

NO. 18-8914 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

MANUEL CAZARES—PETITIONER,

v.

EILEEN REMEY—RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May **Rule 5(e)** of the **Rules Governing Section 2254 cases in the United States District Courts**, entitled **Reply**, which states "the Petitioner may submit a reply to the Respondent's answer or other pleading within a time fixed by the judge (**Title 28 U.S.C. §2254**), be disregarded by the lower court.
2. May the **Rules Governing Section 2254 cases in the United States District Courts**, which provides in **Title 28 U.S.C. §2254**, entitled **Return or Answer, Conclusiveness**, that "[T]he allegations of a return to the writ of habeas corpus of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true", be disregarded by the lower court in that the District failed and refused to consider Petitioner's Reply in making its decision to deny the Writ of Habeas Corpus.

CORPORATE DISCLOSURE STATEMENT

There is no corporate involvement in this case.

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CONSTITUTION, STATUTES, REGULATIONS, AND RULES

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TEXTS, TREATIES, AND LAW REVIEWS

None Applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The **Sixth Amendment**. United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. The **Fourteenth Amendment**, United States Constitution provides:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person

of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. Title 28 U.S.C.S. §2254(d) Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1219:

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

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

or

(2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

4. Missouri Revised Statute, Section 552.030, provides:

1. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct.

2. Evidence of mental disease or defect excluding responsibility shall not be admissible at trial of the accused unless the accused, at the time of entering

such accused's plea to the charge, pleads not guilty by reason of mental disease or defect excluding responsibility, or unless within ten days after a plea of not guilty, or at such later date as the court may for good cause permit, the accused files a written notice of such accused's purpose to rely on such defense. Such a plea or notice shall not deprive the accused of other defenses. The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the accused has no other defense and files a written notice to that effect. The state shall not accept a defense of mental disease or defect excluding responsibility in the absence of any pretrial evaluation as described in this section or section 552.020. Upon the state's acceptance of the defense of mental disease or defect excluding responsibility, the court shall proceed to order the commitment of the accused as provided in section 552.040 in cases of persons acquitted on the ground of mental disease or defect excluding responsibility, and further proceedings shall be had regarding the confinement and release of the accused as provided in section 552.040.

3. Whenever the accused has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2 of this section, and such defense has not been accepted as provided in subsection 2 of this section, the court shall, after notice and upon motion of either the state or the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632.005, or physicians with a

minimum of one year training or experience in providing treatment or services to persons with an intellectual disability or developmental disability or mental illness, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused, or shall direct the director of the department of mental health, or the director's designee, to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, or physicians with a minimum of one year training or experience in providing treatment or services to persons with an intellectual disability or developmental disability or mental illness designated by the director, or the director's designee, as qualified to perform examinations pursuant to this chapter. The order shall direct that written report or reports of such examination be filed with the clerk of the court. No private psychiatrist, psychologist, or physician shall be appointed by the court unless such psychiatrist, psychologist or physician has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper; except that, if the order directs the director of the department of mental health to have the accused examined, the director, or the director's designee, shall determine the time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses and may require the provision of police reports to the department for use in evaluation. If an

examination provided in section 552.020 was made and the report of such examination included an opinion as to whether, at the time of the alleged criminal conduct, the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality or wrongfulness of such accused's conduct or as a result of mental disease or defect was incapable of conforming such accused's conduct to the requirements of law, such report may be received in evidence, and no new examination shall be required by the court unless, in the discretion of the court, another examination is necessary. If an examination is ordered pursuant to this section, the report shall contain the information required in subsections 3 and 4 of section 552.020. Within ten days after receiving a copy of such report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by an examiner of such accused's or its own choosing and at such accused's or its expense. The clerk of the court shall deliver copies of the report or reports to the prosecuting or circuit attorney and to the accused or his counsel. No reports required by this subsection shall be public records or be open to the public. Any examination performed pursuant to this subsection shall be completed and the results shall be filed with the court within sixty days of the date it is received by the department or private psychiatrist, psychologist or physician unless the court, for good cause, orders otherwise.

4. If the report contains the recommendation that the accused should be held in custody in a suitable hospital facility pending trial, and if the accused is not admitted to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending trial.
5. No statement made by the accused in the course of any such examination and no information received by any physician or other person in the course thereof, whether such examination was made with or without the consent of the accused or upon the accused's motion or upon that of others, shall be admitted in evidence against the accused on the issue of whether the accused committed the act charged against the accused in any criminal proceeding then or thereafter pending in any court, state or federal. The statement or information shall be admissible in evidence for or against the accused only on the issue of the accused's mental condition, whether or not it would otherwise be deemed to be a privileged communication. If the statement or information is admitted for or against the accused on the issue of the accused's mental condition, the court shall, both orally at the time of its admission and later by instruction, inform the jury that it must not consider such statement or information as any evidence of whether the accused committed the act charged against the accused.
6. All persons are presumed to be free of mental disease or defect excluding responsibility for their conduct, whether or not previously adjudicated in this or any other state to be or to have been sexual or social psychopaths, or

incompetent; provided, however, the court may admit evidence presented at such adjudication based on its probative value. The issue of whether any person had a mental disease or defect excluding responsibility for such person's conduct is one for the trier of fact to decide upon the introduction of substantial evidence of lack of such responsibility. But, in the absence of such evidence, the presumption shall be conclusive. Upon the introduction of substantial evidence of lack of such responsibility, the presumption shall not disappear and shall alone be sufficient to take that issue to the trier of fact. The jury shall be instructed as to the existence and nature of such presumption when requested by the state and, where the issue of such responsibility is one for the jury to decide, the jury shall be told that the burden rests upon the accused to show by a preponderance or greater weight of the credible evidence that the defendant was suffering from a mental disease or defect excluding responsibility at the time of the conduct charged against the defendant. At the request of the defense the jury shall be instructed by the court as to the contents of subsection 2 of section 552.040.

7. When the accused is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state as well as state the offense for which the accused was acquitted. The clerk of the court shall furnish a copy of any judgment or order of commitment to the department of mental health pursuant to this section to the criminal records central repository pursuant to section 43.503.

5. Mo. Sup. Ct. Rule 29.15(e)

Rule 29.15(e) states in pertinent part that "[W]hen an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel **shall ascertain** whether sufficient facts supporting the claims are asserted in the motion and **whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims.**

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original conviction of Petitioner in the Circuit Court of St. Charles County, Missouri, was not reported. The original conviction of Petitioner was appealed to the Missouri Court of Appeals for the Eastern District of Missouri, which on November 27, 2012 affirmed the conviction in all respects in an opinion report at *State v. Cazares*, 386 S.W. 3d 890 (Mo. App. E.D. 2012). (**Appendix E**) The mandate was issued on December 19, 2012. Thereafter, Petitioner filed a timely post-conviction motion pursuant to **Missouri Supreme Court Rule 29.15**, which was denied on May 16, 2014 by the State Circuit Court and is not reported. Petitioner appeals this ruling to the Missouri Court of Appeals, which on April 14, 2015, affirmed the motion court's decision in an opinion reported at *State v. Cazares*, 461 S.W. 3d 14 (Mo. App. E.D. 2015). (**Appendix D**)

On June 19, 2018, the District Court denied Petitioner's Petition for Writ of Habeas Corpus Relief in a Memorandum and Order. This opinion is reported at *Cazares v. Cassidy*, 2018 U.S. Dist. Lexis 165425 (E.D. Mo., June 19, 2018). (**Appendix C**)

The decision of the Eighth Circuit Court of Appeals to deny Petitioner's Certificate of Appealability is reported at *Cazares v. Cassidy*, 2018 U.S. App. Lexis 36867 (8th Cir., Nov. 30, 2018). (**Appendix B**)

JURISDICTIONAL STATEMENT

The Order of the Eighth Circuit Court of Appeals denying Petitioner's Petition for Rehearing En Banc and Rehearing by Panel in Cause No. 18-2569 was entered on January 16, 2019. (**Appendix A**)

The jurisdiction of this Court is invoked under **28. U.S.C. §1254(1)**.

STATEMENT OF THE CASE

The facts necessary to place in its setting the question now raised can be briefly stated:

I. COURSE OF PROCEEDING IN FEDERAL COURT

The United States District Court for the Eastern District of Missouri, Ronnie L. White, on June 19, 2018, denied Petitioner's timely filed Petition for Habeas Corpus Relief brought pursuant to **Title 28 U.S.C. §2254**. This Petition contained four separate claims all of which were fairly presented and exhausted with the exception of Claim IV of the Petition. However, Claim IV was brought pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which excused Petitioner's default.

In the Petition, Cazares raised four claims that are stated as follows: First, Petitioner was denied due process when the trial court overruled trial counsel's objections to the introduction of gruesome photographs of the crime scene and autopsy photographs of the victims. Second, Petitioner was denied due process when the trial court compelled him to demonstrate how he stabbed the victims in the presence of the jury. Third, Petitioner's trial counsel was ineffective for failing to compel the presence of Jennifer Breshears who was a material witness and whose testimony would have rebutted a significant element of the State's case in chief. Fourth, Petitioner's trial counsel was ineffective for failing to investigate a diminished capacity defense.

On September 18, 2015, Respondent filed with the District Court its Response to Order to Show Cause Why Writ of Habeas Corpus Should Not Be Granted. In the Response, Respondent argued that each of Petitioner's claims should be denied on the

merits. Additionally, with respect to Claim IV, Respondent suggested that this claim should also be denied based upon procedural default.

On or about October 27, 2015, Petitioner filed with the District Court his Traverse in Support of Why the Writ of Habeas Corpus Should Be Granted. (Hereinafter referred to as "Reply Brief") In the Reply Brief, Petitioner set forth specific facts, derived from the State Court Record, as well as legal arguments, premised upon the **Sixth** and **Fourteenth Amendments to the United States Constitution** and United States Supreme Court's precedent, which established that the trial court's evidentiary rulings, individually and in combination, infringed upon Petitioner's constitutional right to a fair trial, in that they were "so grossly or conspicuously prejudiced that they fatally infected the trial and denied the petitioner the fundamental fairness that is the essence of due process." *Estelle v. McGuire*, 502 U.S. 62 (1991) and *Montana v. Egelhoff*, 518 U.S. 37, 58 (1996).

On June 19, 2018, the District Court entered its Memorandum and Order. The District Court's Memorandum and Order adopted and restated practically verbatim, not merely the reasoning suggested by Respondent in its Response to Order to Show Cause Why Writ of Habeas Corpus Should Not Be Granted, but even more egregiously, an examination of the Memorandum evidence that the District Court failed to recognize the specific legal arguments and reasons for relief identified and set forth in Petitioner's Reply Brief. Incredibly, the District Court conducted no analysis, whatsoever, of the constitutional arguments made by Petitioner, nor did the Court acknowledge or even mention any of the constitutional arguments made by Petitioner in his Reply Brief.

Furthermore, although Petitioner argued that the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309, 1319 (2012), which held that "when a state requires a prisoner to raise an ineffective assistance of trial counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim ... [where] appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland excused his procedural default, the District Court nonetheless denied Claim IV of the Petition without conducting any review to determine whether or not the argument made by Cazares constitutes sufficient grounds for excuse of procedural default. Yet, as suggested by the Respondent, the District Court determined that Petitioner's Claim IV is procedurally barred; however, doing so, it failed to even consider Petitioner's reliance upon *Martinez v. Ryan*, supra.

II. REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. The Initial Question Presented before the Court is:

Whether the District Court committed clear error by its failure to adjudicate Petitioner's ineffective assistance of post-conviction claim, pertaining to Claim IV of the Petition, which excuses the Procedural Default of (1) Petitioner's ineffective assistance of trial counsel claim, and (2) a substantial constitutional claim (failing to raise diminished capacity as a defense at trial) resulting from ineffective assistance of trial counsel.

It is Petitioner's position that the District Court clearly abrogated its responsibility to adjudicate Mr. Cazares' constitutional claim that the United States Supreme Court's holding in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), excuses his Procedural Default of

Claim IV of his Petition, which asserts that Petitioner's trial counsel failed to raise an ineffective assistance of counsel claim, pertaining to an investigation of a diminished capacity defense during Petitioner's criminal trial.

The Supreme Court, in *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) held that "when a state requires a prisoner to raise an ineffective assistance of trial counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must demonstrate that the claim has some merit. *Miller-El v. Cockrell*, 537 U.S. 322 (2002)."

PETITIONER'S REPLY BRIEF

In the present case. Petitioner asserted in his Reply Brief, on pages 10 and 11, as follows:

In Cazares fourth claim for relief, Cazares argues that he was denied and deprived of his right to effective assistance of counsel during trial when counsel failed to investigate and pursue a formal defense of "diminished capacity" under §552.030.3, RSMo., because the evidence showed that Cazares mental faculties was overcome by a complete state of anger and rage, which affected his ability to fully appreciate the wrongfulness of his conduct. Cazares further argues that he was prejudiced because had trial counsel filed a proper notice with the court for this theory of defense, Cazares could have secured an

evaluation by a trained psychiatrist who would have had an opportunity to diagnose Cazares' probable mental state at the time of the crime(s) and subsequently provided relevant testimony [if called to do so] during the criminal trial to aid and bolster the theory of defense presented by counsel [that Cazares committed the crime(s) under the influence of sudden passion].

Respondent argues that this claim should be rejected by this Court for two separate reasons: First, respondent argues that this claim is subject to an adequate and independent state procedural bar due to Cazares' failure to raise this claim during [h]is state court proceeding. Alternatively, respondent argues that this claim must fail on the merits since no facts exist to support such a defense.

Cause & Prejudice for Procedural Default

Respondent argues that because Cazares did not raise his fourth claim during his Rule 29.15 post-conviction proceedings in state court, the claim is procedurally barred and should be denied on this basis. However, this Court inquiry does not stop here. State procedural bars are not immortal. The United States Supreme Court has carved out certain exceptions that may excuse a habeas litigant's failure to comply with establish state procedural rules. One of these recognized that may excuse a petitioner's default is the "cause and prejudice" doctrine. See e.g., *Martinez v. Ryan*, 132 S. Ct. 1305 (2012).

Cazares argues that adequate cause and prejudice do exist to excuse [h]is failure to raise the ineffective assistance of counsel claim during the state post-conviction process. Specifically, Cazares diligently sought to have this claim litigated during the initial review stage of the Rule 29.15 proceeding by writing his post-conviction relief (PCR) counsel,

requesting that she include the claim in the Amended Petition. However, PCR counsel failed to raise all claims known to Cazares as a basis for attacking his sentence and judgment. (See **Rule 29.15(e)**) When PCR counsel refused to abide by Cazares' wishes, Cazares took further steps to raise the claim pro se. Cazares actually prepared a pro se pleading with the intent of preserving the claim. Cazares forwarded this pleading to the motion court. Cazares' pleading and attempts were to no avail.

Cazares believes under the circumstances, cause exists for the exclusion of this claim during the initial review stage of the Rule 29.15 post-conviction proceedings under the equitable doctrine espoused in *Martinez*, supra, due to the ineffectiveness of Cazares' PCR counsel's deficient performance in failing to raise all claims known to Cazares as a basis for attacking his sentence and judgment. PCR counsel had an affirmative duty to act under Missouri Supreme Court Rule 29.25(e). Furthermore, the prejudice component is also satisfied under the *Martinez/Strickland* analysis since the underlying ineffective assistance claim is a substantial one.

For these reasons, this Court is free to review the merits of Cazares ineffective assistance of counsel claim.

PETITIONER'S SUGGESTIONS

However, a careful examination and review of the District Court's Memorandum and Order explicitly reveals that nowhere within the Court's decision is there any mention, reference, or discussion of Petitioner's argument that *Martinez v. Ryan*, supra, excuses the procedural default of Claim IV of the Habeas Petition. Incredibly, the District Court not only made no mention of the above Supreme Court holding, but also, it conducted no

analysis whatsoever of Mr. Cazares' specific constitutional arguments for excuse of trial counsel's procedural default in failing to raise diminished capacity as a defense at trial.

THE DISTRICT COURT'S HOLDINGS

On page 13 of the Memorandum/Order, the District Court states as follows:

In his fourth claim, Cazares alleges that trial counsel was ineffective for failing to raise a claim of diminished capacity. This claim, however, is barred based upon procedural default. "Ordinarily, a federal court reviewing a state conviction in a **28 U.S.C. §2254** proceeding may consider only those claims which the petitioner has presented to the state court in accordance with state procedural rules." *Arnold v. Dormire*, 675 F. 3d 1082, 1086-87 (8th Cir. 2012) (quoting *Beaulieu v. Minnesota*, 583 F. 3d 570, 573 (8th Cir. 2009)). Under Missouri law, "a claim must be presented at each step of the judicial process in order to avoid default." *Arnold*, 675 F. 3d at 1087 (quoting *Jolly v. Gammon*, 28 F. 3d 51, 53 (8th Cir. 1994) (quoting *Benson v. State*, 611 S.W. 2d 538, 541 (Mo. Ct. App. 1980) (internal citation omitted)). Cazares failed to raise this fourth claim during his post-conviction proceedings in state court. This claim, therefore, is procedurally defaulted and is denied on this basis.

PETITIONER'S SUGGESTIONS

There can be no doubt that the District Court has failed to recognize the specific reasons argued by Petitioner for excuse of his procedural default of Claim IV of his Habeas Petition. In ruling on Claim IV of the petition, the District Court failed to consider the exact nature of Petitioner's excuse for overcoming the procedural default and does not make any attempt to determine whether the Supreme Court's decision in *Martinez v. Ryan*, *supra*,

may constitute "cause" necessary to excuse the instant procedural default. As such, Petitioner has established by a substantial showing of a denial of a constitutional right in that Jurists of Reason would find it debatable whether the District Court was correct in its Procedural Ruling. *Welch v. U.S.*, 136 S. Ct. 1257 (2016).

B. The District Court has adopted and restated practically verbatim the reasoning suggested by Respondent in its Response to Order to Show Cause Why Writ of Habeas Corpus Should Not Be Granted.

In the Petition for Writ of Habeas Corpus, Mr. Cazares raises four claims for habeas relief: 1) that the court erred in admitting photographs of the crime scene and autopsy photographs of the victims; 2) that the trial court erred in permitting the prosecutor to require Cazares to demonstrate how he stabbed the victims on cross-examination; 3) that trial counsel was ineffective for failing to compel the presence of Jennifer Breshears, a "material witness" whose testimony Cazares claims would have refuted the eyewitness testimony of the two state witnesses who claimed to have seen Cazares in the same location as the victims on the night of the murders; and 4) that counsel was ineffective for failing to raise diminished capacity as a defense at trial.

PETITIONER'S SUGGESTIONS

There can be no question at this point, based upon the previously denoted comparisons, contained in Petitioner's Petition for Certificate of Appealability, that the District Court has adopted and restated practically verbatim the reasoning suggested by respondent in its Response to Order to Show Cause Why Writ of Habeas Corpus Should Not Be Granted. Moreover, the fact that the Court's opinion reflects that there was no

independent analysis conducted by the Court of the very important constitutional issues contained in the four separate claims, i.e. no additional language, no additional case citations, no additional legal reasoning, it is absolutely clear that Petitioner has established that the District Court has failed to give this matter the serious attention that is demanded and required by both the **Sixth and Fourteenth Amendments of the United States Constitution** as well as United States Supreme Court's precedents.

Argument for Allowance of Writ

A. The Decision Of The Eight Circuit Court Of Appeals, Which Apparently Adopts The Decision Of The District Court, Has Sanctioned A Far Departure From The Accepted And Usual Course Of Judicial Proceedings In That, It Has Allowed The District Court To Disregard Title 28 U.S.C. §2254, Entitled Return Or Answer, Conclusiveness.

The District Court has failed to recognize the specific legal argument and reasons for relief identified and set forth in Petitioner's Reply. Nor has the Court conducted any analysis of the constitutional arguments made by Petitioner.

Not only did the District Court abrogate its responsibility in conducting an independent review and analysis of Petitioner's four claims, but even more egregiously, the District Court conducted no analysis, whatsoever, of the constitutional arguments made by Petitioner in his Reply Brief.

PETITIONER'S SUGGESTIONS

In the Court's Memorandum and Order, the District Court conducted no analysis of Petitioner's argument that the evidentiary errors complained of in claims one and two were

so egregious that they fatally infected the proceedings and rendered the entire trial fundamentally unfair.

Specifically, the District Court failed to address Petitioner's arguments that:

1. The fact or manner of the victim's death **was not** at issue before the jury.
2. The only real issue at trial was whether Cazares acted out of sudden passion when he stabbed them to death.
3. Contrary to the Missouri Court of Appeals analysis, this evidence was not relevant to prove any issue before the jury.
4. That the highly prejudicial photographs were submitted solely for the purpose to gain an unfair advantage by inflaming the passion and prejudices of the jury.

PETITIONER'S SUGGESTIONS

- B. The Decision Of The Eight Circuit Court Of Appeals, Which Apparently Adopts The Decision Of The District Court, Has Sanctioned A Far Departure From The Accepted And Usual Course Of Judicial Proceedings In That, It Has Allowed The District Court To Disregard Rule 5(E) Of The Rules Governing Section 2254 Cases In The United States District Courts.**

In the Court's Memorandum and Order, the District Court fails to acknowledge or address Petitioner's argument that trial counsel's justification for not pursuing Ms. Breshears was made belatedly and could not have been made as trial strategy, since trial counsel's testimony at the state court's post-conviction evidentiary hearing is inconsistent to the actual facts and actions taken by trial counsel at the lime of the criminal trial.

ARGUMENTS CONTAINED IN THE REPLY BRIEF

Finally, in Petitioner's Reply Brief. Cazares made both Procedural and Substantive arguments with respect to Claim IV. (See District Court file containing Reply Brief.)

THE DISTRICT COURT'S HOLDING

Nevertheless, the District Court specifically held, on page 3, as to Claim IV as follows:

III. CLAIM IV

In his fourth claim, Cazares alleges that trial counsel was ineffective for failing to raise a claim of diminished capacity. This claim, however, is barred based upon procedural default. "Ordinarily, a federal court reviewing a state conviction in a 28 U.S.C. §2254 proceeding may consider only those claims which the petitioner has presented to the state court in accordance with state procedural rules." *Arnold v. Dormire*, 675 F. 3d 1082, 1086-87 (8th Cir. 2012) (quoting *Beaulieu v. Minnesota*, 583 F. 3d 570, 573 (8th Cir. 2009)). Under Missouri law, "a claim must be presented at each step of the judicial process in order to avoid default." *Arnold*, 675 F. 3d at 1087 (quoting *Jolly v. Gammon*, 28 F. 3d 51, 53 (8th Cir. 1994) (quoting *Benson v. State*, 611 S.W. 2d 538, 541 (Mo. Ct. App. 1980) (internal citation omitted)). Cazares failed to raise this fourth claim during his post-conviction proceedings in state court. This claim, therefore, is procedurally defaulted and is denied on this basis.

Even if Cazares's fourth claim were not procedurally barred, the Court holds that this claim also fails on its merits. The Court notes that trial counsel argued that Cazares was "out of his mind" due to the rage he felt towards his victims. See Memorandum in

Support of Habeas Petition, ECF No. 1-1 at 6. The Court Finds no basis in the record for trial counsel to have argued that Cazares was not guilty due to a mental disease or defect under **Mo. Rev. Stat. §552.030**. See **Mo. Rev. Stat. §552.030.1** ("A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct."). Having found no facts or evidence suggesting a legal basis for asserting this defense, the Court denies habeas relief on this point.

PETITIONER'S SUGGESTIONS

In the Court's Memorandum and Order, as previously stated, the District Court neglected to even recognize, or discuss Petitioner's arguments contained within his Reply Brief premised upon *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) as authority for the excuse of his procedural default. Nor does the Court discuss, analyze, or even acknowledge any of the Petitioner's constitutional arguments and legal authority in support of them.

C. The Questions Raised in this Case are Important and Unresolved.

**Consideration by the United States Supreme Court is Necessary to
Secure and maintain Uniformity of the Rules Governing Section 2254
Cases in the United States District Courts.**

This case involves a matter of general public importance as well as the application by the District Courts of **Rules 5 and 8 of the Rules Governing Section 2254 Cases in the United States District Courts**. The failure of the District Court to consider Petitioner's Reply in the Court's analysis of a Habeas Corpus Petition, effectively nullifies the **Rules**

Governing Section 2254 Cases and clearly denies a Petitioner's Due Process in violation of the **Fourteenth Amendment of the United States Constitution**.

The application of the District Court of the **Rules Governing Section 2254 Cases** is contrary to the requirements of law and the opinions of the United States Supreme Court. The District Court Memorandum and Order totally overlooks the arguments and facts set forth in Petitioner's Reply.

The District Court Opinion acknowledges that Petitioner had procedurally defaulted Ground IV of his Habeas Petition. Yet, the Court does not recognize Petitioner's suggestion that the Supreme Court holding in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) provides sufficient ground to excuse this procedural default. Application by the District Court of *Martinez v. Ryan*, supra, forgives the failure of Petitioner's trial counsel to raise the substantial claim of diminished capacity as a defense at trial, resulting from ineffective assistance of trial counsel.

Very significant factors were required to be considered by the District Court in determining whether or not *Martinez v. Ryan* is applicable as well as Petitioner has stated sufficient facts to establish a substantial diminished capacity defense. Since the District Court Memorandum and Order conflicts with opinions of the United States Supreme Court and the **Rules Governing Section 2254 Cases** in the United States District Courts, as indicated above, the conflict should be reviewed by this Court.


The District Court Memorandum and Order, therefore, effectively transfers the review and analysis of a Petitioner's Petition for Habeas Corpus Relief to the various state

attorneys throughout the United States (Respondents), in violation of the United States Constitution.

If the District Court Memorandum and Order is not reversed or modified it will effectively create a precedent where federal courts are free to disregard Petitioner's pleading, specifically Reply Briefs, in making the Court's determination of Petitions for Habeas Corpus Relief.

Clearly, the failure of the District Court to conduct any analysis of Petitioner's Reply, that specifically relates to Ground Four of his Petition for Relief as well as the District Court's Memorandum and Order, which adopted and restated practically verbatim the Respondent's Response to the court order to show cause, **presents a question of first impression and requires an analysis under the Due Process Clause of the united States Constitution.**

Respectfully Submitted,


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CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should, therefore be granted, and this Court should adjudicate on the merits each of the grounds contained in the Petition for Habeas Corpus Relief.