ATTACHMENT A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 25-10943

EMANUEL JOHNSON, SR.,

Petitioner-Appellant.

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:13-cv-00381-SDM-TGW

No. 25-10947

EMANUEL JOHNSON, SR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:13-cv-00382-SDM-TGW

ORDER:

Emanuel Johnson Sr., a Florida prisoner twice sentenced to death for two separate murders, applies for a certificate of appealability to appeal the denial of his *pro se* petitions for a writ of habeas corpus. Jurists of reason would not debate whether the district court was correct in denying Johnson's claims based on procedural

default. And the refusal by the district court to consolidate Johnson's *pro se* and counseled petitions did not involve the denial of a constitutional right. Johnson's application for a certificate of appealability and motion to proceed *in forma pauperis* are denied.

I. BACKGROUND

Emanuel Johnson Sr. faces two death sentences for the unrelated murders of Iris White and Jackie McCahon. The Supreme Court of Florida affirmed his convictions and sentences on direct review. *Johnson v. State*, 660 So. 2d 637 (Fla. 1995) (White's murder); *Johnson v. State*, 660 So. 2d 648 (Fla. 1995) (McCahon's murder). And it affirmed the denial of state post-conviction relief. *Johnson v. State*, 104 So. 3d 1010 (Fla. 2012) (White's murder); *Johnson v. State*, 104 So. 3d 1032 (Fla. 2012) (McCahon's murder).

Johnson filed four petitions for a writ of habeas corpus in the district court. *See* 28 U.S.C. § 2254. He initially filed separate *pro se* petitions for each murder. These petitions raised the same four claims of ineffective assistance of trial, appellate, and state post-conviction counsel. The next day, Capital Collateral Regional Counsel—the same counsel that represented Johnson on state post-conviction review—filed separate counseled petitions on his behalf for each murder. These petitions were later amended to clarify the claims, which included overlapping challenges to the sentences and convictions and allegations that trial counsel was ineffective.

The district court kept these petitions on four separate dockets. It appointed counsel from the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida

to represent Johnson in his *pro se* petitions. It instructed appointed counsel to review Johnson's claims that Capital Collateral Regional Counsel was ineffective during state post-conviction review as to excuse procedural default under the exception established in *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). And it stayed proceedings for the counseled petitions pending resolution of the *pro se* petitions to avoid a potential conflict of interest because Capital Collateral Regional Counsel continued to represent Johnson in his counseled petitions.

Through appointed counsel, Johnson filed a memorandum of law in support of his *pro se* petitions. He argued that each claim was either not procedurally defaulted or could be excused under *Martinez*. And he asked the district court to consolidate the four actions and to appoint new counsel to replace Capital Collateral Regional Counsel in the light of his concerns about a conflict of interest.

The district court denied Johnson's *pro se* petitions. It refused to extend *Martinez* for Johnson's first claim because the Supreme Court ruled in *Shinn v. Ramirez*, 142 S. Ct. 1718, 1736–37 (2022), that a judge-made exception could not override Congress's codification of rules for evidentiary hearings, *see* 28 U.S.C. § 2254(e)(2). But it ruled that this claim could proceed in the ongoing counseled petitions. It then ruled that *Martinez* did not apply to and there was no cause to excuse procedural default for the remaining three claims. And it denied a certificate of appealability and leave to appeal *in forma pauperis*.

Through appointed counsel, Johnson moved to alter the judgment. He contended that the district court overlooked his consolidation request. And he argued that the district court should reconsider its procedural-default rulings and denials of a certificate of appealability and leave to appeal *in forma pauperis*.

The district court denied the motion to alter the judgment. It explained that consolidation would be "impracticable" and "create an obvious conflict because, in an unwieldy single action, appointed counsel's position would be that co-counsel in the consolidated action — that is, state post-conviction counsel — was ineffective." It rejected Johnson's arguments about procedural default and exhaustion. And it elaborated that "an appeal lacks good faith" because "*Shinn* precludes Johnson from presenting evidence in federal court that he failed to present to the state courts, and he clearly cannot establish cause to overcome his procedural default." Still through appointed counsel, Johnson timely appealed each *pro se* petition, which resulted in the creation of two appellate dockets.

On the last day to file an application for a certificate of appealability, Johnson filed three motions in each appeal. First, he moved to vacate and remand the denial of his *pro se* petitions. Second, he moved to suspend the time to file an application for a certificate of appealability pending a ruling on his motion to vacate. Third, he moved for leave to appeal *in forma pauperis*.

We denied the motions to vacate and remand and to suspend the time to file an application. But we extended the deadline to file an application. Through appointed counsel, Johnson filed an

application for a certificate of appealability. He requests a certificate of appealability for the denial of his request to consolidate the dockets and for his four underlying claims from his *pro se* petitions.

II. STANDARD OF REVIEW

A prisoner who seeks to appeal the denial of his petition for a writ of habeas corpus must obtain a certificate of appealability. *Mills v. Comm'r, Ala. Dep't of Corr.*, 102 F.4th 1235, 1238 (11th Cir. 2024). Under the Antiterrorism and Effective Death Penalty Act, we may issue a certificate "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the . . . underlying constitutional claim, a [certificate] should issue when" the petitioner establishes both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A certificate may also be merited if "the issues presented were adequate to deserve encouragement to proceed further." *Id.* (citation and internal quotation marks omitted). But "issuance of a [certificate] must not be *pro forma* or a matter of course." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

III. DISCUSSION

Resolution of this application for a certificate of appealability turns on the narrow situations where we may excuse a procedurally defaulted claim in a petition for a writ of habeas corpus.

"[F]ederal courts generally decline to hear any federal claim that was not presented to the state courts 'consistent with the State's own procedural rules.'" *Shinn*, 142 S. Ct. at 1732 (alteration adopted) (quoting *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000)). This rule exists because even if a procedurally defaulted claim is "technically exhausted," allowing "a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule." *Id.*

"Despite the many benefits of . . . procedural default, . . . a federal court can forgive [procedural] default and adjudicate the claim if the prisoner provides an adequate excuse." *Id.* But it "may excuse procedural default only if a prisoner 'can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.'" *Id.* at 1733 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). To establish cause, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). And to establish prejudice, a petitioner must "show not merely that the errors at trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494 (alteration adopted) (citation and internal quotation marks omitted).

"[A]ttorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel." *Davila v.*

Davis, 137 S. Ct. 2058, 2065 (2017). Although "[a]ttorney ignorance or inadvertence is not cause because the attorney is the petitioner's agent," "[a]ttorney error that constitutes ineffective assistance of counsel is cause." *Coleman*, 501 U.S. at 753–54 (citation and internal quotation marks omitted). This distinction exists because "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Murray*, 477 U.S. at 488. But, by extension, "in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default." *Davila*, 137 S. Ct. at 2065. So "attorney error committed in the course of state postconviction proceedings . . . cannot supply cause to excuse a procedural default that occurs in those proceedings." *Id.*

In *Martinez*, the Supreme Court created a "narrow exception" to the ordinary rule that ineffective assistance by post-conviction counsel cannot constitute cause. 566 U.S. at 9. The Court held that "ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding" because that "initial-review collateral proceeding [is] a prisoner's one and only appeal as to an ineffective-assistance claim." *Id.* at 8–9 (citation and internal quotation marks omitted). This exception applies both "where state law explicitly prohibits prisoners from bringing claims of ineffective assistance of trial counsel on direct appeal and where the State's 'procedural framework . . . makes it unlikely in a typical case that a defendant will have a meaningful opportunity to raise'

that claim on direct appeal." *Davila*, 137 S. Ct. at 2065 (quoting *Trevino v. Thaler*, 569 U.S. 413, 429 (2013)). But the Supreme Court has refused to extend the *Martinez* exception to a "procedurally defaulted . . . claim of ineffective assistance of appellate counsel when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise that claim." *Id.*

Johnson seeks a certificate of appealability on five grounds. First, he argues that post-conviction counsel performed ineffectively by not adequately developing a claim of ineffective assistance of trial counsel regarding the waiver of attorney-client privilege. Second, he contends that appellate counsel was ineffective for failing to challenge the trial court's denial of his motion to suppress his purported confession. Third, he asserts that post-conviction counsel was ineffective for not preserving the issue of prosecutorial misconduct. Fourth, he argues that his constitutional rights were violated by judicial bias. Fifth, he contends that the district court abused its discretion by refusing to consolidate his *pro se* and counseled petitions. Johnson is not entitled to a certificate of appealability for any of these claims.

A. Jurists of Reason Would Not Debate the Ruling Rejecting the Martinez *Exception Where Post-Conviction Counsel Did Not Procedurally Default the Underlying Claim that Trial Counsel Was Ineffective.*

Johnson's first claim argues that "postconviction counsel performed ineffectively by not adequately developing a claim of ineffective assistance of trial counsel" where trial counsel "impermissibly waived attorney-client privilege in violation of . . . Johnson's

Fifth, Sixth, Eighth, and Fourteenth Amendment rights." Johnson concedes that because "[p]ostconviction counsel raised this ineffective assistance of trial counsel claim to the Florida Supreme Court," it "was exhausted in state court and consequently not procedurally defaulted." Yet Johnson maintains that post-conviction counsel was still ineffective by "fail[ing] to mount a full and substantial claim of trial counsel ineffectiveness." And he contends that the *Martinez* exception applies "to overcome procedurally defaulted aspects of the underlying claim and allow for de novo federal review."

The district court ruled that "Johnson's asserted entitlement to review under *Martinez* [for this claim] lacks merit." It ruled that "*Shinn* precludes considering facts that were not presented to the state courts to support [a] claim" even where the *Martinez* exception applies. Yet it made clear that Johnson could continue to pursue this underlying claim in his counseled petitions because it was exhausted and not defaulted. Because the district court did not address the merits of whether trial counsel was ineffective, the only ruling on review is its conclusion that the *Martinez* exception does not apply where the petitioner did not procedurally default the claim.

Jurists of reason would not debate whether the district court correctly refused to extend *Martinez*'s "narrow exception" to this context where there is no procedural default. 566 U.S. at 9. "By its own emphatic terms, the Supreme Court's decision in *Martinez* is limited to claims of ineffective assistance of trial counsel that are

otherwise procedurally barred due to the ineffective assistance of post-conviction counsel." *Gore v. Crews*, 720 F.3d 811, 816 (11th Cir. 2013); *accord Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 945 (11th Cir. 2014). And we have made clear that "*Martinez*'s narrow exception . . . applies only where . . . the prisoner did not comply with state rules and failed properly to raise ineffective-trial-counsel claims in his state initial-review collateral proceeding." *Arthur v. Thomas*, 739 F.3d 611, 629 (11th Cir. 2014). Because the underlying claim of ineffective assistance of trial counsel was not procedurally defaulted and is still being considered in the counseled petitions, the *Martinez* exception—which concerns "establish[ing] cause for a prisoner's procedural default"—cannot apply. 566 U.S. at 9.

B. Jurists of Reason Would Not Debate Whether the District Court Correctly Ruled that No Cause Excused the Procedural Default of Johnson's Claim that Appellate Counsel Was Ineffective Regarding His Confession.

Johnson's second claim contends that appellate counsel was ineffective for "failing to sufficiently challenge the trial court's denial of his motion to suppress his purported confession" in the McCahon case. Johnson acknowledges that post-conviction counsel "failed to raise the suppression of the confession issue," which prompted him to file *pro se* a "Notice of Intent to File" a habeas petition on this issue that the Supreme Court of Florida dismissed as moot. And he concedes that *Martinez* does not apply to claims that appellate counsel was ineffective. But he argues that he is entitled to review of the merits of this claim because his *pro se* filings "substantively put the highest state court on notice of the federal claims and facts at issue" and "[p]ostconviction counsel's

abandonment of" his claims "combined with the state-court impediment to pro se presentation constitutes cause external to the defense."

The district court ruled that Johnson could not establish cause to excuse the procedural default of the claim that appellate counsel was ineffective. It reiterated Johnson's concession that the *Martinez* exception does not apply to claims that appellate counsel was ineffective. And it ruled that no other cause excused the procedural default of this claim. The district court explained that, under Florida Rule of Appellate Procedure 9.142(b)(4), "the procedurally correct manner for raising a claim of ineffective assistance of appellate counsel when challenging a death sentence . . . requires post-conviction counsel to raise the . . . appellate-counsel claim in a petition for the writ of habeas corpus filed 'simultaneously with the initial brief in the appeal' from the denial of" a motion under Florida Rule of Criminal Procedure 3.851. It concluded that post-conviction counsel's failure to follow this procedure to properly raise Johnson's claim that appellate counsel was ineffective constituted procedural default. And it held that post-conviction counsel's alleged ineffectiveness could not provide cause to excuse the default because Johnson had no constitutional right to counsel in the post-conviction proceedings.

Jurists of reason would not debate whether the district court's ruling was correct. The Supreme Court's decision in *Davila v. Davis* forecloses Johnson's arguments. 137 S. Ct. 2058. There, the Court rejected a petitioner's request "to extend *Martinez* to allow a

federal court to hear a . . . procedurally defaulted . . . claim of ineffective assistance of appellate counsel when a prisoner's state post-conviction counsel provides ineffective assistance by failing to raise that claim." *Id.* at 2065. It explained that "[a] claim of appellate ineffectiveness premised on a preserved trial error . . . does not present the same concern that animated the *Martinez* exception because at least one court will have considered the claim on the merits." *Id.* at 2067 (citation and internal quotation marks omitted). The district court correctly concluded under *Davila* that any alleged failure by Johnson's post-conviction counsel in not following Florida's procedural rules to raise his claim that appellate counsel was ineffective did not excuse the procedural default. Because claims that appellate counsel was ineffective "*necessarily* must be heard in collateral proceedings, where counsel is not constitutionally guaranteed," *id.* at 2068, Johnson cannot establish cause to overcome the procedural default of this claim, *see id.* at 2065 ("[I]n proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default."). And there is no need to address Johnson's separate argument that he fairly presented this claim in his *pro se* filings because that contention about exhaustion does not alter the procedural-default bar.

C. Jurists of Reason Would Not Debate Whether the District Court Correctly Ruled that No Cause Excused the Procedural Default of Johnson's Claim Regarding Prosecutorial Misconduct.

Johnson's third claim argues that post-conviction counsel "failed to sufficiently exhaust in state post-conviction [court] the

issue of prosecutorial misconduct in the form of falsified documents related to the search warrant." Johnson alleges that "the home search warrant, accompanying probable cause affidavit, and inventory from the home search, were falsified and backdated after defective versions (not signed by the judge) of the same documents were used to perform an illegal search of [his] home." He explains that post-conviction counsel adopted his *pro se* arguments on this issue "verbatim" before the state post-conviction court but then failed to appeal the denial of it. And he raises the same arguments as he did for his claim that appellate counsel was ineffective as to why "reasonable jurists could debate the district court's framing of what constituted cause to excuse default of [his] claims."

The district court ruled that Johnson could not establish cause to excuse the procedural default of this claim of prosecutorial misconduct. It concluded that *Martinez* was inapplicable because "the underlying basis for ground three is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963)" and "no governing authority" supported "extending *Martinez* to a *Brady* claim." It explained that this claim "was procedurally defaulted when post-conviction counsel omitted [it] from the appeal" to the Supreme Court of Florida. And it ruled that *Davila* again prevented Johnson from establishing cause to excuse the procedural default because it resulted from inaction by his post-conviction counsel—representation for which he had no constitutional right.

Jurists of reason would not debate whether the district court's ruling was correct. The *Martinez* exception "is limited to

claims of ineffective assistance of trial counsel that are otherwise procedurally barred due to the ineffective assistance of post-conviction counsel." *Gore*, 720 F.3d at 816. So it cannot apply to a *Brady* claim about alleged violations that *the prosecution*, not *trial counsel*, committed. Nor can it apply where the procedural default occurred during the appellate stage of state post-conviction review. Because post-conviction counsel's failure to follow the proper procedures to preserve the *Brady* claim for review was the source of the procedural default—as it was for the claim that appellate counsel was ineffective—Johnson cannot otherwise establish cause. As *Davila* made clear, "attorney error committed in the course of state post-conviction proceedings . . . cannot supply cause to excuse a procedural default that occurs in those proceedings." 137 S. Ct. at 2065.

D. Jurists of Reason Would Not Debate Whether the District Court Correctly Ruled that No Cause Excused the Procedural Default of Johnson's Claim Regarding Judicial Bias.

Johnson's fourth claim contends that "his federal constitutional rights were violated by judicial bias and misconduct when the judge issuing the home search warrant and accompanying probable cause affidavit contributed to fabrication of those documents by backdating and signing false copies of the same." Johnson objects that "three backdated documents were then used by the State during [his] pre-trial suppression hearings to secure admission of evidence resultant to the search—including [his] purported 'confession.'" As with the *Brady* claim, post-conviction counsel adopted Johnson's *pro se* arguments on this issue "verbatim" before the state post-conviction court but then failed to appeal the denial of it.

Johnson acknowledges that "*Martinez* is not the proper conduit" for this claim because the Supreme Court explained in *Stone v. Powell* that a Fourth Amendment claim, like this one, is ordinarily not cognizable on federal habeas review "where the State has provided an opportunity for full and fair litigation" of it. 428 U.S. 465, 494 (1976). But he contends that he is entitled to relief because "the state courts denied him a full and fair forum with which to litigate the judicial bias claim as it implicates the Fourth Amendment."

The district court ruled that Johnson could not establish cause to excuse the procedural default of this claim of judicial bias. It accepted Johnson's concession that the *Martinez* exception did not apply. It ruled that *Stone* foreclosed this claim because "Johnson had the opportunity to develop this claim in pre-trial proceedings, on direct appeal, and in the post-conviction proceedings." And it again held that post-conviction counsel's failure to appeal this claim to the Supreme Court of Florida could not be considered cause to excuse procedural default under *Davila*.

Jurists of reason would not debate whether the district court's ruling was correct. This claim is not about ineffective assistance of trial counsel, so *Martinez* does not apply. *See Gore*, 720 F.3d at 816. And Johnson cannot establish cause to excuse the procedural default of this claim, which—like the *Brady* claim—was never appealed to the Supreme Court of Florida. Again, the failure of post-conviction counsel to preserve this claim for review cannot be cause under *Davila*. 137 S. Ct. at 2065. Johnson's contention that the state did not "provide[] an opportunity for full and fair

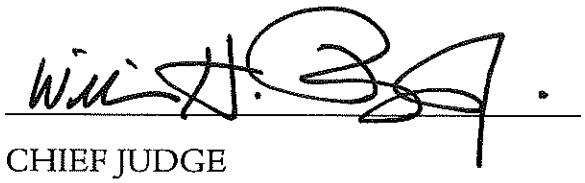
litigation" of this claim under *Stone* cannot save it either because that argument is separate from and cannot excuse his procedural default. 428 U.S. at 494.

E. Jurists of Reason Would Not Debate Whether the Refusal to Consolidate Involved the Denial of a Constitutional Right.

Johnson also argues that jurists of reason could debate whether the district court abused its discretion when it refused to consolidate his *pro se* and counseled petitions. Yet there is no need to consider this procedural matter because the refusal to consolidate did not involve "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Even when a prisoner seeks to appeal a procedural error, the certificate must specify the underlying constitutional issue." *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (en banc). Johnson argues that the refusal to consolidate "has interfered with [his] *statutory* right to federal habeas counsel pursuant to 18 U.S.C. § 3599(a)(2)." But a statutory violation is insufficient to meet the requirement of a constitutional denial. And Johnson does not otherwise suggest that the lack of consolidation violated any constitutional right. Because Johnson cannot establish "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," *Slack*, 529 U.S. at 484, he is not entitled to a certificate of appealability on this issue.

IV. CONCLUSION

Johnson's application for a certificate of appealability and motion to proceed *in forma pauperis* are **DENIED**.



CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 08, 2025

Katherine A. Blair
Federal Public Defender's Office
227 N BRONOUGH ST STE 4200
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Appeal Numbers: **25-10943-P** ; **25-10947 -P**
Case Style: Emanuel Johnson, Sr. v. Secretary, Florida Department of Corrections
District Court Docket No: 8:13-cv-00381-SDM-TGW

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter