnson was prescribed Perphenazine 8 mg bid, 2 mg hs, Clonidine .3 mg, Mirtazapine 15 mg, and Desipramine 50 mg. *Id.* Mr. Johnson was on "Watch Take" likely because of his report earlier that he would save his medications as well as the fact that he swallowed razors in an attempt to harm himself. *Id.* at 2.

Two days later, August 26, 2010, the psychiatrist met with Mr. Johnson. *Id.* at 67. Mr. Johnson reported he became non-compliant intermittently for about three months, and two weeks ago, he started hearing voices again. *Id.* The psychiatrist prescribed a higher dose of Perphenazine and instructed him to take his Clonidine at night. *Id.*

On September 21, 2010, staff met with Mr. Johnson for his chronic care encounter. *Id.* at 70. Mr. Johnson told staff he continued to have weird dreams every three days, tried to wake up and was unable to, and that he experienced enuresis. *Id.* He reported he wakes up at night while he is urinating on his T.V. or somewhere

else inappropriate. *Id.* He also reported he continues to hear voices that are demanding and demeaning, and he has difficulty maintaining his train of thought. *Id.*

On February 13, 2020, a prison psychiatrist met with Mr. Johnson, and Mr. Johnson shared his history of psychiatric treatment. *Id.* at 340. He reported voices saying things like “you are worthless” and reported paranoia of people plotting against him. *Id.* He told the psychiatrist “sometimes I think that the world will end if I die.” *Id.* On May 7, 2020, Mr. Johnson told the psychiatrist he was not doing well. *Id.* at 347. “He report[ed] a racing mind, inability to focus, hearing male/female voices inside of his head telling him that people talk about him, end of world, ‘he is God etc.’” *Id.* The psychiatrist increased Mr. Johnson’s Olanzapine prescription to 10 mgs. *Id.* at 348.

On July 28, 2020, the prison medical staff took Mr. Johnson off Olanzapine and increased his Clonidine. *Id.* at 354. On January 22, 2021, mental health staff met with Mr. Johnson. *Id.* at 375. He reported that he was hearing voices more frequently and could not sleep. *Id.* He requested a meeting with the psychiatrist. *Id.* The psychiatrist met with Mr. Johnson on January 28, 2021. *Id.* at 376. Mr. Johnson “report[ed] chatter of multiple voices that ‘I cannot understand.’” *Id.* He also reported mood swings and poor sleep. *Id.* Mr. Johnson had developed allergic blisters in his mouth due to Trileptal which had been started on November 5, 2020.

Id. It was discontinued on November 21, 2020. *Id.* at 377. The psychiatrist started Mr. Johnson on Aripiprazole for psychosis and mood and cross-tapered it with Thiothixene. *Id.*

On his May 20, 2021, psychiatric appointment, Mr. Johnson reported “he has mood swings & still hears voices ‘chatter, laughter, yelling [sic]’ of multiple voices inside [his] head.” *Id.* at 389. Mr. Johnson’s Abilify was increased to 20 mg for mood/psychosis and two other drugs were decreased: Thiothixene to 5 mg and Benztropine to .1 mg. *Id.* at 391.

By September 15, 2021, Mr. Johnson’s condition worsened dramatically. The prison’s mental health personnel saw Mr. Johnson in Ad-Seg. *Id.* at 400. Mr. Johnson had punched his television “due to believing staff are watching him.” *Id.* Mr. Johnson reported increased paranoia, which was causing him problems with his cell mate “as he has been tearing up his cell.” *Id.* Mr. Johnson told staff he had “increased stress due to the execution pending of another offender.” *Id.* Mr. Johnson reported auditory hallucinations telling him others were out to get him. *Id.* Mr. Johnson’s medications had been recently changed and Mr. Johnson said due to this he felt “as if something is squeezing his brain.” *Id.* The next day, Thiothixene was discontinued, and Aripiprazole was increased to 30 mgs. *Id.* at 402.

As shown above and as set forth more fully in his state habeas petition, due to his symptomology and need for treatment, Mr. Johnson has been evaluated many

times during his hospitalizations, in carceral settings, and by court order or at the request of his legal teams. The results of all these evaluations included various diagnoses; however, all reflect the consistent presence of a psychotic disorder and severe mental illness. Due to his condition, petitioner experienced auditory hallucinations and suffered from irrational delusions.

After the Attorney General moved to set an execution date for petitioner in November of last year, neuropsychiatrist Dr. Bhushan Agharkar, M.D., evaluated petitioner to determine the extent of his mental illness and whether he is mentally competent to be executed.² After conducting a lengthy face-to-face evaluation of petitioner in February of 2023, Dr. Agharkar issued a comprehensive report that was attached as Exhibit 1 to petitioner's underlying habeas corpus petition in this matter.

² Dr. Agharkar has been licensed to practice medicine in Georgia since 2002. In addition to completing his Doctor of Medicine degree, he completed a Forensic Psychiatry Fellowship at Emory University School of Medicine, and he holds dual board certification as a Diplomate of Adult Psychiatry (AP) and Forensic Psychiatry (FP) of the American Board of Psychiatry and Neurology (ABPN). In 2015, the American Psychiatric Association awarded him Distinguished Fellow status. He also is an Adjunct Assistant Professor of Psychiatry at Morehouse School of Medicine and a Clinical Assistant Professor with the Emory University School of Medicine. He has served as a consultant to various school systems in the Atlanta area, Emory University Hospitals, Georgia Tech Athletic Department, Georgia Composite State Board of Medical Examiners, Arizona Medical Board, the Federal Bureau of Investigation, the United States Armed Forces, and the Department of Defense. He holds Top Secret security clearance with the United States government. As a neuropsychiatrist, he treats a wide variety of medical conditions, including schizophrenia spectrum disorders and other neurologic impairments or neurodevelopmental disorders.

Dr. Agharkar's report found that petitioner has suffered from severe mental illness and cognitive defects all of his life. Due to his severe psychosis, marked by auditory and visual hallucinations and irrational delusional thinking, Dr. Agharkar concluded that petitioner did not have a rational understanding of the reasons he is facing execution. Dr. Agharkar's report concluded that petitioner believed he was being executed because of a bizarre and irrational delusion that "Satan is using the State of Missouri to execute me to bring about the end of the world." This belief was part of petitioner's "extensive delusional belief system involving paranoid, grandiose, and bizarre beliefs," many of which center on concepts related to spiritual warfare and demons. Exh. 1 at 54. As a result of his severe psychotic mental illness, his cognitive impairments, and bizarre delusions, Dr. Agharkar concluded that petitioner "does not have a rational understanding of the reasons for his execution and is incompetent to be executed." *Id.* Dr. Agharkar also noted that petitioner has "delusional beliefs regarding his ability to live on after death in an animal's mind or as the undead," which "indicate[s] a lack of rational awareness of the finality of his punishment." *Id.* Petitioner's "irrational understanding is further demonstrated by his belief that he potentially can change this plan by going into the judge and lawyers' heads or that the spirits of the underworld can influence the State to not execute him for Satan's purpose." *Id.*

Based upon his long history of mental illness and the findings of Dr. Agharkar, petitioner filed his state habeas petition before the Missouri Supreme Court on May 16, 2023, that claimed petitioner's upcoming execution scheduled for August 1, 2023, would violate the Eighth and Fourteenth Amendment because he has long suffered from serious mental illness and that he lacks a rational understanding of the reason for his execution. In this petition, petitioner also requested an evidentiary hearing before a Special Master and a stay of execution.

The state did not present any expert psychiatric evidence from a qualified mental health professional to rebut Dr. Agharkar's findings. Instead, respondent presented the court with a one-and-a-half-page affidavit from a prison mental health counselor, Ashley Skaggs. (*See* Resp. Exh. D). Ms. Skaggs stated that before preparing her affidavit, she reviewed Dr. Agharkar's report. (*Id.*) Ms. Skaggs's affidavit stated that, based upon her observations and interactions with petitioner in the preceding months that he "appeared to understand the nature of his upcoming execution." (*Id.*) Ms. Skaggs also averred that petitioner's hallucinations had ceased and were being controlled by his current medications such that Mr. Johnson's mental illness "was well managed by medication". (*Id.*) She also stated that petitioner never told her about the kinds of hallucinations and delusions that were noted in Dr. Agharkar's report. (*Id.*).

The Attorney General also presented the court with some of petitioner's prison records. Those records revealed similar delusions petitioner expressed to Dr. Agharkar and, in some instances, the same delusion about his death causing the end of the world. They also revealed that Mr. Johnson's symptoms, including auditory hallucinations and delusions, were constantly present even when he was on strong antipsychotic medications. For example:

- In 2004, Dr. Dean, a psychologist, reported that during her four-day evaluation of Mr. Johnson, he “expressed the belief that ‘when I was born the world was created, and when I die the world will die.’” Exh. 19 at 9.
- In 2005, a prison psychiatrist reported Mr. Johnson stated, “I think I’m the 7th sign. I’m the end of the world when I die.” Exh. 16 at 53; Resp. Exh. C at 48.
- In 2020, a prison doctor reported Mr. Johnson heard voices and said, “sometimes I think that the world will end if I die.” Resp. Exh. C at 463.
- In 2020, the prison reported that Mr. Johnson was hearing “male/female voices inside his head telling him that people talk about him, the end of the world, he is God etc. [sic].” *Id.* at 470.
- In 2022, a prison psychologist reported that Mr. Johnson had auditory hallucinations of voices telling him “the world is going to end,” auditory hallucinations on a “regular basis” and “has heard God’s voice talking directly to him and sometimes he ‘can hear the other side of the world and different spirits.’” *Id.* at 567-68.

Similarly, as Mr. Johnson expressed to Dr. Agharkar his delusion about being able to “go into others’ minds,” Exh. 1 at 6, Mr. Johnson informed the mental health staff on September 22, 2020, “I can close my eyes and see into somebody else’s eyes.” Resp. Exh. C at 568.

On June 8, 2023, the Missouri Supreme Court denied the petition and petitioner's requests for a stay and the appointment of a Special Master. (A-1-9). In doing so, the Missouri Supreme Court relied upon the substance of Ms. Skaggs's affidavit and petitioner's prison records to discredit Dr. Agharkar and found that petitioner could not meet the threshold showing of insanity necessary to receive a hearing on his claim he was incompetent to be executed under *Panetti*. (A-2, 6-8).

At the outset of its analysis, the Missouri Supreme Court rejected respondent's argument that his *Panetti* claim should be rejected because he was aware that he was being executed for murder. (*See* A-5-6). However, the Missouri Supreme Court proceeded to find that petitioner could not meet the threshold test of insanity by relying upon Skaggs's affidavit and some of petitioner's prison records indicating that petitioner had expressed remorse for the offense and was aware his legal appeals were coming to an end. (A-7). The court suggested those records indicated he was aware of why he was being executed. (*Id.*). The other critical finding of fact that the Missouri Supreme Court made to reach its decision was Skaggs' affidavit and notations in some of the medical records stating that petitioner's current medications were controlling his hallucinations and he had not been hallucinating under his current medication regimen. (*Id.*).

After the Missouri Supreme Court denied his habeas petition,³ counsel for petitioner received additional prison psychiatric records from the attorney general's office on July 12 and July 20, 2023. These records were unavailable to petitioner or the court during the litigation of his state habeas petition. These new records established, among other things, that petitioner's treating doctors at the prison changed his anti-psychotic medication on July 5, 2023, and then doubled the dosage of that medication five days later. These new records also indicated that Mr. Johnson continued to suffer from hallucinations and delusions while on his previous antipsychotic medication, and even after his medication had been altered. (See MRM, Exhs. 1, 2). The records also revealed that in a May 31, 2023 appointment with the prison psychiatrist, Mr. Johnson reported he "has felt regularly people are controlling him, that he hears voices in his head and has others' voices come out of his mouth at times. He reports this has been going on for an extended period." (*Id.*). In a June 27, 2023 appointment with the psychiatrist, Mr. Johnson "confirmed ongoing AVH [auditory/visual hallucinations]" and "sometimes he has contact with demons as indicated by feeling heat on his ears." (*Id.*).

After reviewing some of this new evidence, Dr. Agharkar conducted a follow-up face to face evaluation of petitioner on July 15, 2023. Petitioner also obtained

³ Before the petition was denied, counsel pointed out to the court that they had not received all of petitioner's prison records that they had requested from the Attorney General.

affidavits from two of petitioner's former treating doctors at the Missouri Department of Corrections, Angeline Stanislaus and Alwyn Whitehead. All three of these doctors found that Mr. Johnson was not malingering. (MRM, Exhs. 3-5). More importantly, however, Dr. Agharkar's new report indicated, based upon his recent face-to-face evaluation on July 15, 2023, that petitioner continues to suffer from auditory hallucinations and the same irrational delusions about the reasons for his execution despite being overly sedated by his current medication regimen.⁴ (MRM, Exh. 3). Dr. Agharkar noted: "Mr. Johnson has been trying to enter the minds of the Judge and the Prosecutor but has been unsuccessful. He does not think that will work at this point because he 'can't figure out the code.' He absolutely believes he can communicate with the "Underworld" but has grown frustrated with "them" because he cannot get what they say to work. He continues to believe he has been marked with the 'Seventh sign' and his death would cause the end of the world." (*Id.*). Petitioner told Dr. Agharkar "he does not trust prison staff and knows 'they don't believe' him so he does not talk to them about his symptoms. Mr. Johnson also

⁴ Prior evaluations by Drs. Stanislaus and Whitehead similarly found that petitioner's symptoms are a regular presence in his life even while he is on medication. Dr. Stanislaus reported that even while petitioner was medicated, he still suffered from breakthrough symptoms of his illness. (MRM, Exhs. 4-5). Dr. Whitehead agreed: "Medication does not get rid of Mr. Johnson's symptoms; it just makes them less apparent. Mr. Johnson consistently heard voices even when on the medication." (*Id.*). Although petitioner was medicated when he was evaluated by Dr. Stewart, petitioner exhibited psychosis during Dr. Stewart's evaluation. PCR Tr. 191.

confirmed that his interactions with prison staff are extremely brief and do not delve deeply into his belief system.” (*Id.*).

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

The Missouri Supreme Court, as noted earlier, summarily denied this motion on July 29, 2023. (A-10). The present petition for a writ of certiorari is now before this Court for discretionary review.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO PERMIT THE COURT TO CLARIFY THE QUANTUM OF PROOF THAT A MENTALLY ILL CONDEMNED PRISONER MUST PRESENT TO MAKE “A SUBSTANTIAL THRESHOLD SHOWING OF INSANITY” IN ORDER TO OBTAIN A “FAIR HEARING IN ACCORD WITH FUNDAMENTAL FAIRNESS” AS REQUIRED BY *FORD* AND *PANETTI*.

In the aftermath of *Ford* and *Panetti*, it is unclear to this day as to what quantum of proof a mentally ill prisoner facing an imminent death sentence must present to a reviewing court to obtain a fair hearing that procedural due process

requires. *See Ford*, 477 U.S. at 427; *Panetti*, 551 U.S. at 949. The facts of this case underscore this problem and the lack of guidance and clarity that this Court's prior decisions in *Ford* and *Panetti* has engendered among lower courts.

Dr. Agharkar's findings and conclusions were not disputed or rebutted in any way by any qualified mental health expert employed by or retained by the state. His findings and conclusions were also not rebutted by petitioner's medical records submitted by the state; the records contained at least 15 references to the types of delusions reported by Dr. Agharkar, five of which were the same delusion Dr. Agharkar reported. Despite this failure of the state to attempt to rebut Dr. Agharkar's findings with any qualified evidence and the ample record support for Dr. Agharkar's findings in petitioner's medical history, the Missouri Supreme Court nevertheless found that petitioner could not meet the threshold showing of insanity, based upon the opinion of a prison counselor applying the awareness standard of incompetency *Panetti* rejected and the court's cursory review of an incomplete set of petitioner's records that were submitted to the court prior to its judgment that was issued on June 8, 2023.

However, the new evidence presented in conjunction with petitioner's subsequent post-judgment motion to recall the mandate seriously undermined Ms. Skaggs's affidavit and the court's interpretation of petitioner's medical records. Under *Ford* and *Panetti*, the court should not have relied on this evidence going only

to petitioner's awareness and not his rational understanding and contradicted by the medical records to conclude that petitioner could not satisfy the minimum threshold standard of incompetency, particularly without giving petitioner the opportunity for full discovery and a fair process to discredit the state's evidence. *Panetti*, 551 U.S. at 956-57 (holding that the awareness standard is "too restrictive to afford a prisoner the protections granted by the Eighth Amendment."). But for the court's reliance on the opinion of *Skaggs*, petitioner's evidence unquestionably satisfied the minimum threshold standard of incompetency under *Ford* and *Panetti*.

In order to establish a more precise bright-line definition of the term "substantial threshold of insanity", this Court could look to other areas of the law for guidance. For instance, the Court might consider adopting the standard for establishing a prima facie case of discrimination that must be met by a civil litigant or criminal defendant in order to obtain further judicial review of a claim of racial discrimination. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986). This test would require a mentally ill condemned prisoner to show that the totality of the evidence "gives rise to an inference of [insanity]." *Id.* at 94. *See also McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Another possible solution would adopt a test that Missouri and most other courts employ to determine whether a criminal defendant is entitled to an evidentiary hearing in a post-conviction action. In Missouri, a prisoner raising claims for relief under Mo. S. Ct. R. 29.15, is entitled to an

evidentiary hearing if the petitioner pleads facts that, if true, would entitle him to relief unless his claims for relief are conclusively foreclosed by the existing record. *See, e.g., Wedlow v. State*, 841 S.W.2d 214, 215-216 (1992).

Regardless of the standard this Court may elect to adopt to clarify this threshold requirement issue, Dr. Agharkar's report was sufficient by itself to entitle petitioner to a "fair hearing" that comports with procedural due process. The ample support in petitioner's medical records for Dr. Agharkar's conclusions should have left no question that petitioner satisfied the threshold requirement. In *Panetti*, this Court found that Scott Panetti had made a substantial threshold showing of insanity based upon the extensive evidence of Panetti's mental dysfunction presented in earlier legal proceedings coupled with the declarations of a law professor and an expert who had conducted only a preliminary evaluation of Panetti and did not submit a full report at that time. Those declarations were issued the day before Scott Panetti was scheduled to be executed. *Panetti v. Quarterman*, 551 U.S. 930 (2007).

The facts of this case are arguably just as strong as—or stronger than—the evidence presented in *Panetti* that was found sufficient to meet the necessary threshold to require further hearings on whether Panetti was competent for execution. Assuming for the sake of argument that the State of Texas had presented prison records or observations of prison personnel that suggested Scott Panetti did not exhibit signs of mental illness in the days and weeks preceding his execution

date to rebut his experts' findings, it is unlikely that this Court's 2007 decision in *Panetti* would have materially changed. This is particularly so given that outward signs are only one component of mental illness, and delusions can be, and often are, present even without outward signs of symptoms. Furthermore, the Court in *Panetti* explicitly rejected the awareness standard Skaggs employed in her affidavit. *See Panetti*, 551 U.S. at 956-57. However, under this hypothetical, if Panetti's case had been reviewed under the procedures and standards that the Missouri Supreme Court utilized here and other similar cases, Scott Panetti would have likely been executed. The facts of this case provide this Court an ideal opportunity to clarify and establish a more definitive test that a condemned prisoner must meet to receive a fair hearing to prove that he is incompetent to be executed.

II.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE MISSOURI SUPREME COURT'S PRACTICE OF ISSUING FINDINGS OF FACT AND CREDIBILITY DETERMINATIONS BASED UPON A PAPER RECORD IN ADJUDICATING WHETHER A MISSOURI DEATH ROW INMATE IS MENTALLY COMPETENT TO BE EXECUTED VIOLATES DUE PROCESS.

As noted earlier, the Missouri Supreme Court's opinion found that petitioner could not meet the threshold test of insanity because Dr. Agharkar's report was purportedly discredited by prison records and the opinion and observations of counselor Skaggs. However, as petitioner's motion to recall the mandate revealed, these observations were not accurate, and the court's interpretation of the records

was contradicted by substance of the records themselves, including those that were not initially disclosed.

What the Missouri Supreme Court really does in adjudicating *Panetti* claim is a review of the paper record presented by both parties, in a time-compressed atmosphere where the execution is imminent, and “make credibility determinations as to whom to believe and whose reports are entitled to more weight in the first instance and then decide the ultimate factual issue regarding whether [the prisoner] is incompetent.” *See State ex rel. Cole v. Griffith*, 467 S.W.3d 349, 362 (Mo. banc 2015)(Stith J., dissenting). In *Ford*, this Court found that the Texas procedures for determining incompetence for execution were constitutionally infirm because its procedures invited arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even in explaining the inadequacy of the state’s examinations. *See Ford v. Wainwright*, 477 U.S. 399, 424 (1986).

As in *Ford*, the current record from the Missouri Supreme Court proceedings demonstrates arbitrariness and a denial of a fair opportunity to rebut the evidence that the state presented by way of affidavit and incomplete records that led the Missouri Supreme Court to totally discredit Dr. Agharkar’s findings. In both *Ford* and *Panetti*, despite finding clear inadequacies with procedures employed by Texas in assessing competence to be executed claims, the court left unanswered whether due process required other procedures such as the opportunity for discovery or cross-

examination of witnesses in order to provide a mentally ill condemned man a fair hearing. *Panetti*, 551 U.S. at 949.

In this case, the court below discredited the only qualified mental health expert who evaluated petitioner based upon incomplete records and Skagg's observations that were subsequently exposed as inaccurate and probably false, whose opinion rested upon an incorrect legal standard for assessing incompetency claims. As respondent has never contested, the prison counselor upon whose opinion and observations the court relied was not qualified under Missouri law to practice psychology, diagnose psychiatric illnesses, or render a forensic opinion based on such diagnoses. She also did not even purport to conduct an evaluation of petitioner's competency, and instead merely relied on her observations from a total of nine five-to ten-minute encounters with petitioner over the course of three years, amounting to, at most, 75 minutes (less than half the length of Dr. Agharkar's first face to face evaluation). Moreover, her own notations in petitioner's medical records contradicted her statement that his symptoms were well managed by effective medication. For example, on January 23, 2023, Skaggs noted that Mr. Johnson "said he's doing better and is hearing **less** voices." Resp. Exh. C at 588 (emphasis added). Hearing less does not come close to none.

Although on February 2, 2023, Skaggs noted that Mr. Johnson reported that he did not have hallucinations while on medication, on March 8, 2023, she also noted

that Mr. Johnson reported that “the voices are still ‘a whisper’ and at baseline,” reflecting that he does indeed experience auditory hallucinations while compliant with his medications. *Id.* at 590, 594. On May 10, 2023, Skaggs noted that Mr. Johnson “reports he is now having minor auditory hallucinations. He described them as laughing or chattering in his ear.” *Id.* at 601. Another note from the same day states that Mr. Johnson was “having issues with sleep” and reported “mild AH [auditory hallucinations] of ‘chattering and laughing.’” *Id.* at 602. The more recent records from the prison psychiatrist further reveal that Mr. Johnson’s auditory hallucinations and demon-related delusions continue to be present despite medication, as does his recent medication change “for psychosis.” (MRM Exhs. 1, 2).

Furthermore, because Skaggs is under contract with Potosi Correctional Center, she was burdened by a conflict of interest. Her involvement in the effort to ensure that Mr. Johnson is deemed fit for execution while also purportedly providing him with mental health treatment unfairly pits her loyalty to her employer at odds with her duty to petitioner to provide him necessary health care. (*See* Pet. Exh. 22).

The facts here provide this Court with an ideal opportunity to decide what process is due under the Fourteenth Amendment to a condemned man, who has been diagnosed as schizophrenic since the age of sixteen, to give him a fair opportunity

to prove that permitting his upcoming execution would violate the Eighth Amendment. Discretionary review is warranted.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE MISSOURI SUPREME COURT'S DISPARATE TREATMENT OF HABEAS PETITIONS FROM CONDEMNED MEN RAISING COMPETENCE TO BE EXECUTED CLAIMS WITH THE PETITIONS OF OTHER SIMILARLY SITUATED PRISONERS' STATE HABEAS CASES VIOLATES DUE PROCESS AND EQUAL PROTECTION.

As petitioner noted during the litigation of his motion to recall the mandate, the Missouri Supreme Court adjudicates habeas corpus petitions filed by mentally ill condemned men differently than those filed by other prisoners raising other claims for relief. Pursuant to Mo. S. Ct. R. 68.03, the Missouri Supreme Court and other Missouri appellate courts are authorized under this rule to appoint Special Masters in habeas corpus cases and other matters in situations where there is an inadequate record for the court to fairly adjudicate the claims presented.

In adjudicating habeas petitions filed by other prisoners raising other claims for relief, the Missouri Supreme Court has routinely appointed Special Masters to allow the habeas petitioner to fully develop the facts supporting their underlying claims. This procedure has been employed in numerous cases involving both capital and non-capital cases. *See e.g. State ex rel. Clemons v. Larkins*, 475 S.W.3d 60 (Mo. banc 2015), *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013), *State ex rel. Carnes v. Buckner*, No. SC98736. (Order of 12/22/20)

By failing to even handedly and consistently apply its own rules regarding habeas corpus procedure, the Missouri Supreme Court's failure to appoint a Special Master in this case violates due process under *Hicks v. Oklahoma*, 447 U.S. 343, 347 (1980). This disparate treatment also violates well-settled equal protection principles that require that all similarly situated persons should be treated alike. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

The Missouri Supreme Court's unique method it employs in reviewing mentally ill prisoners' *Panetti* claims is fundamentally unfair and is clearly out of the mainstream from how other jurisdictions adjudicate such cases. Unless this Court grants discretionary review, this aberrant practice will continue unabated, which will likely result in the unlawful executions of other inmates like Johnny Johnson who are profoundly mentally ill and whose executions would serve no legitimate penological purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Kent E. Gipson
KENT E. GIPSON
Mo. Bar #34524
Law Office of Kent Gipson, LLC
121 East Gregory Blvd.
Kansas City, Missouri 64114
816-363-4400 • Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER