No. 19-7048

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BERNARDO COSTA — PETITIONER
(Your Name)

vs.

SHERIE KORNEMAN, WARDEN. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE MISSOURI SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BERNARDO COSTA, #233400,(H.U.3-C-232),
(Your Name)
WESTERN MISSOURI CORRECTIONAL CENTER,
609 EAST PENCE ROAD
(Address)

CAMERON, MISSOURI, 64429.
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim?

2.Whether "new" evidence in relation to the actual innocence gateway for the purpose of due process in habeas cases is defined as [all reliable evidence that was not presented at trial, even if it would have been available through the excercise of due dilligence], OR is it [evidence that was discovered post-conviction and it could not have been discovered prior to trial through the excercise of due dilligence?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Missouri Court of Appeals, W.D. court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Nov. 19, 2019. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of counsel for his defense".

The Fourteenth Amendment to the United States Constitution provides that "no State shall deprive any person of life, liberty, or property, without due process of law...".

STATEMENT OF THE CASE

Petitioner, Bernardo Costa, was charged in state court with one count of statutory rape, first degree. State V. Costa, 11 S.W. 3d 670 (Mo.App.W. D. 1999). This case involve a 6½ year old child and her biological father, and is exceptionally unusual because it did not originate with a sudden and unexpected statement by the child to another individual, which caused that person to report it to authorities, which in turn caused an investigation that ultimately resulted in a conviction. Rather, the case originate with a suspicion of sexual abuse of the child that was reported to authorities, based not on any allegation of abuse by the child, but on a erroneous identification of an insect which was found in a 'suspect area': On February 26, 1997, after being at school for some hours already, Petitioner's daughter, Jennifer, developed an itch in her groin area which was attended to by the school nurse; during an examination, the nurse discovered an insect in the labia of the child's vagina which she identified as being a "pubic crab"and, suspicious that the child had been sexually abused, the nurse contacted the 'hotline' to report "suspected sexual abuse" which, in turn, caused two social workers to arrive at the school to interview Jennifer who, during the interview, made accusations against her father which precipitated her removal, as well as that of her siblings, Layla and Bernard III from their home, and an investigation which ultimately resulted in Petitioner's conviction. 11 S.W. 3d 673-675; Appendix 'E', at p.p. 6-8, 45-47, 79-84, 86, 149-150 .

The prosecutor's theory of the case was that Petitioner, between the dates of August 15, 1995, and Feb. 26, 1997, had sexual intercourse with his daughter, on multiple occasions, on a couch in the basement of their home. see Appendix 'D', at p.p. 4(citing to pages 1032, 1034, and 1044

of the Trial Transcript that reflect the prosecutor argued [multiple] instances of sexual intercourse not only occurred, but also that only took place on the couch in the basement of the home and nowhere else); also APPENDIX 'E', p.p. 37-38, 83, 174.
But initially, however, Petitioner was charged with "first degree child molestation", evidently based on the medical opinion that Jennifer's vaginal area "had been manipulated in some manner,[probably by a digit]"--as oppossed to [by] "sexual intercourse" as it was later alleged and argued-- and as having occurred "on or about Feb. 26, 1997"--the date on which the insect was found-- obviously based on the life expectancy of a pubic louse. APPX. 'E', p.p. 143, 172-174. Nevertheless, whether in relation to the first, or the second information, Petitioner has always maintained his 'actual innocence'(APPX.'E', 143-147,179)and, in that regard, although the "when", "where", and "how" did Jennifer contracted the insect was never determined by the State/prosecutor...or the defense, clearly no link could have been established between Petitioner and the alleged crime based on the existence, or the life span of the insect--and was not--,even if Petitioner was in fact at home on the weekend prior to Feb. 26, 1997: see APPX. 'E', p.p. 62 ("Dr. Scott suggested have the Dad examined for crabs soon");144 (Petitioner submitted to be examined);148 (No evidence of lice or chemical burns); Trial Transcript at p.p. 821-825 (Police officer testimony that a search of Petitioner's home produced no evidence of insects or infestation). And, later, it was established that the insect was erroneously identified as a pubic crab, although Petitioner, to date, has not seen it, nor been allowed to have it identified by independent expert. see APPX.'E', 150 (request and stipulation). The possibility that Jennifer contracted the insect at school cannot be ignored since she started itch-

ing, as well as scratching at school at around 10:00 a.m., and not at, and from home. APPX. 'E', 6 . Moreover, in no uncertain terms, Jennifer had adamantly denied [any] abuse by her father, and had stated that what she told to the social worker who interviewed her at school on 2-26-1997, was the same thing [that] social worker --Welpman--- had told--i.e., suggested to-- her.APPENDIX 'E', 48-(53-54)Yet, neither in light of those facts, or the fact that Petitioner remained in jail and could not have any contact with his children, were Jennifer and her siblings returned to their home after their removal; and, subsequently, Petitioner's charge was upgraded even in relation to the date(s) between which the crime was alleged to have occurred. APPENDIX 'E', at 137 (Jennifer could not give a reason for living with foster parents);172-174(change of dates and updated information).

To prove his case, the prosecutor presented evidence showing that Petitioner and his family have lived at their residence since August 15, 1995, as well as evidence in the form of medical expert's findings and opinions relating to physical abnormalities observed in Jennifer's vaginal area that were testified as having been consistent with sexual abuse; although Jennifer was an "unavailable witness" at the time of the trial, the prosecutor was permitted testimony of social workers, counselors, and other witnesses relating to statements made by Jennifer, as well as to 'behaviors' observed in Jennifer and her mannerisms, and as having been consistent with those observed in children that have been sexually abused and, at the conclusion of the evidence, the jury found Petitioner guilty. 11 S.W. 3d 673-675, 680-684 (summarizing the evidence, and affirming the conviction on appeal); see APPENDIX 'E', at p.p. 6-8 .

Although ultimately Petitioner was found guilty, he defended at trial : Defense counsel presented evidence to refute the State's medical expert's testimony as to their findings and opinions, as well as testimony of social

workers, counselors, and other witnesses with experts and other witnesses of his own. APPENDIX 'D', at p.p. 5(alluding to pages 743-932 of the Trial Transcript); and see APPENDIX 'E', at p.p. 41-44 . Incredibly, however, trial counsel [failed] to present other, more compelling exculpatory evidence that was available to him prior, and at the time of the trial, and that would have contradicted and disprove so much of the prosecutor's evidence, particularly in light of the defense he mounted, i. e., that "Nothing Occurred.None of it". Consider APPENDIX 'D', at p.p. 6-24 (addressing [the documents and their contents] which trial counsel had [failed] to present at trial in relation to his defense and the evidence presented by the prosecutor), together with APPENDIX 'E', at p.p. see 45-47 and 55-67, 68-72, 73-75, 76, 109-111, 112-136, 137-138, 139-140, 141-42. Missouri law, however, prohibits the presentation of ineffective assistance of trial counsel claims in the process of the direct-appeal by requiring them to be presented in Rule 29.15 collateral postconviction proceedings. see Missouri Rule 29.15(a). Yet, Petitioner's defense, as well as the contents of the documents(evidence) not presented at trial, both, were...and remain consistent with Petitioner's assertions of innocence to the police and the trial court, and with the exculpatory statements by Jennifer; and, with the documents adequately presented at trial, and introduced into evidence, trial counsel could--and should-- have sought to demonstrate that,consistent with the documents' content; There were never any physical abnormalities present in Jennifer's vaginal area that were caused by sexual abuse, as those were reported and testified at trial by Dr. Scott and Dr. Frasier; that Dr. Scott had fraudulently created and reported the abnormalities and, as such, it was impossible that Dr. Frasier could have observed any abnormality,as reported and testified of by her,during her examination of Jennifer; and, in particular, that the falsity(in relation to observations, findings)

of Dr. Scott's and Dr. Frasier's testimony, was additionally corroborated by the fact that, Dr. Scott---an expert, although evading the fact, appear to have indeed fully and adequately attended Jennifer's genitalia for a complaint specific to that area on the day [prior] to her SAFE examination, when the only peculiarities he observed present were those caused by Jennifer herself, i.e., "irritation and a "discharge" due to her "scratching"---which are corroborated by the observations of a school nurse and a emmergency room doctor(which appear to have recurred even at some time [after] those corroborations)---and that obviously did not caused Dr. Scott to be alarmed or suspicious that any sexual abuse had caused them, and in light of his training. APPENDIX 'D', at p.p. 6-16; APPENDIX 'E', at p.p. (82,108), 62, 68-72, 73-74, 109-111.

Trial counsel also could--and should-- have sought to recap that Jennifer continue asserting the accusations in spite of her denials due to the constant rehearsals, presure, and manipulation by Loletta Combs, but must particularly--and as reflected by the documents-- by Lea Rear; and, that the 'behaviors' observed in Jennifer by others more likely were the result of everything the child was going through, APPENDIX 'D', at 6-26, although some were probably created in order to "assist" the prosecution of Petitioner. see APPENDIX 'D', at p.p. 16-19, [20-21], 21-23; and APPENDIX "E', at p.p. 15-16, 122-123, 127, 130,138[62].Consider APPENDIX 'D', at p.26-52. Obviously the documents were in the possession of trial counsel, and Petitioner was not aware of their existence until [after] his direct-appeal had concluded. APPENDIX 'E", at p.p. 39-40, 162-168(@111). As such, pursuant to Missouri Rule 29.15(a), on or about May 16, 2000, Petitioner filed his 'pro se' 29.15 motion for postconviction relief alleging "numerous grounds of ineffective assistance at trial" which, although 'appointed counsel'

for the representation of Petitioner opined that "some of the claims were not as clearly written as they probably should be", he nevertheless failed to modify them and, apparently, even the motion court failed to "understand what (Petitioner)was alleging clearly in his motion". see APPENDIX 'E', at p.p. 23, 167(at 105-[106]) Yet, Rule 29.15(g), requires that the 'pro se' pleadings be 'amended' by appointed counsel. Rule 29.15(e). On July 2, 2001, the motion court held an evidentiary hearing on Petitioner's postconviction motion where the only witnesses to testify were Petitioner and his trial counsel, even though Petitioner had persistently requested to postconviction counsel to call all the witnesses that were necessary, and as reflected in the pleadings, in order to question them regarding the documents that trial counsel failed to present at trial, their contents, and for their introduction into evidence in order to establish the claims for relief; Consequently, due to the failure to properly and adequately authenticate the documents--with few exceptions--, the great majority of the documents were not admitted, nor considered as evidence by the motion court during the 29.15 evidentiary hearing. see APPENDIX 'D', at p.p. 24-26; APPENDIX 'E', at p.p. 23, 151, 167(at 107-108).

Further, during the evidentiary hearing, postconviction counsel was struggling so much as to how to present the numerous claims during the direct examination of trial counsel that, as a result of his "tossing them around" -- apparently due to the manner in which they were written, their number, and his failure to modify them, the motion court intervened to let him know that [it] wasn't following not only his questioning of the witness, but also that he needed to make clear what was it that he was trying to establish, allege, etc. APPENDIX 'E', at p.p. 159(at34), 169(Id) . Not one single claim for postconviction relief dealt completly and adequately

with the representation of Petitioner by trial counsel in relation to the documents that were not presented at trial, in light of the evidence presented by the prosecution (Consider e.g., APPENDIX 'E', at p.p.23-36) and, even if one claim would have been, it could not have been established due to the rejection of the evidence. APPENDIX 'E', at p.p.167 at 107-108.

On October 9, 2001, the motion court issued its findings of fact and conclusions of law overruling Petitioner's Rule 29.15 motion.Id., at p.p.23 .

Appealing the denial of the postconviction motion, Petitioner was represented by the same attorney and,the claims on appeal, clearly reflect the failure to adequately challenge the prosecution's evidence at trial in the 29.15 action, as well as the representation of Petitioner by trial counsel based on the evidence that was not presented to[the jury]; the only claim bearing resemblance to such challenge was the one which, in addition to contend on appeal that the denial of postconviction relief was "erroneous" in light of it, dealt with the "failure to correct perjured testimony of a witness". see APPENDIX 'E', at p.p. 34-36 . But the challenge of that claim in the proceedings below dealt only with the memory of a prosecution witness, and in regard to whether or not he "recalled attending Jennifer prior to her SAFE examination", and not at all as to the fabrication of false medical findings/observations and testimony [by that witness], as challenged and asserted by the Petitioner, even though they may not have been, as postconviction counsel characterized them, i.e., "not as clearly written as they probably should be", but when that was exactly what Petitioner--who is not an attorney--was trying to assert, but counsel failed to completly and adequately amend. Compare APPENDIX 'D', at 6-16, 24, 26-52, with APPENDIX 'E', at p.p. 24-36, [167]-168 .

The manner in which postconviction counsel handle Petitioner's postconviction action, prevented the adequate assertion, presentation, and establishing that Petitioner's conviction was the result of ineffective assistance of trial counsel, due to his failure to challenge and demonstrate with evidence that was available to him at the time of trial, that the evidence presented by the prosecution was, at least, fraudulent. see APPENDIX 'D', at p.p. 6-23, 26-52 ; APPENDIX 'E', at p.p. 45-171 . On October 1, 2002, the appellate court affirmed the denial of Petitioner motion for postconviction relief. APPENDIX 'E', at p.p. 19-36 .

Although Petitioner attempted through different means to obtain a supplemental opportunity to develop the claims and evidence that had been procedurally defaulted by postconviction counsel---once even prior to the conclusion of the 29.15 proceedings in the motion court--- in order to establish that his conviction was the result of ineffective assistance of trial counsel, those efforts were simply to no avail: APPENDIX 'E', at p.p. 94-105 (addressing Petitioner's 'pro se' motion to the postconviction motion court); Costa V. State, 311 S.W. 3d 340(Mo.App.W.D.2010); Costa V. State, W.D. 70950, Slip Opinion, Per Curiam; Although Missouri prohibits claims of ineffective assistance at trial to be presented on direct-appeal, and requires that such category of claims be presented in Rule 29.15 postconviction proceedings, it holds nevertheless that there is no constitutional right to effective assistance of counsel in postconviction proceedings, apparently even in relation to claims in that category, that may provide cause for a procedural default, even though those proceedings [are] the first place where a challenge can be made to a criminal conviction based on that category of claims.see Rule 29.15(a); State v. Wheat, 775 S.W. 2d 155 (Mo.1989); Barnett V. State, 103 S.W. 3d 767 (Mo.banc 2003); State V. Hunter, 840 S.W. 2d 850(Mo. 1992); Gehrke V.

State, 280 S.W. 3d 54 (Mo. banc 2009).

In addition to his efforts to reopen the postconviction proceedings, Petitioner petitioned for a federal writ of habeas corpus which was denied in Costa V. Kemna, 4:0300260-GAF (U.S. Dist. 2004), based on procedural grounds and a finding that evidence was not new for purposes of overcoming the bar to review; Martinez V. Ryan, 132 S.Ct. 1309 (2012), had not yet been decided at the time for the purpose of the procedural default; and for purposes of reopening, appear that Martinez present 'no extraordinary circumstances' in a non-capital case. Consider Barnett V. Roper, 941 F. Supp. 2d 1099 (2013). Further subsequent history of this case is found in Costa V. Allen, 2008 Mo.App. LEXIS 8 (W.D. 67378); Costa V. Allen, 2008 Mo. LEXIS 276 (Mo. S.Ct, 89177); and Costa V. Allen, 232 S.W. 3d 383 (Mo.App.W.D. 2010).

Finally, on July 3, 2017, Petitioner commenced the pursuance of his [last available remedy] for challenging his incarceration, by filing his initial state habeas corpus action seeking [relief from his conviction] on the basis of 'ineffective assistance of trial counsel for his failure to use and present available exculpatory evidence that would have produced an acquital'. APPX. 'C', at 1-2 ; APPX. 'D', at 26-52. (FN1)

Although it was conceded in the petition that [the claims] were procedurally defaulted, APPX. 'D', at p.p.[55]-56, Petitioner nevertheless[advanced two (2) excuses for the procedural default, i.e., 'ineffective assistance of postconviction counsel' and 'actual innocence based on "new evidence"'],

(FN1) Although the petition presented two (2) claims for relief, only[Claim One] is in relation to [relief from the conviction], and it is only in relation to that [Claim One] that the questions raised in this petition are presented. Compare APPX. 'D' at p.p. 26 with p.p. 52.

[and argued not only the validity and availability of both excuses under the Fourteenth Amendment, and the holding in Schlup V. Delo, 513 U.S. 298, 324, but also that, when adequately established, either excuse should allow the review of the claims]. APPX. 'D', p.p. 55-78, 79-90. A "Jurisdictional Defect" was also advanced, however, but [only in relation to 'a portion'] of Claim Two of the petition. see APPX. 'D', at p.p. 52, and 78. Obviously rejecting Petitioner's excuses and arguments relating to the procedural default (FN2), the initial state habeas court directed the Respondent to respond [only] to a portion of Petitioner's Claim Two, but not as to 'Claim One' -- **or the portion of Claim Two that also included the 'procedurally defaulted allegation of ineffective assistance of trial counsel'** -- finding that "Petitioner is not entitled thereto". APPX.'C', at p.1-2; Missouri Rule 91.05 (FN3); and see McKim V. Cassady, 457 S.W. 3d 831(Mo. App.W.D. 2015)(at **HN 15 and HN 16**). On 1-16-2018, the initial state habeas court denied the petition finding that "Petitioner is not entitled to relief"; the petitions made on the same claims, excuses and arguments to the Missouri Court of Appeals and Missouri Supreme Court were "denied", without more, on 12-7-2018 and 11-19-2019 respectively, as if concurring with the initial court's disposition of it , APPX. 'A' , 'B'

(FN2) Consider Gehrke V. State, supra("Claims of ineffective assistance of postconviction counsel are categorically unreviewable"); State V. Hunter, (no constitutional right to postconviction counsel, citing Coleman V. Thompson, 501 U.S. 722 (1991); and also Covey V. Moore, 2001 Mo.App. LEXIS 1089 (New evidence as 'newly discovered evidence').

(FN3) Missouri Rule 91.05 provides: "A court to which a petition for a writ of habeas corpus is presented shall forthwith grant the writ or issue an order directing the respondent to show cause why the writ should not be granted unless it appears from the petition that the person restrained is not entitled thereto".

and 'C', at p.p. 1-[4], and summarily. see also APPX. 'F'. Because Petitioner had previously exhausted all other available remedies to challenge his conviction, as noted above, the denial of his petition for a state writ of habeas corpus, which was his [last available remedy] and which was denied without consideration and resolution of 'Claim One', has effectively left him without any remedy by which the wrong he alleges, i.e., [that he was convicted of a crime he never committed due to the ineffective assistance of his trial counsel], even though able to establish it (consider APPENDIX 'D', at p.p. 6-24, 26-52 with APPENDIX 'E', at p.p. 45-171) could be addressed...and corrected, obviously due to the rejection of his excuses for the procedural default of the claim, even though those gateways that could permit review of the defaulted claim could also be established (consider APPENDIX 'D', at p.p. 6-26, 79-90 with APPENDIX 'E', at p.p. 6-23, 45-171,), and noting that, as to all, an opportunity was asked for to establish it. see APPENDIX 'D', at p.p. 51-52, 90.

But the rejection of the excuses that would-- when established -- permit the review of the defaulted claim and evidence, appear to be based on matters of Constitutional law not yet decided by the United States Supreme Court, and on precedent appearing to be inapplicable to the circumstances of this case, to the extent that the disposition of Petitioner's habeas petition by Missouri courts may violate due process of law due to the probability that the rejection of the excuses is erroneous, and the denial of the petitions were without the state courts requiring the State to answer, and without giving Petitioner an opportunity to prove his allegations:

In Martinez, supra, the Court pointed out that Coleman V. Thompson, 501 U. S. 722 (1991), held that negligence on the part of a prisoner's postconviction attorney does not qualify as cause for a procedural default, but noted that Coleman did 'not present occasion to decide whether or not an

exception to that rule exist when the error is in initial-review collateral proceedings on a claim of ineffective assistance at trial'; it stated that since Coleman was decided 20 (now 28) years ago that it have not held that Coleman applies in circumstances like this one (but consider in contrast Gehrke, supra; Krider V. State, 44 S.W. 3d 850 (Mo.App.2001); Logan V. State, 377 S.W. 3d 623, 628-629 (Mo.App.2012); Yarberry V. State, 372 S.W. 3d 568, 575 (Mo.App. 2012), all applying the holding of the Missouri Supreme Court in State V. Hunter, supra, based on the holding 'in Coleman'), and concluded that Martinez was not the case for deciding whether that exception exist as a Constitutional matter, leaving the question open still; and, regarding what constitute "new" evidence for the purpose of the 'actual innocence gateway', it is a matter as to which the 'federal courts of appeals' are divided, making it incumbent upon the United States Supreme Court also to decide and settle. see e.g., 59 Hasting L.J. 711 (2008); and compare Covey V. Moore, supra ('new' evidence as evidence newly discovered) with Schlup, supra (new evidence as evidence'not presented at trial').

Unlike a federal habeas proceeding under Martinez, neither Missouri's Judiciary nor its Legislature have even attempted to craft a mechanism that would provide protection to prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, although both have power of procedural rule making, so habeas petitions will continue to be denied by Missouri courts, without precedent by the U.S. Supreme Court directly supporting-- or rejecting-- their rejection of the excuses asserted by Petitioner, under the circumstances, and irrespective of any miscarriage of justice. see APPX. 'F'; (HN4).

(HN4) Missouri Supreme Court's precedent constitute the [controlling] law within the State until [it], or the Supreme Court declares otherwise. see Mo. Const. Art. V, sect. 2; State V. Salazar, 414 S.W. 3d 606 (Mo.App. S.D. (2013)).

REASONS FOR GRANTING THE PETITION

It has been almost three (3) decades since 'the first question of this petition' was left open by the Court in Coleman V. Thompson(see also Martinez, supra, 132 S. Ct. at 1315); and about a quarter of a century-- regarding the second question-- since the Court articulated the standard for determining whether a prisoner may pass through the actual innocence gateway in Schlup V. Delo, but without defining "new" evidence for that purpose. The importance of having the Court decide these questions cannot be overstated.

As demonstrated in the previous section of the petition, in this case it is alleged that Petitioner was convicted of a crime which he did not commit, due to ineffective assistance of counsel. The claim, and the evidence supporting it, however, are procedurally defaulted.

Although Missouri law provides that in habeas corpus proceedings a petitioner could secure habeas relief by establishing 'cause and prejudice', State ex rel. Nixon V. Jaynes, 63 S.W. 3d 210, 214-215(Mo. banc 2001), Missouri courts reject claims of ineffective assistance of postconviction counsel as cause (or excuse) for a procedural default of claims of ineffective assistance of trial counsel, without any [Constitutional] precedent [by this Court] **directly** supporting such rejection, by applying the 'general rule' of Coleman that 'there is no Constitutional right to counsel in postconviction proceedings', even though this Court has never held Coleman applies to circumstances like the ones in this case. see Martinez, 132 S.Ct. 1315-1320; and cf. e.g., with Gehrke V. State, supra ("Claims of ineffective assistance of postconviction counsel are categorically unreviewable"); and Yarberry V. State, supra (rejecting application of Martinez, and re-stating that..."Thus, [the rule] **remains** that"claims of ineffective assistance of [postconviction] counsel are categorically unreviewable").

Missouri does not provide protection for "prisoners with a potentially legitimate claim of ineffective assistance of trial counsel", neither in light of this Court's [necessity] in Martinez to "modify the unqualified statement in Coleman", 132 S.Ct. at 1315-1317; or the fact that Martinez, although it was decided as an 'equitable rulling', was argued as a Constitutional matter; and, not even though its Judiciary and Legislature, both, have the power of procedural rule making. As such, in Missouri, even under the circumstances in Petitioner's case (and in those of others similarly situated), a prisoner is left stuck with ineffective assistance at trial because of ineffective assistance in collateral proceedings, irrespective of any miscarriage of justice caused by that Constitutional violation at trial, even under the procedural framework for asserting it, resulting in denial of due process.

Further, in Clay V. Dormire, 37 S.W. 3d 214, 217 (Mo. banc 2000), the Missouri Supreme Court explicitly adopted the notion of innocence as a gateway to judicial review of procedurally defaulted evidence and issues as articulated by this Court in Schlup V. Delo, supra, but "new" evidence for the purpose of a gateway actual innocence claim in Missouri depend on [newly discovered] evidence of innocence for its proof. see McKim V. Cassady, 457 S.W. 3d 831, 843(Mo.App.2015). Although this requirement mirrors the definition of "new" evidence in relation to gateway claims of actual innocence by the Third and Eighth Circuit Courts of Appeals (see Amrine V. Bowersox, 128 F. 3d 1222, 1230 (8th cir. 1997)(en banc); and Hubbard V. Pinchak, 378 F.3d 333, 340 ((3rd cir, 2004), other Circuit Courts, however, have adopted an inclusive formulation to their definition of "new" evidence, permitting habeas courts to evaluate 'all reliable evidence that was not presented to the fact-finder, even if the evidence would have been available at trial through due dilligence'. see Gomez V. Jaimet, 350 F. 3d 673, 679 (7th circuit. 2003);

and Griffin V. Johnson, 350 F. 3d 956, 961 (9th cir. 2003).

In Missouri, therefore, Petitioner (and other prisoners similarly situated), although provided with the Schlup gateway in habeas corpus process/proceedings as an opportunity for overcoming a procedural default, the requirement for its proof limits the scope of the fundamental miscarriage of justice in a manner not contemplated by this Court, resulting in denial of due process.

The denial of Petitioner's petition for a writ of habeas corpus by the Missouri Supreme Court-- just as the denial by the Missouri Court of Appeals and the initial state habeas court -- was necessarily based on precedent by the Missouri Supreme Court. For the reasons that follow, the Missouri Supreme Court's action in summarily, and without more, denying Petitioner's petition for a writ of habeas corpus, represent a denial of due process, as guaranteed by the Fourteenth Amendment, and is therefore in error because : 1-Petitioner was entitled to show 'cause' for the procedural default of his habeas claim based on ineffective assistance of postconviction counsel; and 2- Petitioner' documents should have been considered "new" evidence for the purpose of establishing the actual innocence gateway, and an opportunity to establish it.

I. Petitioner Had a Fourteenth Amendment Right to Effective Assistance of Postconviction Counsel in Relation to Any Claim of Ineffective Assistance of Trial Counsel.

In Martinez, supra, while acknowledging that it did not "imply the State acted with any impropriety by reserving the claim of ineffective assistance for the collateral proceedings", this Court also recognized that "by deliberately choosing to move (it) outside of the direct-appeal process, where

counsel is Constitutionally guaranteed, the State 'significantly diminishes prisoners' ability to file such claims'". 312 S.Ct. at 1315-1318. It was "within the context of this procedural framework" that the Court held that, "in federal habeas proceedings", "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as 'cause' for a procedural default". 132 S.Ct. at 1315-1319.

Although Missouri recognize that the Court went on to decide Martinez as an 'equitable ruling' which is not binding upon its courts (see e.g., Logan V. State, 377 S.W. 3d at 628-629; and Yarberry V. State, 372 S.W. 3d at 568, 575), the requirements of the 'due process' and 'equal protection' clauses of the Fourteenth Amendment, nevertheless, are applicable...and binding. U. S. Const. Amend. XIV.

Though a State is not Constitutionally required to grant appeals as of right for the purpose of challenging a criminal conviction, McCane V. Durston, 135 U.S. 684 (1894), "in establishing a system of appeal as of right" (Section 547. 070 Rev. Stat. of Mo.; Missouri Rule 30.01), Missouri has "implicitly determined that it was unwilling to curtail drastically a defendant's liberty unless a second decisionmaker, the appellate court, was convinced that the conviction was in accord with law" and, consequently, when it opted "to act in a field where its action has significant discretionary elements, it must nontheless act in accord with the dictates of the Constitution---and, in particular, in accord with the Due Process Clause" by providing procedures appropriate for the adequate and fair presentation of claims for relief. see Griffin V. Illinois, 351 U.S. 12, 18, 20 (1956)(right to free transcript); Douiglas V. California, 372 U.S. 353 (1963)(right to counsel on first appeal as of right); and Evitts V. Lucey, 469 U.S. 387 (1985)(right to effective assistance of counsel on first appeal of right).

Given the critical importance of this [State-created-right] to challenge a

criminal conviction, therefore, it appear that, in addition to the Constitutional right to a transcript, and the right to/effective assistance of counsel, the "specific dictates of due process" would require an 'evidentiary [h]earing' for the adequate and inclusive presentation and adjudication of claims of ineffective assistance of trial counsel in the direct-appeal process. Connecticut Bd. of Pardons V. Dumschat, 452 U.S. 458, 463 (1981)("a State created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right"). Indeed, if this State-created-right-to-appeal [bego[t]] "yet other rights to procedures essential to"its realization (i.e., Griffin; Douglas; Evitts, supra), it would follow that, "the right to be heard with the Constitutional right to/effective assistance of counsel at a meaningful time and manner regarding claims of ineffective assistance at trial in the direct-appeal process would still be a right essential to the realization of the parent right to challenge a criminal conviction: undeniably, given the importance of the "private interest that will be affected", i.e., the right to/effective assistance of counsel at trial (Gideon V. Wainwright, 372 U.S. 335, 344 (1963); Cuyler,V. Sullivan, 446 U.S. 335, 344 (1980)), it is obviously important to ensure an adequate and fair adjudication of such claim; and, the right to counsel on direct-appeal has been recognized to relate to "the very integrity of the fact-finding process". McConnell V. Rhay, 393 U.S. 2,3 (1968).Moreover, in that regard, as even Missouri recognize, errors of counsel on direct-appeal proceedings constitute 'cause' for a default. State V. Kelly, 966 S.W. 2d 382 (Mo.App. 1998); Watkings V. Pash, 2016 U.S. Dist. LEXIS 69074 (citing Smith V. Robbins, 528 U.S. 259 (2000));see Mathews V. Eldridge, 424 U.S. 319. As previously pointed out to this Court in Martinez V. Ryan, 2010 U.S. BRIEFS 1001, at [**40](note 6), some states provide procedures regarded as part and parcel of the original direct-appeal for the purpose of claims of in-

effective assistance at trial. Rice V. State, 154 P.3d 537, 539-42 (Kan.App. 2007); State V. Johnson, 13 P.3d 175, 178 (Utah 2000); Calene V. State, 846 P.2d 679, 683-84, 692 (Wyo. 1993). A defendant in those proceedings would have a Fourteenth Amendment right to effective assistance of counsel in relation to a claim of ineffective assistance at trial. Douglas/Evitts, supra. Missouri in contrast, does not provide a procedure that would allow ineffective assistance at trial claims to be reviewed as part of the direct-appeal process, even though its Judiciary, as well as its Legislature, both, have the power of procedural rule making, Kinsky V. Platte, 944 S.W. 2d 74 (Mo. App. 1999); and, instead, prohibit that category of claims to be presented in the direct-appeal process, requiring them to be presented in the collateral review proceedings...[without] the right to the effective assistance of counsel. Mo. S.Ct. Rule 29.15(a); State V. Hunter, supra (citing Coleman); Gehrke, supra("Claims of ineffective assistance of postconviction counsel are categorically unreviewable"). Yet, under these circumstances, it is the [due process] which would require that the adjudication of ineffective assistance of trial counsel claims in the collateral proceedings 'closely approximate that of the direct-appeal process', see e.g., Mathews, at 333 (citing Goldberg V. Kelly, 397 U.S. at 266-271), i.e., with the right to/ effective assistance of counsel. Douglas/Evitts, supra.

Courts of several other states have recognized as a matter of state law a prisoner has a right to an effective lawyer in his first postconviction proceedings : see e.g., Grinols V. State, 10 P.3d 600 (Alaska Ct. App.2000); Silva V. People, 156 P.3d 1164, 1169(Colo. 2007); Lozada V. Warden State Prison, 613 A.2d 818 (Conn. 1992); Hernandez V. State, 992 P.2d 789, 793 (Idaho, 1999); In the Matter of Carmody, 653 N.E. 2d 977, 983 (Ill. 1995); Daniels V. State, 741 N.E. 2d 1177 (Ind. 2001); Dunbar V. State, 515 N.W. 2d 12, 14-15 (Iowa 1994); Brown V. State, 101 P.3d 1201 (Kan. 2004); State

V. Flansburg, 694 A.2d 462 (Md. 1997); State V. Velez, 746 A.2d 1073 (N. J. Super. 2000); Crump V. Warden, 934 P.2d 247 (Nev. 1997); Johnson V. State, 681 N.W. 2d 769 (N.D. 2004); Hale V. State, 934 P.2d 1100 (Okla. Crim. App. 1997); Commonwealth V. Pursel, 724 A.2d 293, 303 (Pa. 1999); Jackson V. Weber, 637 N.W. 2d 19 (S.D. 2001); Menzies V. Galetka, 150 P.3d 480 (Utah 2006); State V. Love, 700 N.W. 2d 62 (Wis. 2005). In those states, recognition of such right, even though by state law, provide significant protection to 'prisoners with potentially legitimate claims of ineffective assistance of trial counsel'. see Martinez, supra, at 1315.

In contrast, although it has been held in Missouri that the 'statutory right to counsel is rendered 'meaningless' unless it includes the right to effective counsel', see e.g., In the Interest of J.C.Jr., 781 S.W. 2d 226 (Mo. App.W.D. 1989)(juvenile proceedings), the'right to counsel' provided in postconviction proceedings to a defendant by Missouri Supreme Court Rule 29.15(e), clearly does not includes that right to the 'effective assistance'. see Price V. State, 422S.W. 3d 292 (Mo. 2014). However, 29.15 proceedings are unquestionably the first point at which Missouri law permmitted Petitioner (and those similarly situated), to raise any ineffective-assistance-of-trial-counsel claim, Rule 29.15 (a); State V. Wheat, supra; Missouri courts "must review such claims on the merits when timely asserted, Rule 29.15 (b)(d)(f); and, a defendant pursuing the first opportunity for review of such claims "is specially ill equipped to represent himself". Halbert V. Michigan, 545 U.S. 605, 617 (2005); see also Martinez, 132 S.Ct. at 1315-1319. Consequently, under both, Douglas, Evitts, and Mathews, supra, not only 29.15 proceedings - - - in relation to claims of ineffective assistance of trial counsel - - - are the equivalent of the 'first and only' appeal as of right, but also in those proceedings, Petitioner (and those similarly situated) had a Fourteenth Amendment right to counsel in relation to that

category of claims. And, the right to counsel means the right to effective assistance of counsel. Evitts, supra.

Moreover, indeed, through judicial decision Missouri has pointed out that 29.15 proceedings..."are to be used [in place of] other remedies". see Koster V. McCarver, 376 S.W. 3d 46 (Mo.App. E.D. 2012)(quoting Nixon V. Jaynes, supra). Certainly, for the purpose of claims of ineffective assistance of trial counsel, 29.15 proceedings [are]'used "in place of" the direct-appeal process', and should be consider,therefore, Petitioner's 'one and only' appeal as of right for that very purpose. see e.g. Halbert, supra (citing Douglas, 372 U.S. at 357).

The "difference" between "direct-appeal" and "postconviction proceedings" does not change the fact that, 29.15 proceedings, in relation to ineffective assistance of trial counsel claims, may be considered Petitioner's 'one and only' appeal [of right] so as to entitle him to the right to/effective assistance of counsel, and only to that extent. To conclude otherwise, would be to differentiate - - -under this limitted circumstances- - - on the basis of 'labels', an approach rejected by this Court. see Halbert, supra, at 619; see also Turner V. Rogers, 131 S.Ct. 2507, 2517-2519(2011)(citing Mathews V. Eldridge).

Indeed, the availability of Constitutional rules in other contexts- - - perhaps even without finding an analogy between "criminal" and "civil" proceedings- - - is based upon an analysis of "the essentials of due process and fair treatment", even though the proceedings at issue may be "little different" from, and "comparable in seriousness" to, a criminal proceeding. see In re Gault, 387 U.S. 1, 28, 30, 36, 49-50 (1967); In re Winship, 397 U.S. 358-359 (1970). But see In re Gault, 387 U.S. at 61 (Justice Black concurring). This has increasingly become evident in other, as well as more recent decisions by this Court. Although continuing to dismiss the "civil/criminal"

distinction as a "wooden approach" that the Court "carefully has avoided", McKeiver V. Pennsylvania, 403 U.S. 528, 541 (1971)(plurality opinion),the Court has expressly focused on the applicable due process standard of fundamental fairness, balancing the liberty interest of the individual against the potential for interfering with the State's purpose. Id. at 528; Cf. Middendorf V. Henry, 425 U.S. 25 (1976)(Whether[due process] embodies a right to counsel depends upon the analysis of the interest of the individual and those of the regime to which he is subject. Wolff V. McDonnell, 418 U.S. 539, 556 (1974)).

In Parham V. J.R., 442 U.S. 584 (1979), the Court expressly applied the prodedural due process balancing approach articulated in Mathews, supra. see also Youngberg V. Romero, 102 S.Ct. 2452, 2460 (1982)(quoting Poe V. Ullman, 367 U.S. 497, 552, 542 (1961)(Justice Harlan dissenting). Most recently, the Court again employed the Mathews balancing test in Turner V. Rogers, supra; and in Halbert, the Court stated that the Fourteenth Amendment required "the appointment of counsel for...defendants who [sought] access to first-tier review", and making clear that the lable "appeal" did not matter. Although Rule 29.15 is a "criminal" rule of procedure, 29.15 proceedings are considered "civil" and, consequently, the determination that Petitioner is entitled to the right to counsel - - - and as such, the right to the effective assistance of counsel - - - in 29.15 proceedings in relation to claims of ineffective assistance at trial, under the "specific dictates of due process" must be examined under the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make civil proceedings fundamentally fair. Turner, supra, at 2517-2520 (citing Mathews). Under this test, it is undisputably clear that Petitioner is entitled to the right to effective assistance of counsel in 29.15 proceedings, in connection to claims of

ineffective assistance at trial : those proceedings may be considered Petitioner's "one and only appeal of right" for that purpose.

As relevant, the factors are : 1- The nature of "the private interest that will be affected"; 2- the comparative "risk" of an "erroneous deprivation of that interest with and without additional or substitute safeguards"; and, 3- the nature of any countervailing interest in not providing "additional or substitute procedural requirements". see Turner, supra, at 2517-2518. With regard to the first two factors, the analysis is so straight-forward as to hardly require exposition: The right to the effective assistance of counsel at trial is a bedrock principle in our justice system; critical to the accuracy of a criminal proceeding that places an individual's life or liberty at risk, to the point that a fair trial cannot be assured of having been received without it. Gideon V. Wainwright, 372 U.S. 335, 344 (1963); Powell V. Alabama, 287 U.S. 45, 68-69 (1932); Cuyler V. Sullivan, 446 U.S. 335, 344 (1980).

"Because this right is so fundamental to a fair trial, the Constitution cannot tolerate trial in which counsel, though present in name, is unable to assist the defendant obtain a fair decision on the merits; as Strickland V. Washington, 466 U.S. 668 (1984) makes clear, the Constitutional guarantee of effective assistance of counsel at trial applies to every prosecution, without regard to whether counsel is retained or appointed. see Cuyler, supra, at 342-345. The Constitutional mandate is addressed to the action of the State in obtaining a criminal conviction [through a procedure that fail to meet the standards of due process of law]. Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such trial, it is the State that unconstitutionally deprives the

defendant of his liberty. Cuyler, supra, at 343". Evitts, supra, at 395-96. In the context of the "first appeal as of right", the right to/effective assistance of counsel [relates to "the very integrity of the fact-finding process"], McConnell V. Rhay, 393 U.S. 2-3 (1968), and as such, as previously noted, given the importance of the "private interest that will be affected" therefore, it is obviously important to ensure an adequate and fair adjudication of a claim of ineffective assistance of trial counsel.

The question that ineffective assistance claims present is whether or not a defendant received that assistance at trial which is Constitutionally required. Strickland, supra. This category of claims often require investigative work and an understanding of trial strategy; while confined in prison, a defendant is in no position to develop the evidentiary basis for an ineffective assistance claim, which often turns on evidence outside the trial record; and, in the vast majority of the cases, a defendant is not formally trained in the law, nor has, at least, an understanding of procedural rules or substantive details of federal Constitutional law. see e.g., Halbert, supra. To present a claim of this category in accordance with the State's procedures, then, a prisoner likely [needs] an effective attorney. Moreover, the fact that the question as to "the assistance rendered at trial" marks a dividing line between "direct-appeal" and "postconviction proceedings", Massaro V. United States, 538 U.S. 500 (2003), reinforces the need for accuracy and adequacy in the fact-finding process. Rhay, supra, at Id. That is because an incorrect decision- - -wrongly classifying the 29.15 proceedings in relation to this category of claims as not being Petitioner's "one and only appeal as of right"- - - can increase the "risk" of failure to vindicate the fundamental right to the effective assistance at trial by depriving Petitioner of the procedural protection- - -the right to ef-

fective assistance of counsel- - - that the Constitution would demand in a criminal proceeding. see Douglas, Halbert, Evitts, supra.

As such, the first two factors of the test argue strongly for Petitioner's right to/effective assistance of, counsel. As previously pointed out, the critical question is a defendant's ability to present, and develop, a claim of ineffective assistance at trial for its fair and adequate adjudication. 29.15 proceedings are [adversarial], in where the person opposing the defendant is the government, represented by experienced and learned counsel and, therefore, the defendant can fairly be represented only by a trained advocate. see Evitts, at 386; and Cf. with Appx. 'E', at 94-105, 151-171 .

Other than claims of ineffective assistance at trial, claims that may be presented in 29.15 proceedings [h]ave had "an adequate opportunity to be presented in the context of the State's appellate process"; and, had there been a meritorious claim that was not presented there, 29.15 proceedings provide a forum for their review for "cause". see e.g., Watkins V. Pash, 2016 U.S. Dist. LEXIS 69074 (citing Smith V. Robbins, 528 U.S. 259 (2000)); State V. Kelly, 966 S.W. 2d 382 (Mo.App. 1989)(ineffective assistance of appellate counsel must be presented in 29.15 proceedings). As such, those proceedings provide a [second] opportunity for [those] claims: Ross V. Moffitt, 417 U.S. 600 (1974) made clear that "a State can, consistently with the Fourteenth Amendment, provide for differences...so long as the result does not amount to a denial of due process or an invidious discrimination", 417 U.S. at 608 (quoting Douglas, 372 U.S. at 356-357); and, that "the question is not one of absolutes, but one of degrees". 417 U.S. at 612.

In contrast, ineffective assistance at trial claims have [n]ot had that previous opportunity; and, they need to be presented, first, to the State court with considerable clarity and precision. see Baldwin V. Reese, 541 U.S. 27, 29-33 (2004). Further, when a state court adjudicate a claim on

the merits, their review- - - including federal review- - - is limited to the record developed initially; and, a decision is entitled to a presumption of correctness. see e.g., Cullen V. Pinholster, 131 S.Ct. 1388, 1398-1402 (2011).

Moreover, if a claim is procedurally defaulted in 29.15 proceedings- - - unlike other claims that may be presented there- - -there would be [no second opportunity for its review] in any other court. Missouri, therefore, does not have any compelling "countervailing interests" in not providing "additional or substitute procedural requirements" under these circumstances: Missouri clearly [have] an 'interest' in the assurance that a criminal conviction was obtained under Constitutional norms, before it deprives an individual finally of his liberty, see Section 547.070, supra; and, had this category of claims been allowed in the process of the "direct-appeal", Missouri would have been required to, also, provide the right to/effective assistance of counsel for their presentation. Douglas, supra; Evitts, supra. To the extent that Rule 29.15(e) provide for the right to counsel, that argument would be irrelevant to [the central issue] presented here because, in the posture of the case at bar, the right to counsel provided by Rule 29.15(e), and as alleged, was[inadequate to vindicate Petitioner's Constitutional right to the effective assistance of counsel at trial], when it deny the effective assistance of counsel as its safeguard.

Of course, this is not to assume appointed counsel in those proceedings are always going to perform below professional norms; but, when that do occur, the procedure will prove inadequate to vindicate the right to the effective assistance of counsel at trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Consideration of the "probable value of additional or substitute procedural safeguards", moreover, would not provide basis for defeating the result of

the consideration of the previous two factors. This is because, as it was previously pointed out to the Court, "in Douglas, Evitts, and Halbert, this Court already has determined that if a criminal defendant was not represented on first-tier review of claims of error relating to his conviction, the risk (and costs) of an erroneous determination would be sufficiently great that the defendant has a Due Process right to effective assistance of counsel on such review. But none of those precedents means that the same is true on second-tier review, and Ross suggest the contrary. 2010 U.S. BRIEFS at [**48-49], and at note 9.

Finally, it should also be considered that in Halbert, supra, this Court's holding that [Michigan] defendants convicted on their pleas, who [sought] access to first-tier review, even though that review was discretionary, rather than of right, were entitled to "appointment of counsel" under the Fourteenth Amendment, Id., at 610, was based on the Court's conclusion that Douglas, rather than Ross, supra, provided "the controlling instruction", 545 U.S. at 616-617; and, that conclusion in turn, was based on two factors that correlated to the decisive considerations in those competing precedents:(a)"in determining how to dispose of an application for leave to appeal, Michigan's intermediate court look at the merits of the claims made in the application", and (b) "indigent defendants pursuing first-tier review [i.e., their first available opportunity for review] in the court of appeals, are generally ill equiped to represent themselves". Id. at 617, 618-622.

The holding and rational in Douglas and Halbert apply squarely to this case, and Ross therefore does not. With respect to Petitioner's ineffective assistance at trial claims, the first occasion to raise those claims available to him were the 29.15 proceedings. Moreover, both factors are fully satisfied here: (a) in deciding how to dispose of this category of claims

in 29.15 proceedings, a Missouri trial court- - -unlike the discretionary second-tier review in Ross- - - must "look at the merits" (and only the merits) of the claims; and, b) in 29.15 proceedings, Petitioner- - -unlike the defendants in Ross- - - had received no prior assistance of counsel in relation to this category of claims, i.e., effective assistance; and, he was, at least, as ill equiped as the defendants in Douglas and Halbert to represent himself in investigating and presenting such claims.

As such, under Douglas, Missouri's 29.15 proceedings effectively serve as the first appeal of any claim of ineffective assistance at trial and, hence, Petitioner was entitled to the right to counsel/effective assistance of counsel in relation to that category of claims: Missouri cannot infringe [at all] on a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a "compelling state interest". Reno V. Flores, 507 U.S. 292, 302 (1993).Further, in D.A.'s V. Osborne, 557 U.S. 52, 69 (2009)(citing Medina V. California, 505 U.S. 437, 446, 448 (1992), this Court stated that "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided". In this case, the Missouri Supreme Court summarily, and without more, denied Petitioner's petition for a writ of habeas corpus- - his last available remedy- - without requiring the State to respond or providing an opportunity to prove the allegations or addressing the merits of Petitioner's claim of ineffective assistance at trial,regarding the conviction, and likewise did the Missouri Court of Appeals and the initial state habeas court; the allegations of the petition, in connection with the documents presented in the 'Appendix of Exhibits', undeniably make 'a colorable probability of innocence' of the crime for which Petitioner is incarcerated and of ineffective assistance at trial.

The petition does not address the merits of Petitioner's Ineffective Assistance of Trial Counsel and Ineffective Assistance of Postconviction Counsel claims, because neither the Missouri Supreme Court, nor the Missouri Court of Appeals or the initial state habeas court did so. This Court, therefore, should reverse the judgment/order of the Missouri Supreme Court denying Petitioner's petition and remand with directions to require the Missouri Supreme Court to consider the merits of Petitioner's ineffective assistance claims.

II. Petitioner Should Have Been Afforded An Opportunity To Establish The Actual Innocence [Gateway] That Would Permit Review Of His Otherwise Procedurally Defaulted Ineffective Assistance At Trial Claim Because His Documents Are "New" Evidence For That Purpose.

As previously stated, in petitioning for state habeas relief from his conviction on the basis of ineffective assistance at trial, Petitioner conceded that the claim, and evidence, were procedurally defaulted, APPX. 'D' at p.p. 26-52, 55-56, but asserted that 'new evidence of actual innocence that was not presented at trial' would provide the basis for overcoming the default and permit review of the claim. APPX. 'D', at p.p. 6-23, 72-78, 85-90. The Missouri Supreme Court---as also the Missouri Court of Appeals and the initial state habeas court--- summarily, and without more, denied the petition. APPX. 'A', 'B', and 'C'.

However, when Missouri, having explicitly adopted the notion of innocence as a gateway to judicial review of procedurally defaulted evidence and issues as articulated by this Court in Schlup V. Delo, the failure to extend to Petitioner the benefit of the procedures for adjudicating the actual innocence "[gateway] to establish entitlement to review of his otherwise barred claim violated due process because his documents are "new" evidence for that purpose.

In Schlup, this Court held that in order to establish actual innocence, a prisoner must demonstrate that in light of "new reliable evidence...that was not presented at trial" it is more likely than not that no reasonable juror would vote to convict. 513 U.S. at 324, 326-327. Accordingly, in addition to citing to items and testimonies that were presented as part of his defense, Petitioner also referred and addressed [several] other documents---and their contents--- as "evidence that was not presented at (his) trial", APPX. 'D' at p.p. 6-23; and, those documents and their contents were presented to the Missouri Supreme Court (as well as to the Appellate and initial habeas court) as part of Petitioner's petition in an "Appendix of Exhibits", so as to confirm or give support to the allegations in the petition. APPX. 'E'. Undoubtedly, adequately authenticated to the satisfaction of a court, such [evidence] would sufficiently, not only establish Petitioner's ineffective assistance at trial claim, but also the 'actual innocence gateway' to permit review of the claim because, in light of such evidence, 'no reasonable juror would (have) voted to convict Petitioner'. Consider APPX. 'D' at p.p. 26-52, 85-90 in connection with APPX. 'E', as cited.

For the purpose of the 'actual innocence gateway', establishing the fraudulent nature of the prosecution's medical/forensic evidence and testimonies at trial, as alleged in the petition, should suffice. see Schlup, 513 U.S. at 329, 330-332; and consider APPX. 'D' at 6-15, 26-38, 86-89. Moreover, Petitioner has been attempting to present, and demonstrate, his 'actual innocence' in every available forum since the moment he became aware of the existence of the evidence which should establish it, and even at the time of his sentencing, when he complained about his lawyer not providing him with documents...the same documents presented which he received only [after] his direct appeal concluded. see Trial Transcript at 1099-[1106] ; and

APPX. 'E' at p.p. 163, 166, 167; [94-105] .

But Missouri expects that the 'actual innocence gateway' be established with 'new evidence that was not available at trial and could not have been discovered through due dilligence'. see e.g., McKim V. Cassady, 457 S.W. 3d 831; and Covey V. Moore, supra. That definition of "new" evidence, however, which is also the interpretation of the Third and Eighth Circuit Courts of Appeals (Amrine V. Bowersox and Hubbard V. Pinchak, supra), restrict the availability of the actual innocence gateway in a manner not contemplated by this Court; and, although there may be criticism regarding the 'more broader' interpretation of "new" evidence by the Seventh and Ninth Circuit Courts of Appeals (see Kidd V. Norman, 651 F.3d 947, 953 (8th cir. 2011)(citing Houck V. Stickman, 625 F.3d 88, 94 (3rd cir. 2010)), [this Court's] definition of "new" evidence as articulated and as applied in Schlup, is broader than Missouri's, the Third's, or the Eighth's Circuits definitions. Moreover, the hypothetical illustration by Chief Judge Hamilton in FN8 of Reasonover V. Washington, 60 F. Supp. 2d 937 (E.D. Mo. 1999), demonstrate---at the very least---why the criticism of the Amrine definition of "new" evidence, at least in circumstances which are also present in this case, is well founded. see Kidd V. Norman, 651 F. 3d at 952-53(citing to Houck V. Stickman, 625 F.3d 88, 94; and see also Reeves V. Fayette SCI, 897 F.3d 154 (3rd cir. 2018)(citing Houck,AND McQuiggin V. Perkins, 133 S.Ct. 1924 (2013).

According to[this Court], the availability of the actual innocence gateway is extremely limited because "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare"; and, because evidence sufficient to sustain the burden to establish it is "unavailable in the vast majority of cases, claims of actual innocence are rarely successful". Schlup, 513 U.S. 321, 324. To restrict, therefore, the availability of the

'gateway' exception based upon whether the evidence was available at the time of trial, not only is inconsistent with [this Court's] holding in Schlup, but also places a limitation not contemplated in Schlup.

In Schlup, this Court did not---although it could have---defined "new" evidence to include only evidence that was unavailable at trial and could not have been discovered through due dilligence. In fact, the Court reffered to [unavailable] evidence [once], and in the context which permits a habeas court to consider "all the evidence", including, but not limited to..." evidence available only after trial". Schlup, 513 U.S. at 327-328. This is consistent with the Court's view that, because the "emphasis on actual innocence", a habeas court considering the gateway claim is permitted to consider a "broader array of evidence". Id. at 328. In assessing the adequacy of a petitioner's showing, therefore, a habeas court is not bound by the rules of admissibility that would govern at trial; the miscarriage of justice standard is concerned with the truth and, therefore, requires the court to engage in [the broadest] possible range of inquire:...it is intended to focus the inquiry [on actual innocence].

'It is possible to infer from Justice Stevens' majority opinion that he intended to admit all newly-presented evidence, regardless of whether the evidence was available at the time of trial. 513 U.S. at 289, 324. Justice Stevens clearly employed the word "presented" rather than the word "discovered". Id. Similarly, the majority in House V. Bell, 126 S.Ct. 2064 (2006), appear to endorse liberal evidentiary rules for gateway petitions. Building on the language found in Schlup, Justice Kennedy's majority opinion stressed that in evaluating gateway claims, a habeas court's inquiry is not limited solely to "new reliable evidence...that was not presented at trial", House, 126 S.Ct. at 2077 (citing Schlup, at 324), even though he did not expound on what the limits are. consider 59 Hastings L.J. 711 (2008).

Indeed, because the word employed in Schlup was "presented" rather than the word "discovered", all Schlup requires is that the new evidence is reliable and that it was not presented at trial. Consider Gomez V. Jaimet, supra; 59 Hastings. Although Justice O'Connor concurring opinion in Schlup suggest that she intended the decision to only permit newly-discovered evidence based on her use of the word "discovered" rather than "presented", Id. at 332, the use of the word "presented in Justice Stevens' opinion suggest that "a habeas petitioner may pass through the Schlup gateway without "newly-discovered" evidence if other reliable evidence is offered [that was not presented at trial]". see Griffin V. Johnson, 350 F. 3d 673, 679. In citing Judge Friendly, the Court in Schlup endorsed the position that evidence which was excluded at trial should receive review by the habeas tribunal. 513 U.S. 298, 327-28.The Court reiterated this [mandate] in House V. Bell, 126 S.Ct. at 2064, 2077. As such, the Eighth Circuit's position in Amrine (as well as that of the Third Circuit...and Missouri's) that courts should only review evidence discovered after trial cannot be reconciled with the directive in Schlup. Moreover,as previously pointed out, even the Third Circuit recognize that the Amrine (and consequently, also Missouri's for all practical purposes) definition of "new" evidence---at least in one circumstance which is also present in this case--- may be flawed, Houck V. Stickman; Reeves V. Fayette, supra, and...in that respect, the Eighth Circuit only points out that "one panel of that Court may not overrule another". Kidd, supra, at 953.For Petitioner, and others similarly situated, however, that position may be incompatible with the principles of the fundamental miscarriage of justice, and with the nature---and purpose--- of the Great Writ.

Under Missouri's (as well as the Third and Eighth Circuits) requirement/ definition, the evidence presented by Petitioner is not "new", and therefore

may not be---and was not---considered by the habeas court; the Petitioner's Schlup claim must fail, notwithstanding the compelling evidence of actual innocence; Petitioner's claim would be procedurally barred, and the habeas court, as it was, precluded from ruling on Petitioner's ineffective assistance of counsel claim. see Reasonover V. Washington, 60 F. Supp. 2d 937 at FN8. "In contrast, under Schlup, the evidence presented by the Petitioner is "new" because it was not presented at trial". Schlup, 513 U.S. at 324. Assuming that the new evidence is reliable and sufficient to sustain the Petitioner's burden under Schlup, the habeas court must consider the merits of the Petitioner's ineffective assistance of counsel claim because failure to do so would result in a "fundamental miscarriage of justice". Reasonover, at Id.

The very nature of the writ of habeas corpus demands "that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected". Harris V. Nelson, 394 U.S. 286, 291 (1969). "Thus, a claim of actual innocence may be based on "reliable evidence not presented at trial", Calderon V. Thompson, 523 U.S. 538, 559 (1998)---whatever the reason it was not presented. see also Id. at 573 (Souter J, dissenting)(actual innocence standard is met with a "demonstration of innocence by evidence 'not presented at trial', even if it had been discovered, let alone discoverable but unknown, that far back). The question, in other words, is not whether the evidence is new to the defendant, but whether it is new [to the jury]. Having adopted the notion of innocence as a gateway to judicial review of defaulted evidence and issues by following the lead of this Court, Missouri is bound to follow the standard set by Schlup regarding what constitute "new" evidence and avoid seeming 'ambiguities' that may provide for the adoption of a different definition but that at the end of the day would be, indeed, incompatible

with Schlup, due process, the nature of the great writ...and with justice. Finally, evidence that the jury never heard in Petitioner's case (and in those of others similarly situated), may call into question the credibility of the witnesses presented at trial, thereby requiring the habeas court to make some credibility assessments. Schlup, 513 U.S. at 330. For more than 20 plus years of State and Federal proceedings, Petitioner has protested his innocence of the crime for which he is incarcerated. In support of his 'actual innocence' claim, which he assert under Schlup as a[gateway] to his underlying due process claim, Petitioner submitted to the Missouri Supreme Court (as well as to the Court of Appeals and the initial state habeas court) an "Appendix" of [exhibits] to support the allegations in his petition. Adequately authenticated to the satisfaction of a court, that evidence, in conection to the allegations in the petition, present a good case of a miscarriage of justice. As such, because Petitioner's evidence is "new" for the purpose of the'gateway', the Missouri Supreme Court was required to conduct an evidentiary hearing in order to evaluate Petitioner's evidence, and in order to decide whether or not he meets his burden in all respects regarding entitlement to review of his ineffective assistance at trial claim, and the granting of habeas relief. It is a fundamental principle under the Fourteenth Amendment that a prisoner's access to the courts cannot be obstructed or denied and, for example, when the Missouri Supreme Court did not required the State to answer a petition for a writ of habeas corpus and refused to allow the petitioner an opportunity to prove the allegations, this Court ruled that because the court failed to accord the state prisoners a full and fair hearing on their federal constitutional claims, the decisions denying those claims had to be reversed. see Williams V. Kaiser, 323 U.S. 471 (1945); Tomkins V. Missouri, 323 U.S. 485 (1945). Accordingly, the failure to extend to Petitioner the benefit of the pro-

cedures for adjudicating the 'actual innocence [gateway]' in order to establish entitlement to review of his otherwise procedurally defaulted ineffective assistance at trial claim violated due process: his documents are "new" [evidence for that purpose].

The petition does not address the merits of Petitioner's ineffective assistance at trial and ineffective assistance of postconviction counsel claims, because neither the Missouri Supreme Court, nor the Court of Appeals or the initial habeas court did so. This Court therefore should reverse the denial of Petitioner's petition by the Missouri Supreme Court, and remand with directions to require the Missouri Supreme Court to consider the merits of Petitioner's ineffective-assistance claim[s].

CONCLUSION

For the reasons presented above, Petitioner respectfully request this Court reverse with directions the denial of his state habeas corpus as requested.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 12-4-2019

Casey J Hansen 12-4-19

CASEY J HANSEN
Notary Public - Notary Seal
STATE OF MISSOURI
Clinton County
Commission # 17036169
My Commission Expires: 05-10-2021