

No. 21-_____

In The Supreme Court Of The United States

VINCENT MCFADDEN,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTION PRESENTED

The Missouri Supreme Court denied all of Petitioner's claims of ineffective assistance of counsel on post-conviction appeal, utilizing a skewed construction of the well-established *Strickland* standard. Rather than following *Strickland* and its progeny, the Missouri Supreme Court employed an outdated approach to *Strickland*'s performance and prejudice prongs to deny relief in direct contradiction of this Court's precedent in *Rompilla, Wiggins, Williams, Lockett, Eddings, and Tennard v. Dretke*.

Because of this tortured application, these questions are presented:

1. Whether the Missouri Supreme Court's total deference to counsel's "deliberate decisions" without considering their actual reasonableness amounts to an irrebuttable presumption of effectiveness, violating *Strickland*, and the Sixth and Fourteenth Amendments?

2. Whether the Missouri Supreme Court's application of a prejudice assessment that ignores the "one juror" test, never considers the totality of the evidence, and imposes a nexus requirement between the new mitigating evidence and the crime, violates *Strickland*, and the Sixth and Fourteenth Amendments?

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

State v. McFadden, Cause No. 03CR-000005 (Circuit Court of the County of St. Louis, Missouri)

State v. McFadden, 191 S.W.3d 648 (Mo. banc 2006) (direct appeal)

State v. McFadden, 369 S.W.3d 727 (Mo. banc 2012), *cert denied*, 568 U.S. 999 (2012) (second direct appeal)

McFadden v. State, Cause No. 12SL-CC04879 (Circuit Court of the County of St. Louis, Missouri) (post-conviction trial proceeding)

McFadden v. State, 2020 WL 1861425 (Mo. Apr. 14, 2020), *reh'g denied* (June 30, 2020) (post-conviction appeal)

LIST OF PARTIES

All parties to the proceedings are named in the caption of the case.

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Petitioner Vincent McFadden respectfully prays that a Writ of Certiorari issue to review the opinion entered by the Missouri Supreme Court.

INTRODUCTION

Petitioner brings this petition because the Missouri Supreme Court deviated from the well-established standard for ineffectiveness of counsel found in *Strickland v. Washington*, 466 U.S. 668 (1984), and ignored clear authority from this Court. This petition challenges the Court to protect its precedent as it did in *Andrus v. Texas*, 140 S.Ct. 1875 (2020) and *Sears v. Upton*, 561 U.S. 945 (2010). Instead of engaging in a rigorous standard of review when contemplating such a serious and irreparable penalty as death, the Missouri Supreme Court employed an outdated and lethargic assessment of Petitioner's claims. This approach deprived Petitioner of his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and ignores this

Court's precedent in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Tennard v. Dretke*, 542 U.S. 274 (2004).

This Court requires the Missouri Supreme Court to faithfully apply *Strickland* and its progeny. Simply, it is not too much to ask a state to comply with this Court's precedents. The Missouri Supreme Court departed from this Court's precedents in several ways. First, in addressing the performance prong of *Strickland*, the Missouri Supreme Court applied an irrebuttable presumption of effectiveness to all decisions made by counsel if they were made deliberately. The Missouri Supreme Court made no pretenses in their disregarding of *Strickland*'s essential inquiry into the actual reasonableness of counsel's decisions. Second, the Missouri Supreme Court engaged in an equally flawed and abbreviated prejudice inquiry. Specifically, the Missouri Supreme Court failed to properly assess the mitigation evidence that trial counsel presented by imposing an unreasonably high standard for mitigation – one rejected by this Court's Eighth Amendment precedent -- and utterly failing to assess the totality of the evidence as *Strickland* requires. The desultory analysis the Missouri Supreme Court did conduct improperly rejected this Court's "one juror" test and improperly required an unconstitutional nexus between the mitigation evidence and the criminal act. In this capital case, the Missouri Supreme Court fumbled both prongs of *Strickland* and remedial action is required.

OPINIONS BELOW

The opinion of the Missouri Supreme Court denying Petitioner's post-conviction claims on appeal is unpublished and found in the appendix at Apx. 1-16. *McFadden v. State*, 2020 WL 1861425 (Mo. Apr. 14, 2020). On June 30, 2020, the Missouri Supreme Court denied Petitioner's request for rehearing in an unpublished order, which is included in the appendix at

Apx. 17-18. The trial court's denial of Petitioner's ineffective assistance of counsel claims regarding the sentencing phase is attached in the appendix at Apx. 19-108.

JURISDICTIONAL STATEMENT

The decision of the Missouri Supreme Court became final on June 30, 2020. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1257 to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the interpretation of the Sixth Amendment, which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...to have the Assistance of Counsel for his defense.

This case further involves the Eighth Amendment, which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also implicates the Fourteenth Amendment, which provides:

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.

STATEMENT OF THE CASE

A. Procedural History

In July 2007, Petitioner was convicted of first-degree murder for acting with codefendant Michael Douglas in killing Todd Franklin. Petitioner was sentenced to death after the jury found five statutory aggravators including four prior assaultive convictions and depravity of mind in

Franklin's killing. Before this proceeding, Petitioner had been convicted of first-degree murder in two earlier trials and had received two death sentences, which were overturned by the Missouri Supreme Court for *Batson* violations after the State engaged in racially discriminatory jury selection. *See State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006) ("Franklin" case) and *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007) ("Addison" case).

After the Missouri Supreme Court affirmed Petitioner's death sentence for the Franklin murder and his subsequent petition for writ of certiorari to this Court was denied (*State v. McFadden*, 369 S.W.3d 727 (Mo. banc 2012), *cert. denied*, *McFadden v. Missouri*, 568 U.S. 999 (2012)), Petitioner timely filed his petition for post-conviction relief in the Circuit Court of St. Louis County. Petitioner asserted numerous claims of ineffectiveness of counsel and one claim of trial court error, which were denied by the Circuit Court on January 18, 2020. Apx. 19-108. The Missouri Supreme Court rejected Petitioner's claims on appeal on April 14, 2020 and denied his motion for rehearing on June 30, 2020. *McFadden*, 2020 WL 1861425 (Mo. 2020), *reh'g denied* (June 30, 2020).

In the second trial, a primary component of defense counsel's guilt phase strategy involved putting codefendant Michael Douglas on the stand to elicit testimony that he previously told defense counsel the shooters were Douglas and his brother Kyle Dismukes. However, consistent with what Douglas's attorney had warned defense counsel before trial, Douglas testified Petitioner was the second shooter and he had been lying when he told defense counsel otherwise while he was not under oath. Douglas's testimony therefore underpinned the State's argument and undermined the defense's theory. Defense counsel presented affirmative evidence of their client's guilt.

Further, counsel's mitigation presentation was equally misguided. Trial counsel focused primarily on Petitioner's challenging home life where he was passed around to various family members and frequently left alone as a young child. However, counsel's narrow focus on Petitioner's home life ignored an available, complementary, and non-contradictory mitigation strategy incorporating evidence of the terrible conditions of Petitioner's community, Pine Lawn, which would have inspired mercy in the jury. The defense's only expert witness in the penalty phase, Dr. Wanda Draper, presented an easily discounted non-medical assessment that Petitioner developed a "disorganized attachment" from his childhood lack of consistent role models—a weak assessment further weakened by Draper's insistence that Petitioner had no excuse for his crimes. The State seized on this as a basis to reject the entire mitigation presentation. This could not have occurred had trial counsel also presented the testimony of a cultural anthropologist or criminologist to explain the extent of the poverty and violence that ravaged Petitioner's community.

1. Having chosen to present affirmative evidence of his client's guilt, trial counsel failed to impeach defendant Michael Douglas with a sworn legal document in which he asserted that he was not present when Mr. Franklin was shot.

Michael Douglas testified that he was present with Petitioner and Douglas's brother, Kyle Dismukes, when they encountered Todd Franklin and two other men. (T. Tr. at 1624-27). Douglas testified that one of the men with Franklin shot at him, Petitioner, and Dismukes, so Douglas chased the shooter. (*Id.* at 1626-30). Douglas testified that he shot Mr. Franklin three to four times then passed the gun to Petitioner, who also shot him. (*Id.* at 1630-31).

Further, the State presented as evidence the casefile from Douglas's Rule 24.035 motion for post-conviction relief challenging his involvement in Mr. Franklin's murder. The casefile introduced a second, different version of the events surrounding Franklin's death. (*Id.* at 1546-

47). The file contained a verified motion filed by Douglas which asserted that he was not present when Mr. Franklin was shot and had alibi witnesses who would account for his whereabouts at the time of the shooting. (29.15 L.F. #130 at 59-61).

In a conversation on February 7, 2007 and in a letter written on the same day, Douglas told Petitioner's defense counsel a third version of events. In this version, Douglas vouched he was present at the shooting, but the second shooter had not been Petitioner but actually his brother, Dismukes. (29.15 Tr. at 45-48, 53, 462). However, trial counsel knew from Douglas' attorney Kim Freter that Douglas would not testify to this effect. Ms. Freter explicitly notified Petitioner's attorneys that Douglas would never contradict his guilty plea in which he stated that Mr. Franklin's shooters were himself and Petitioner. (*Id.* at 250-253). Furthermore, Petitioner's counsel testified in the post-conviction proceedings they believed they told Douglas he could receive 30 years as the sentence for committing perjury by contradicting his guilty plea. (*Id.* at 468-69).

But trial counsel put Douglas on the stand without impeaching him through the simplest vehicle at their disposal: the verified *pro se* motion in which Douglas averred that he was not even present at the shooting. (T. Tr. at 1622-97). Douglas's unimpeached testimony he and Petitioner shot Mr. Franklin fueled the prosecution's case during closing arguments both in the guilt phase and the penalty phase of the trial. The prosecution argued in the guilt phase not only that Petitioner killed Mr. Franklin but he and Douglas were people who tried to blame their crimes on others:

The letter that [Douglas] wrote to defense counsel, [that] he didn't think I would get, talks about the whole thing. The whole situation is all laid out. He's laying it out for the defense, but he put Kyle's name in there, who was dead. That's why he blamed it on Kyle. Because when he wrote the letter in '07, February of '07, Kyle had been dead since '03. So it's easy to put the murder on his dead brother to help

his Big Bro, which is how he refers to [McFadden] in the letter. That's his Big Bro. [McFadden] refers to Michael Douglas as Little Bro, okay? So that's why he blames it on Kyle. He blames it on a dead person. That's why he does it.

(*Id.* at 1728).

You never know with these guys. They're killers. They're cold-blooded killers. You never know what someone like Michael Douglas is going to say... or what's going to come out of their mouth.

(*Id.* at 1752).

The prosecution's closing arguments in the penalty phase also relied on the argument strengthened by Douglas's testimony, which was that Petitioner blamed his crimes on others:

He doesn't need anyone with him for the courage to kill. He's the one. He's the strong man. He's the leader in this killing. He's the one. He's never taken responsibility for his actions. Never.

(*Id.* at 2384). Thus, defense counsel presented affirmative evidence of their client's guilt but also undermined their mitigation theory by presenting what the State characterized as a lack of remorse – the worst non-statutory aggravator that can be asserted.

During post-conviction trial proceedings, defense counsel offered a post-hoc rationalization that putting Douglas on the stand was the only way to present their theory that Douglas and Dismukes shot Mr. Franklin and Petitioner did not. (29.15 Tr. at 57, 462). This post-hoc justification collapses when considered in the context of defense counsel's primary closing argument during the guilt phase. Contrary to their self-serving, post-hoc justification offered in post-conviction; trial counsel actually focused on how it was hard to know what happened during Mr. Franklin's murder. (T. Tr. at 1755-75). Inconsistent with their subsequent testimony, counsel emphasized that the jury could not believe everything Douglas said, stating "I don't know about what everything Michael Douglas said what's true and what isn't true. It's hard to say." (*Id.* at 1770). Thus, trial counsel's jury argument and characterization of Douglas's

testimony undermines the veracity and credibility of the self-serving, post-hoc justification offered in post-conviction.

The State pounced on defense counsel's error. In the State's rebuttal argument in the guilt phase, the prosecution restated the advantage that trial counsel had conceded by failing to impeach Douglas and instead presenting testimony that the shooters were Douglas and Petitioner:

They didn't have to put Michael Douglas on. They chose to. **That made my case that much stronger.** Now you know the whole situation. It's their calculated decision. **That helped me.** If you didn't think he was guilty before, you knew he was guilty then. **Just because they put it on doesn't mean it's their evidence. Sometimes their evidence helps the State. In this case it did.**

(*Id.* at 1777) (emphasis added).

Moreover, Douglas's unimpeached testimony allowed the prosecution to introduce highly prejudicial letters. The State introduced letters between Petitioner and Douglas while they were incarcerated to demonstrate that the codefendants were conspiring to exonerate Petitioner by placing blame on Dismukes. (*Id.* at 1520-34; 1541-45; 1564-69). The letters included gang references that defense counsel had ostensibly worked hard to keep out of the trial because, as counsel acknowledged in post-conviction proceedings, the letters would cause the jury to infer Petitioner's gang involvement. (Trial Exs. 502, 503, 504, 505, 506; 29.15 Tr. at 588-90). Had counsel's error not rendered these letters valid impeachment material, counsel could have successfully objected to the letters as irrelevant hearsay.

Trial counsel's failure to impeach their witness Michael Douglas with his sworn *pro se* motion resulted in fodder for the prosecution's case that Petitioner was the second person to shoot Mr. Franklin. Notwithstanding counsel's grievous error in putting Douglas on the stand at all, their failure to undercut Douglas's damaging testimony also bolstered the State's argument

that Petitioner blamed Douglas's deceased brother. These mistakes undermined Petitioner's chances in the guilt phase of the trial and irreparably damaged the defense's own mitigation case in the penalty phase by painting Petitioner in an unsympathetic light.

2. *Trial counsel failed to present Dr. White or a similar expert as mitigation about the harsh realities of living in Pine Lawn and the disadvantage these circumstances posed to Petitioner, which would have inspired mercy in the jury.*

Dr. Norman White was a criminologist who studied the effect of environment on young people's involvement in crime. He was recruited to study Pine Lawn life and its effects on Petitioner as a child and adolescent in the 1980s-1990s. (29.15 Ex. 43 at 459; 466-67). In his report, Dr. White described how Petitioner grew up in Pine Lawn, Missouri at the outskirts of St. Louis at a time when the crack epidemic had grown exponentially, resulting in significant increases in gang membership and violence. (*Id.* at 477). The crack epidemic, combined with preexisting systemic racism, resulted in severe poverty, high crime and unemployment rates, and single-family households in extremely segregated African-American neighborhoods. (*Id.* at 478-83; 492-94). Nearly an entire generation of Pine Lawn men Petitioner's age ended up dead or in prison due to the crack epidemic and its consequences on the African-American community, already subjected to generations of racial injustice. (*Id.*)

Dr. White also created a video in which he interviewed numerous residents who described their experiences growing up in Pine Lawn. (*Id.* at 468, 497) The overall investigation revealed that growing up in Pine Lawn was like growing up in a war zone where there is a constant struggle simply to survive. (*Id.* at 487-88). Interviews Dr. White conducted with residents outlined how Pine Lawn police were both unreliable and corrupt, so no one in the community would call them for help. (29.15 Ex. 37 at 14:22-15:48).

Despite the significant potential for mitigation stemming from evidence of Pine Lawn's violence and poverty which Dr. White or a similar cultural anthropologist or criminologist could have offered, defense counsel engaged a mitigation strategy that single-mindedly focused on putting Petitioner's challenging childhood and family life under the microscope. Counsel presented testimony from several family members including Petitioner's grandmother, Minnie McFadden, his aunts Fay McFadden and Lisa Northern, and testimony read from the first trial of his uncle Don Northern who had passed away before the second trial. (T. Tr. at 2102-18; 2079-2102; 2118-34; 2136-46). Their testimony centered on evidence that Petitioner had not had a consistent family member present in his early life, in particular a lack of a father figure, since his own father was around very little and had an alcohol problem all throughout Petitioner's childhood. (*Id.* at 2082-2085; 2107-09).

Defense counsel underscored their strategy of focusing on Petitioner's family history challenges in their penalty phase opening statement. (*Id.* 1837-41). Counsel also set the stage for Dr. Wanda Draper's testimony to be the primary vehicle for interpreting Petitioner's background and its effect on him as a person. After briefly describing his family challenges with glancing references to the "violent neighborhoods of Pine Lawn," defense attorney Kraft stated,

Now, you may say, why does this all matter? Why do we care about that? Well, Dr. Wanda Draper, who is a world-renowned child psychologist, will be here to testify. And she will tell you the things that occurred during McFadden's upbringing that can knock normal childhood development off track: That he did not get the things that he should have gotten from his parents from his upbringing.

(*Id.* at 1838-1840).

Dr. Draper's testimony— drawn from one three-hour meeting with Petitioner, isolated interviews with his family members, and reviewing his records— largely ignored or downplayed

the broader societal issues in Pine Lawn and their resulting impact on Petitioner. (*Id.* at 2223-2329). Instead, Dr. Draper focused on Petitioner’s family’s shortcomings and her assessment of his developmental problem which she termed “disorganized attachment,” though Dr. Draper was not a doctor, psychiatrist, psychologist, or licensed in any capacity. (*Id.* at 2235; 2307). She spoke at length about Petitioner being passed around as a child and in particular about the lack of a consistent father figure. (*Id.* at 2233-38). However, the defense’s witness Don Northern was characterized as a fill-in father figure even in the defense’s own questioning of his widow Lisa Northern, which undermined Dr. Draper’s focus on this deficiency in Petitioner’s upbringing. (*Id.* at 2118-34).

Dr. Draper further attempted to pinpoint the nexus between the challenges in Petitioner’s upbringing and the crime he committed, rather than providing contextual evidence about Pine Lawn’s violence and poverty which likely would have mitigated Petitioner’s culpability in the eyes of the jury. She described the different attempts made to help Petitioner change his path, including placing him in a juvenile program and a halfway house, as “[t]oo many approaches to getting him to become a good citizen. It couldn’t work. It was too late.” (*Id.* at 2249-50).

On the other side, the State focused on demonstrating Petitioner’s dangerousness and propensity to kill contrasted against Todd Franklin’s portrayal as an innocent victim, aiming to prove that growing up in Pine Lawn did not automatically make someone a killer. (*Id.* at 2388-93; 2301-04). The prosecution accordingly capitalized on Dr. Draper’s testimony which fixated on Petitioner’s family and her statement there were no excuses for Petitioner’s violent behavior. During the prosecution’s cross-examination, Dr. Draper’s answers undercut much of the mitigating value of her testimony and demonstrated her severe minimization of Pine Lawn’s desperate living conditions:

Q: Many kids grow up in his same neighborhood and do fine, don't they?

A: Yes

Q: You're not trying to imply that if you grow up in Pine Lawn, that you're destined to fail, are you?

A: Absolutely not.

Q: There's a lot of good, hard-working, God-fearing people in Pine Lawn.

A: Yes.

Q: Most of them you'd say, wouldn't you?

A: Yes.

Q: Like 95 percent.

A: Yes.

Q: Maybe 99 percent.

A: Yes.

(*Id.* at 2303-04).

In the penalty phase closing argument, the prosecution lobbied the jury about the lack of convincing mitigation evidence, “I don’t know where you’re going to find **any** mitigation in this case. You’re going to have to be **very creative thinkers to come up with some mitigation in this case.**” (*Id.* at 2377) (emphasis added).

Overall, trial counsel’s failure to present relevant and crucial mitigating evidence about Pine Lawn through a report similar to Dr. White’s meant that Dr. Draper’s damaging statements undercut any chance of successful mitigation. Instead of the most salient mitigation evidence about the war zone-like environment that was Pine Lawn in the 1980’s and 1990’s which Dr. White’s report described, the jury primarily heard defense counsel’s evidence about Petitioner’s family life challenges which were then undermined by the defense’s own witnesses. Defense counsel should have presented a cultural anthropologist or criminologist such as Dr. White, which would have had a reasonable probability of convincing one juror to impose a sentence less than death.

REASON FOR GRANTING THE WRIT

In denying Petitioner's *Strickland* claims, the Missouri Supreme Court applied an incorrect *Strickland* standard to his arguments about counsel's ineffectiveness, which circumvented constitutional standards promulgated by this Court's precedent. This Court should grant certiorari to clarify whether state courts can avoid Supreme Court precedent by employing an alternative *Strickland* standard. Alternatively, this Court should grant, vacate, and remand to ensure that the Missouri Supreme Court assesses Petitioner's *Strickland* claims utilizing the correct constitutional standard.

I. The Missouri Supreme Court Mischaracterizes *Strickland*'s Performance Prong By Presuming Counsel's Effectiveness In All Deliberately Made Trial Decisions In Violation of this Court's Decisions in *Rompilla* and *Wiggins*.

This Court has been clear. A proper analysis of ineffective assistance of counsel claims under *Strickland* involves two well-established prongs: the performance prong which assesses whether counsel's conduct was objectively reasonable, and the prejudice prong which assesses whether counsel's deficiency prejudiced the defendant. *Strickland*, 466 U.S. 668.

The Missouri Supreme Court's decision in Petitioner's case exemplifies its routine misapplication of the performance prong in which the court defers completely to counsel if counsel made a deliberate trial decision, regardless of the decision's objective reasonableness. Herein, the Missouri Supreme Court dismisses several ineffective assistance of counsel claims (IAC) simply by deferring to counsel's defense strategy without engaging in an inquiry into the reasonableness of each tactical decision. *McFadden v. State*, 2020 WL 1861425, at *3 (affirming denial of an IAC claim for failure to impeach codefendant Douglas with his Rule 24.035

motion); *see also id.* at *11 (affirming denial of an IAC claim for failure to present evidence of codefendant Douglas's affidavit).

This Court's *Strickland* analysis demands more. Indeed, the Missouri Supreme Court's assessment of these claims runs counter to this Court's precedent which clarifies "performance [is] measured against an objective standard of reasonableness... under prevailing professional norms." *Rompilla v. Beard*, 545 U.S. 374 (2005) (internal quotation marks omitted) (citing *Strickland*, 466 U.S. at 688, and *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). Failure to engage with the question of reasonableness by assessing performance in the context of professional standards is an abdication of *Strickland* per this Court's precedent. What the Missouri Supreme Court failed to comprehend is that it is not enough that a deliberate decision was made – that decision *must* be assessed for reasonableness in the context in which that decision was made.

The Missouri Supreme Court's dismissal of IAC claims on failure of trial counsel to impeach Douglas best demonstrates the court's fundamental misunderstanding of *Strickland's* performance prong requirements. In denying Petitioner's IAC claim for failure to impeach Douglas with his Rule 24.035 motion, the court states, "It is presumed that counsel's decision not to impeach a witness is a matter of trial strategy." *McFadden v. State*, 2020 WL 1861425, at *3 (citing *Barton v. State*, 432 S.W.3d 741 (Mo. banc 2014)). Implicit in this standard is the court's over-deference to counsel's deliberately made decisions without examining their reasonableness.

This shorting of *Strickland* occurred due to the Missouri Supreme Court's reliance on a Missouri interpretation of the Sixth Amendment predating *Strickland*. An examination into the Missouri Supreme Court's citation for this impeachment deference standard reveals that it originates from at least 1976, eight years before *Strickland* was decided, in *Haynes v. State*, 534

S.W.2d 552 (Mo. App. 1976).¹ The court did not rely upon an updated IAC analysis regarding impeachment after *Strickland*. Instead, the court applied an outdated standard. Were this Court to give the Missouri Supreme Court the benefit of the doubt it applied an updated *Strickland* analyses (with no explicit recognition of the new standard), the Missouri Supreme Court's application mischaracterizes *Strickland*. The court improperly conflated trial strategy with reasonableness and applied this presumption to counsel's decision not to impeach a witness.²

The Missouri Supreme Court's misguided approach to the performance prong makes it all too easy for meritorious IAC claims to be dismissed. The Missouri Supreme Court's interpretation of the performance inquiry effectively sanctions any deliberate decision made by

¹ *Barton*, 432 S.W.3d at 750, citing *State v. Phillips*, 940 S.W.2d 512, 524 (Mo. banc 1997) ("The movant also must overcome the presumption that the decision not to impeach was a matter of trial strategy."); *Id.*, citing *State v. Dunn*, 889 S.W.2d 65, 76 (Mo. banc 1994) ("A movant has the burden to show how impeachment on these points would have provided him a defense... The movant also must overcome the presumption that the decision not to impeach was a matter of trial strategy."); *Id.*, citing *State v. Roe*, 845 S.W.2d 601, 606 (Mo. banc 1990) ("Failure to impeach a witness as a matter of trial strategy cannot constitute the basis for a charge of ineffective assistance of counsel."); *Id.*, citing *McClain v. State*, 686 S.W.2d 879, 881 (Mo. App., E.D. 1985) ("Failure to impeach a witness as a matter of trial strategy does not serve as a basis for a charge of ineffective assistance of counsel."); *Id.*, citing *Jackson v. State*, 540 S.W.2d 616, 617 (Mo. App. 1976) ("Under the circumstances, the question of impeachment and of obtaining a gun expert were matters of trial strategy and technique, which will not serve as a basis for ineffective assistance of counsel.") (citing *Haynes*, 534 S.W.2d 552).

² In fact, the court applied yet another outdated standard which at best mischaracterizes, and more likely ignores *Strickland*, in its treatment of Petitioner's claim of IAC for failure to object to letters exchanged between Petitioner and Douglas. In the same vein as the court's failure to apply *Strickland* with its over-deference to counsel's decision not to impeach a witness, the court denied Petitioner's claim on the letters because, "prejudice cannot be found from the admission of hearsay evidence if the declarant 'was also a witness at trial, testified on the same matter, and was subject to cross-examination.'" *McFadden*, 2020 WL 1861425, at *4 (citing *State v. Tindle*, 395 S.W.3d 56, 63 (Mo. App. 2013)). Tracing the *Tindle* standard back to its earlier citations shows that the Missouri Supreme Court draws it from a 1972 case published well before *Strickland*, in which the court concludes that a police officer's testimony was not prejudicial since he had taken the stand and, "[h]earsay evidence is objectionable 'because the person who makes the statement offered is not under oath and is not subject to cross-examination.'" *State v. Robinson*, 484 S.W.2d 186, 189 (Mo. 1972).

The Missouri Supreme Court's iteration of the hearsay standard in Petitioner's case went beyond the *Robinson* standard, let alone adapting to *Strickland*. In denying Petitioner's claim, the court prohibited the finding of prejudice when the declarant is put on the stand even if the evidence that a petitioner challenges as objectionable (in this case, letters presented as exhibits) is not identical to the evidence the declarant gives on the stand. This approach circumvents *Strickland* by failing to take into account the "totality of the evidence before the judge and jury" or consider the possible "pervasive effect" the hearsay evidence at issue could have had on inferences drawn by the jury. *Strickland*, 466 U.S. at 695. Moreover, this approach deprives a capital defendant of the opportunity for critical challenges to his sentence to be fully heard and considered.

an attorney. The court may easily rationalize the decision as comporting with the defense strategy regardless of the reasonableness of that decision in the context in which it was made. This allows the court to shortchange a proper IAC claim assessment, creating an irrebuttable presumption of trial counsel's reasonableness to quickly dismiss claims without a full hearing.

Petitioner accepts that *Strickland* requires a reviewing court to provide deference to trial counsel's strategic decisions made after thorough investigation and consideration. Those decisions are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. However, courts must determine whether counsel conducted "substantial investigations" in order to decide whether each decision reflected "professional judgment" and thus passed *Strickland* muster. *Id.* at 681. This analysis necessarily requires courts to address counsel's decisions in light of the investigation for each IAC claim before approving them as reasonable. The Missouri Supreme Court bypasses this critical step in its performance prong inquiries, giving its stamp of approval by simply characterizing decisions as reasonable if they "support the defense's strategy," without a further look into the reasonableness of the strategy itself. *McFadden*, 2020 WL 1861425 at *3; *see also McLaughlin v. State*, 378 S.W.3d 328, 346 (Mo. banc 2012).

The Missouri Supreme Court has engaged in a thorough reasonableness inquiry in certain elements of IAC cases in its jurisprudence, and the analysis in these instances contrasts markedly with that utilized to deny many of Petitioner's claims. *See Strong v. State*, 263 S.W.3d 636, 649 (2006) (discussing at some length the reasonableness of counsel's choice of a particular defense strategy). Such analyses better meet the *Strickland* standard and support its overarching goal of ensuring the fundamental fairness of a defendant's trial under the Sixth and Fourteenth Amendments.

Occasionally this Court must intervene to protect the integrity of its precedent, such as in *Andrus* where the Court rebuked the Texas Court of Criminal Appeals for its unacceptably truncated *Strickland* analysis. 140 S.Ct. 1875; *see also Sears*, 561 U.S. 945. The Missouri Supreme Court’s obligation to faithfully conduct a proper inquiry into *Strickland*’s performance prong must be enforced. This Court has consistently mandated that a proper analysis is one in which counsel’s strategy itself is assessed for its reasonableness. It is not enough for a reviewing court to declare or make a reference to a defense strategy – this creates an irrebuttable presumption under the Sixth Amendment. This Court has rejected irrebuttable presumptions in comparable circumstances. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978) (refusing to permit a ““conclusive presumption [of intent],”” which ““would effectively eliminate intent as an ingredient of the offense”” (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952)). Similarly, a State must permit the defendant to raise challenges to the State’s conviction and/or sentence. See *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (affirming the defendant’s right to ““have a meaningful opportunity to present a complete defense”” (internal quotation marks omitted)).

For counsel’s trial decisions to pass constitutional muster, they must be assessed for their reasonableness. Petitioner’s IAC claims will only receive proper treatment – and his constitutional rights will only thereby be upheld – if the Missouri Supreme Court applies the correct performance prong analysis.

II. The Missouri Supreme Court Evades A Proper *Strickland* Prejudice Inquiry By Dismissing Relevant Mitigation Evidence Without Weighing Its Possible Impact On At Least One Member Of The Jury.

The Missouri Supreme Court’s interpretation of the prejudice prong in this case conflicts with the objective reasonable-probability test mandated by *Rompilla*, 545 U.S. 374, *Wiggins*, 539

U.S. 510, *Williams*, 529 U.S. 362, *Porter v. McCollum*, 558 U.S. 30 (2009), *Sears*, 561 U.S. 945, and *Strickland*, 466 U.S. 668. The prejudice analysis requires just “a reasonable probability that at least one juror would have struck a different balance’ regarding [the defendant’s] ‘moral culpability.’” *Andrus*, 140 S.Ct. at 1886 (citing *Wiggins*, 539 U.S. at 537–538).

In its prejudice prong analysis in Petitioner’s IAC claims, the Missouri Supreme Court repeatedly circumvents this Court’s *Strickland* mandates. Instead of projecting the effect that each piece of evidence would have had on the mitigation/aggravation balance and appropriately weighing the resulting effect on the case’s outcome, the court brushes aside numerous pieces of new evidence if the court determines that it would not produce a “viable defense.” *McFadden*, 2020 WL 1861425 at *8. A “viable defense,” according to the Missouri Supreme Court, is “one in which there is a reasonable probability that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor resulting in the jury voting against the death penalty.” *Id.* at *7 (citing *Deck v. State*, 381 S.W.3d 339, 346 (Mo. banc 2012)).

The Missouri Supreme Court’s “viable defense” requirement first misrepresents *Strickland* by unduly disregarding potentially mitigating evidence. New evidence which involves both mitigating and aggravating elements, which has been termed “double-edged” mitigation by Justice Sotomayor, must be considered not in isolation but rather in the context of the “totality of the available mitigation evidence... and reweigh[ed] [] against the evidence in aggravation.” *Sears*, 561 U.S. 945; *see also Trevino v. Davis*, 138 S.Ct. 1793, 1794 (2018) (Sotomayor, J., dissenting). The Missouri Supreme Court’s “viable defense” standard is a blatant error in a *Strickland* analysis which threatens to erode a defendant’s ability to ever show prejudice in his

IAC claims so long as the aggravating elements of new evidence could be construed as outweighing its mitigating effect, despite its effect on the entirety of the evidence.

In *Lockett*, this Court held that “the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” 438 U.S. 586, 604. This holding was extended in *Eddings*, 455 U.S. 104. “The sentencer[s] … may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.” *Id.* at 114-15.

Further, this “viable defense” requirement constitutes a misapplication of *Strickland* by overstating the defendant’s burden in proving that a piece of new mitigation evidence would have changed the outcome of the trial. The Missouri Supreme Court writes that new mitigating evidence must sway “**the jury**” in defining its term “viable defense.” *McFadden*, 2020 WL 1861425, at *7 (citing *Deck*, 381 S.W.3d at 346) (emphasis added). However, this Court restated *Strickland*’s critical language in *Wiggins*, whereas “there is a reasonable probability that **at least one juror** would have struck a different balance” in weighing the evidence for and against sentencing the defendant to death. *Wiggins*, 539 U.S. at 537 (emphasis added). The Missouri Supreme Court requirement of the entire jury as opposed to “at least one juror” overburdens a defendant’s task. It risks allowing courts to dismiss new pieces of mitigating evidence too easily through too narrow a lens, unconstitutionally ignoring this Court’s explicit instructions as reiterated in *Wiggins*.

The Missouri Supreme Court used this incorrect formulation of *Strickland* to deny several of Petitioner’s claims. *McFadden*, 2020 WL 1861425, at *3 (denying the claim of failure to call

Tanesia Kirkman-Clark); *see also id.*, at *8 (denying the claims of failure to call Dr. White and to provide Dr. Draper with Dr. White’s report); *id.*, at *10 (denying the claim of failure to call Butch Johnson, investigator); *id.*, at *11 (denying the claim of failure to call Maggie Jones to impeach Eva Addison’s testimony.)

Even when the Missouri Supreme Court refrains from incorrectly dismissing new mitigation evidence if it does not produce a “viable defense,” the court shortchanges a proper prejudice inquiry required under *Strickland* by failing to fully engage with the likely impact of different decisions made by trial counsel or new pieces of evidence. As demonstrated above in the performance prong discussion, the Missouri Supreme Court is willing to speculate when it comes to counsel’s decisions, deeming any deliberate decision a reasonable trial strategy and therefore ineligible as deficient performance. However, it does not speculate in the appropriate context of the prejudice prong as this Court has prescribed. *See Sears*, 561 U.S. at 956 (emphasizing the need for courts to consider the totality of mitigation evidence which “necessarily requires a court to ‘speculate’ as to the effect of the new evidence”); *see also Andrus*, 140 S.Ct. at 1887 (citing *Sears*).

In Petitioner’s case, the Missouri Supreme Court failed to speculate whether certain unpresented pieces of evidence or different decisions made by trial counsel would have changed the mind of one jury member and therefore the outcome of the trial. A proper prejudice assessment would have included discussion on the potential impact of Dr. White’s testimony. The court should have explored the possibility that one member of the jury could have changed her mind about imposing capital punishment if she had heard about the generation of Pine Lawn men either dead or in prison, the deep corruption of the Pine Lawn police, the war zone-like environment of the community, and countless other factors influencing Petitioner’s upbringing

that remained unknown to the jury. However, the court brushed aside this IAC claim without so much as comparing the Pine Lawn evidence which was not presented with the extremely limited evidence put forth by the defense. *McFadden*, 2020 WL 1861425, at *8.

The Missouri Supreme Court’s regular reliance on outdated and misconceived standards fails to respond to directives from this Court. Petitioner’s claims did not receive a full and proper prejudice inquiry which assessed the fundamental fairness of his trial under the Sixth and Fourteenth Amendment. This petition asks the Court to clarify *Strickland*’s authority for the Missouri Supreme Court, so it properly applies the prejudice prong standard not only in Petitioner’s case but also in future IAC litigation, ensuring that all capital defendants receive a constitutional review of their claims.

III. The Missouri Supreme Court Requires An Unconstitutional Nexus Between Mitigating Evidence And The Crime Being Tried Before Considering That Evidence’s Exclusion To Be Ineffective Assistance Of Counsel.

Since the death penalty’s effective reinstatement in *Furman v. Georgia*, 408 U.S. 238 (1972), this Court restricts its implementation, so it is applied in a “consistent and rational manner.” *Lockett*, 438 U.S. 586, 601; *see also Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (interpreting *Furman* to require sentencing procedures which avoid an “arbitrary and capricious” result). Mitigating evidence is key in the fair and consistent imposition of the death sentence, and accordingly the sentencer may not preclude the defense from presenting relevant mitigation. *Eddings*, 455 U.S. 104, 113 (applying *Lockett* to a case in which the facts of a defendant’s family history were excluded from evidence by the trial judge).

Further, this Court has expressly denied that *Strickland* requires a nexus between mitigation evidence not presented and the crime being tried. In *Tennard v. Dretke*, 542 U.S. 274

(2004), this Court rejected the Fifth Circuit’s nexus test, which disregarded evidence of the defendant’s mental disabilities because it did not relate to the crime he committed. The Court cited *Eddings* among other authority to emphasize the need to examine all relevant mitigating evidence to comply with the Eighth Amendment. *Id.* at 284. The Court again rejected the nexus test in *Smith v. Texas*, 543 U.S. 37 (2004), after a Texas state court determined that the “petitioner had offered ‘no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder.’” *Id.* at 45 (citing *Ex parte Smith*, 132 S.W.3d 407, 414 (Tex. Crim. App. 2004)); *see also Hodge v. Kentucky*, 568 U.S. 1056, 1061 (2012) (Sotomayor, J., dissenting from cert denial).

Most glaringly in its rejection of Petitioner’s IAC claim for trial counsel’s failure to call Dr. White, the Missouri Supreme Court implemented the nexus test this Court has determined violates principles of the Eighth Amendment. The Missouri Supreme Court acknowledged the mitigating value of Dr. White’s testimony but then improperly rejected it based on the court’s sundry mischaracterizations of the prejudice prong analysis:

Although Dr. White’s testimony would have further supported the defense’s mitigation theory, Dr. White was unable to opine how growing up in Pine Lawn actually impacted McFadden’s decision to murder Victim. Because the defense presented ample evidence of the Pine Lawn culture and its effects on McFadden’s childhood and development – including testimony by another expert, Dr. Draper – additional expert testimony on this topic would have been of limited assistance.

McFadden, 2020 WL 1861425, at *8.

This passage represents a neat microcosm of the Missouri Supreme Court’s *Strickland* mismanagement, demonstrating the court’s incorrect approach in two concise sentences. First and most obviously, the court dismissed Dr. White’s testimony because it did not believe that the testimony shows how Petitioner’s upbringing caused him to commit this crime. The court thus

creates an unconstitutional nexus requirement by which mitigation evidence must be directly related to the charged crime before its exclusion by trial counsel could be considered IAC. The court's adherence to this nexus requirement is also referenced in the introduction of the Missouri Supreme Court's opinion, where it states that Dr. Draper—the only expert presented by the defense as mitigating evidence—explained that "McFadden's environment partially caused his violent behavior." *Id.* at *1.

The court's nexus requirement violates *Eddings* by excluding relevant mitigating evidence that potentially could have tipped the mitigation v. aggravation balance in favor of mitigation. This outlier approach, requiring a nexus requirement, forces defense counsel to present only those expert witnesses who may speculate as to or establish an actual causal link between a defendant's background and the crime. But this is not what is required by *Tennard* and *Smith*. Requiring such damages an expert's credibility in attempting to establish a nexus and forecloses the consideration of relevant mitigation. Additionally, when defense counsel is forced to play a blame game and identify external factors which caused the defendant to commit the crime, a defendant risks appearing not to take responsibility for his actions and pushes the jury away from mercy in their sentencing. Petitioner contended with this difficulty since his own trial counsel misguidedly focused on mitigating evidence with a nexus to the crime, yet his own expert witness Dr. Draper stated that he had "no excuses." (T. Trial 2251).

Further, this excerpt demonstrates the court's truncated prejudice approach. Instead of weighing the likely impact of Dr. White's testimony presented in addition to Dr. Draper's and its resulting effect on the mitigation and aggravation balance, the court deems this additional evidence, "of limited assistance" since Dr. Draper previously testified generally about Pine Lawn. *Id.* at *8. The court never speculates on the jury's potential change of heart had the jury

learned about Pine Lawn’s crushing poverty, ubiquitous gang violence, and corrupt police force from an expert who actually spent time in the community. This is the precise erroneous *Strickland* application this Court condemned in *Sears*. *See also Hodge*, 568 U.S. at 1060-61 (noting that in rejecting mitigation and conducting a truncated analysis of mitigation the state courts are running afoul of this Court’s precedent that dictates “that mitigation does not play so limited a role”) (Sotomayor, J., dissenting from cert denial). Serving as a counterpoint to Dr. Draper, an expert who outright condemned Petitioner for his actions while on the stand for the defense, testimony from Dr. White or a similar expert could have produced a powerful shift in the jury’s attitude and propensity towards mercy for Petitioner.

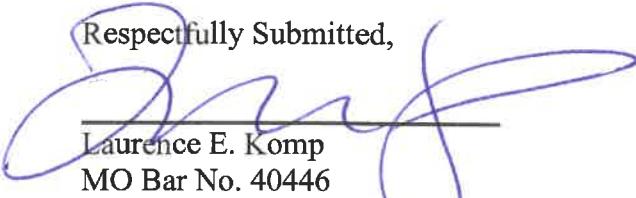
Clearly, the Missouri Supreme Court’s mistakes in applying *Strickland*’s performance and prejudice prongs are rendered even worse with adding its unconstitutional nexus requirement. The court’s approach violates *Lockett* and *Eddings* by failing to properly consider potentially mitigating evidence. Further, this approach erodes Petitioner’s constitutional rights, including his right to a fair trial under the Sixth and Fourteenth Amendments and freedom from cruel and unusual punishment under the Eighth Amendment. Petitioner asks for no more than the constitutional standard which this Court has afforded others in capital cases by affirming its authority and instructing lower courts to properly follow its precedent.

CONCLUSION

The Missouri Supreme Court misapplied the *Strickland* standard for ineffective assistance of counsel claims in Petitioner’s post-conviction appeal on several fronts. The court applied a nearly irrebuttable presumption of effectiveness to all deliberately made decisions by counsel, engaged in an inadequate “viable defense” prejudice inquiry which unduly dismissed double-edged mitigation evidence, and required an unconstitutional nexus between mitigating evidence

and the criminal act. Because the Missouri Supreme Court has decided an important federal question in a manner contrary to numerous of this Court's precedents, this Court should clarify for the Missouri Supreme Court its obligations under *Strickland* when assessing ineffective assistance of counsel claims pursuant to Sup. Ct. R. 10 (c). Alternatively, this Court should grant, vacate, and remand this case for reconsideration so the court may apply the full and proper standard for IAC claims as mandated by this Court.

Respectfully Submitted,



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This petition was written with the assistance of Legal Intern, Ms. Emily Curran, a 2L attending the University of Minnesota Law School.

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No. 21-_____

In The Supreme Court Of The United States

VINCENT MCFADDEN,

Petitioner,

v.

STATE OF MISSOURI,

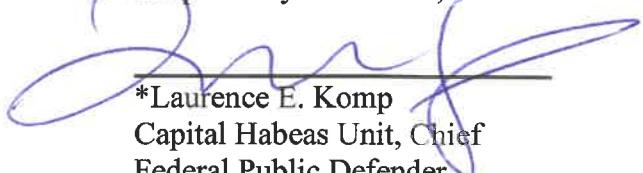
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis, Petition for Writ of Certiorari, and Certificate of Service were served via regular U.S. Mail, on this 16th day of November 2020 upon Mr. Eric. S. Schmitt, Attorney General, P.O. Box 899, Jefferson City, MO 65102. All persons required to be served have been served.

Respectfully Submitted,



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