

****THIS IS A CAPITAL CASE****

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARMAN DECK, Petitioner

v.

PAUL BLAIR, Warden, Potosi Correctional Center, and
ERIC SCHMITT, Attorney General, State of Missouri, Respondents

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Court is familiar with Mr. Deck, having reversed his second death sentences due to state action that occurred over Mr. Deck's objection. Three years after this Court's actions, a third capital resentencing finally occurred, delayed again largely by state action. The District Court properly found the 12-year delay from the crime to the third resentencing to be attributable to Missouri, and Mr. Deck to have suffered prejudice due to losing "substantial mitigation" (as described by the Missouri Supreme Court in the first reversal), primarily in the form of evidence of a traumatic childhood of abuse and neglect. The Eighth Circuit reversed. This petition thus raises the following question:

1. Does this Court's Sixth, Eighth and Fourteenth Amendment precedent protect a defendant's right to present mitigation when a delay occasioned by the State leads to losing that substantial mitigation at a subsequent resentencing?

Post-conviction counsel failed to raise the readily apparent issue of trial counsel's lack of objection to the death penalty after the long delay. The District Court, without an evidentiary hearing, found post-conviction counsel ineffective under the *Strickland* standard, applying *Martinez v. Ryan*, 566 U.S. 1 (2012). In conflict with other Circuits, the Eighth Circuit reversed applying an appellate standard, as opposed to a trial counsel standard, to measure ineffectiveness of post-conviction counsel, and denied an evidentiary hearing on the *Martinez* question. This raises these questions:

2. What is the proper standard to employ, that of trial counsel or appellate counsel, when addressing a post-conviction trial level omission under *Martinez*?
3. Similar to *Shinn v. Ramirez*, No. 20-1009 2021 WL 1951793 (Cert. granted May 17, 2021), when is an evidentiary hearing required to address the question of the substantiality of the claim?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Carman Deck is the Petitioner in this case and was represented in the Court below by Elizabeth Unger Carlyle and Kevin Louis Schriener.

Paul Blair, Warden of Potosi Correctional Center, is a Respondent. He and his predecessors in that position, Richard Jennings, Cindy Griffith and Troy Steele, were represented in the court below by Assistant Missouri Attorney General Katharine Dolin.

Eric Schmitt, Missouri Attorney General, is the additional respondent. He was also represented in the court below by Ms. Dolin

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Petitioner Carman Deck prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on October 19, 2020. In the alternative, Mr. Deck requests that his petition be held until this Court decides the issues in *Shinn v. Ramirez*, No. 20-1009, 2021 WL 1951793 (Cert. granted May 17, 2021), which deals with the applicability of the AEDPA to the equitable rule of *Martinez v. Ryan*, 566 U.S. 1 (2012). Like Mr. Ramirez, Mr. Deck argues that his claims were substantial enough to deserve a hearing. Had that hearing been held, Mr. Deck could have disputed the Eighth Circuit’s claim that post-conviction counsel strategically omitted these claims.

OPINIONS BELOW

The order of the Eighth Circuit reversing the district court’s grant of relief is reprinted at Appendix (hereinafter “App.”) p. 1a. The opinion is reported at 978 F.3d 578 (8th Cir. 2020). The memorandum and order of the district court is printed beginning at App. p. 14a.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on October 19, 2020, reversing the district court's grant of penalty phase relief and reinstating Mr. Deck's sentences of death. *See* App. p. 1a. That court denied a timely petition to that court for rehearing or, in the alternative, for rehearing en banc, on January 13, 2021. App. p. 396a. Pursuant to this Court's order of March 19, 2020, Mr. Deck's petition for writ of certiorari is due June 14, 2021¹.

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

¹ The petition is due 150 days after the order denying rehearing. That date, June 12, is a Saturday, extending the due date to June 14. Sup. Ct. Rule 30.1.

and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const Amend. VIII

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

U.S. Const. Amend. XIV § 1

No state shall ...-deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(d) and (e)

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

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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Mr. Deck comes before this Court with two sentences of death for the 1996 murders of James and Zelda Long.² After his convictions and first sentences of death were affirmed on direct appeal (*State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999)), the sentences of death were reversed by the Missouri Supreme Court on the ground that trial counsel rendered ineffective assistance when they failed to request proper sentencing instructions. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).

Mr. Deck then received a second sentencing hearing before a second jury. His second sentences of death were reversed by this Court in *Deck v. Missouri*, 544 U.S. 622 (2005), because he was required (over

² He also has consecutive sentences for related offenses not at issue here.

defense objection) to appear before the jurors in shackles for his second sentencing.

Three years later, a third compromised sentencing hearing followed. The Missouri Supreme Court affirmed the death sentences from the attenuated hearing. *State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010). Mr. Deck filed another post-conviction proceeding. The Missouri Supreme Court affirmed the denial of post-conviction relief. *Deck v. State*, 381 S.W.3d 339 (2012).

Mr. Deck then pursued habeas relief. After briefing but without holding a hearing, the U.S. District Court, Eastern District of Missouri, denied relief as to all grounds relating to the convictions themselves, and as to most of the grounds relating to the sentences. A certificate of appealability (COA) was denied as to all rejected grounds. However, the district judge granted relief as to two sentencing grounds. The Eighth Circuit Court of Appeals reversed.

Mr. Deck cross-appealed the denial of relief as to his additional grounds. Without revealing its analysis, the court of appeals denied a COA. App. p. 397a. This Court then denied the petition for writ of

certiorari as to the denial of a COA. *Deck v. Jennings*, 139 S. Ct. 2719 (2019).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI AND FIND THAT A DEATH SENTENCE CANNOT BE IMPOSED ON A PERSON WHO IS UNABLE, THROUGH NO FAULT OF HIS OWN, TO PRESENT MITIGATING EVIDENCE. (CONFLICT WITH AUTHORITY OF THIS COURT, RELATES TO QUESTION 1.)

Twelve years and two state induced failures of process after the offense, a jury sentenced Mr. Deck to death at the state's third bite of the apple in 2008. This decade-long delay was not the fault of Mr. Deck. Rather, Missouri's repeated violations of his constitutional rights caused the delay.

The Missouri Supreme Court vacated Mr. Deck's first sentences of death because trial counsel failed to offer proper mitigation instructions during the penalty phase. After Mr. Deck was sentenced to death a second time, this Court vacated his conviction because he was visibly shackled during the trial with leg irons, handcuffs and a belly chain over Mr. Deck's objections. After remand, delay attributable to the state

continued. In addition to the state seeking a trial continuance over Mr. Deck's objection, there was a ten-month delay due to the disqualification of the prosecutor's office because it employed a niece of the Longs in its victim services office, who disclosed confidential negotiations between the state and Mr. Deck to persons outside the office. As a result, Mr. Deck's third penalty phase trial did not begin until three years after remand. By that time, powerful mitigation evidence that was previously available was lost. Without Mr. Deck's trial attorneys being able to present this substantial mitigation evidence, the jury sentenced Mr. Deck to death.

In his habeas corpus petition, Mr. Deck raised two claims relevant to this petition. They were:

1. Mr. Deck has been denied due process of law and the right to be free of cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution because numerous errors not attributable to him have resulted in reversals and delays which made it impossible to afford him a fair penalty phase proceeding in 2008, and from now on.
2. Mr. Deck was denied effective assistance of trial and appellate counsel under the Sixth Amendment to the United States Constitution when his third trial counsel failed to move for preclusion of the death penalty based on a violation of due process of law and the right to be free from cruel and

unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

The district court granted relief on both of these grounds.

Specifically, the district court found that the delay was not the fault of Mr. Deck.

Most of this delay is attributed to the action of the State, especially since the violation of Deck's constitutional rights in the first and second penalty-phase trials were not Deck's fault; and Deck did nothing to forfeit his right to a speedy disposition.

App. p. 174a.

The court further held that conducting a death sentencing procedure after a ten year delay, in the circumstances of this case, violated due process and resulted in cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.:

Deck's inability to present mitigation evidence prevented the jury from adequately considering compassionate or mitigating factors that might have warranted mercy. And, as the Missouri Supreme Court found in *Deck II*, the mitigating evidence presented at the first trial was substantial. *Deck [v. State]*, 68 S.W.3d] at 430-31. Because the last jury was not able to consider this substantial mitigating evidence, imposition of the death penalty violates Deck's right to be free from cruel and unusual punishment.

App. p. 173a.

Also, applying the *Strickland v. Washington*, 466 U.S. 668 (1984), standard, the district court found that penalty phase counsel were ineffective for failing to raise these arguments, noting that they were obviously aware of the difficulties they had in presenting a mitigation case. These difficulties were made clear in their testimony at the final post-conviction hearing. The district court ordered Mr. Deck's death sentences to be commuted to life in prison without the possibility of parole.

On appeal, a panel of the Eighth Circuit held that no clearly established federal law established that Mr. Deck was entitled to relief because he was unable to present mitigating evidence at his third resentencing trial, and therefore 28 U.S.C. § 2254(d) precluded reversal. In so holding, the court ignored the many decisions of this Court establishing a prisoner's right to present mitigating evidence before being sentenced to death. *See, e.g. Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 304 (1989); *Wiggins v. Smith*, 539 U.S. 510 (2003). Since Mr. Deck had a constitutional right to present this compelling mitigating evidence, he cannot be sentenced to death if he was not able to do so whether that

reason is delay or incorrect legal rulings or ineffective assistance of counsel.

This Court should grant review and hold that its prior decisions that the ability to present mitigation evidence is essential to the constitutionality of the death penalty apply as fully to situations in which the failure to present such evidence is due to a delay in proceedings as they do when the failure to present evidence is due to other factors not attributable to the prisoner, such as state prohibitions on such evidence (*Skipper v. South Carolina*, 473 U.S. 1 (1986), *Lockett, Eddings, Penry v. Lynaugh*); and ineffective assistance of counsel (*Wiggins, Sears v. Upton* 561 U.S. 945 (2010)).

When it considered the proceedings at Mr. Deck's first trial, the Missouri Supreme Court found that the defense presented "substantial evidence" that was mitigating. As set out in further detail below, that evidence included the testimony of four live witnesses who had known Mr. Deck before the offense occurred and explained his horrendous upbringing. *Deck v. State*, 68 S.W.3d 418, 430 (Mo. banc 2002). The court further explained that the jurors sent a note requesting clarification of the concept of mitigation. The existence of this

substantial evidence, and the jurors' focus on it, was the basis of the court's finding that Mr. Deck was prejudiced by his trial counsel's error in failing to offer proper jury instructions concerning the weight to be given mitigating evidence. The court held,

[O]n the particular facts of this case ***in which substantial mitigating evidence was offered***, counsel's errors have so undermined this Court's confidence in the outcome of the trial that the Court concludes there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 431, emphasis added.

At his final post-conviction hearing, Mr. Deck presented a claim that he was denied effective assistance of counsel because his trial counsel failed to present mitigating evidence. Trial counsel testified, "[A] lot of time has passed between 2000³ and 2006, 2007, whatever year it was or 2008. . . . [T]here were so few and so scarce of live family members who would come and say anything on Carman's behalf, that we would try to grasp anybody that we could." Trial counsel explained further that previously available witnesses had died, or had become uncooperative. As a result, while Mr. Deck was able to present

³ When the case was first tried.

testimony from four live witnesses at his first trial, *none* of these witnesses testified at his last trial.

The first trial live witnesses were Mr. Deck's younger brother Michael Deck, his stepmother Rita Deck, his foster father Major Puckett, and his aunt Beverly Dulinsky. The witnesses described an early life characterized by disruptive changes in custody, and physical and emotional abuse. Rita Deck, Mr. Deck's stepmother, described an incident in which Carman Deck and his three younger siblings were picked up by his father on Thanksgiving after authorities notified him that they had been found alone in their mother's house. The children were dirty and hungry. Rita Deck also testified that she still loved Carman Deck. But Mr. Deck's last jury never heard from Rita Deck, because she was unwilling to cooperate in a third resentencing.

The first jury also heard live from Mr. Deck's brother Michael and his aunt Beverly Dulinsky, as well as from his foster father Major Puckett. In addition to describing Mr. Deck's deprived upbringing, Mr. Puckett and Ms. Dulinsky described Mr. Deck's good qualities—his care for his siblings and for his blind foster mother. Mr. Puckett also testified that he and his wife tried to adopt Mr. Deck but that the state

took him away and placed him back with his mother. He further testified that he drove 800 miles to testify on Mr. Deck's behalf,, an unwavering show of support.

Michael Deck testified that their mother was always drunk and at clubs and that Mr. Deck would take care of his younger siblings by finding food for them and providing for their needs. Also, Michael testified regarding the aforementioned Thanksgiving meal that he was so hungry that he tried to eat his vomit after throwing up on his plate. Michael Deck recounted the children's harrowing mistreatment at the hands of their stepmother Marietta Deck who would only feed them hot dogs and punish them for no reason by making them kneel on broomstick handles. He described an incident when Mr. Deck defecated in his pants because Marietta would not allow him to use the bathroom. After finding out that he had soiled himself, Marietta rubbed his face with his feces.

At Mr. Deck's second penalty phase hearing in 2003, the jury viewed the video deposition of Michael Deck. Rita Deck, Beverly Dulinsky and Major Puckett again testified live. Elvena Deck, another aunt, also gave live testimony. Elvena Deck testified that Mr. Deck's

mother did not take very good care of Mr. Deck and the other children as she was often absent from the home and that she would usually leave the children in the care of an intellectually challenged family member. Psychiatrist Dr. Eleatha Surratt also testified. While the Missouri Supreme Court affirmed Mr. Deck's sentence, this Court reversed. *Deck v. Missouri*, 544 U.S. 622 (2005). This Court held that the trial court's requirement that Mr. Deck be confined in visible shackles during the proceeding was improper and required reversal without a specific showing of prejudice. *Id.* at 635.

During the third and final penalty phase trial in 2008, three years after this Court's reversal, counsel attempted to compensate for the lack of live witness testimony from people who had known Mr. Deck before the charged offenses by presenting additional expert testimony. Psychiatrist Dr. Eleatha Surratt again testified, and the testimony of child development expert Dr. Wanda Draper was also offered. Counsel also presented the videotaped depositions of Michael Deck and Mr. Deck's aunt Mary Banks. Finally, counsel read into the record the written depositions of Major Puckett and Beverly Dulinsky. The testimony of the remaining first and second trial live witness, Mr.

Deck’s stepmother Rita Deck, and second trial live witness Elvena Deck, was not presented in any form at Mr. Deck’s last trial. While some of the information provided by the original trial witnesses was available to the last jury, the jury did not see anyone who was willing to come forward in person for Mr. Deck. As the district court recognized, the contrast between the earlier penalty phase trials and the last trial was stark. Mr. Deck’s third trial counsel testified in the post-conviction hearing that he thought it was “absolutely” important to have some of Deck’s family members testify at trial—to be able to “look at the jury, and say, please spare his life. He is of value to me.” (Resp. Exh. UU at 142-43.)⁴ Trial counsel disavowed any strategic reason for not presenting additional witnesses: “This guy’s life is at stake, and anything that we had that would have helped, you know, held water, and that, you know, would have served as just one basis, one basis to spare Carman Deck’s life, that person would have been presented.” (Resp. Exh. UU at 193.)

⁴ The reference is to the exhibits to the state’s response to the district court petition.

Based on her careful analysis of the delay in Mr. Deck's third retrial and the difference between the original "substantial" evidence and the secondhand evidence presented at the third trial, the court found, "Because the last jury was not able to consider this substantial mitigating evidence, imposition of the death penalty violates Deck's right to be free from cruel and unusual punishment." App. p. 173a.

The district court then addressed the issue of whether Mr. Deck's default of this claim could be excused under *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). In the second claim as to which relief was granted by the district court, Mr. Deck alleged that trial counsel were ineffective for failing to seek preclusion of the death penalty because of the delay. This issue was not raised as a claim of ineffective assistance of counsel in the final post-conviction proceeding.

Holding that the claim relied on clearly established federal law and that its basis was readily available to post-conviction counsel, the district court found that "Deck's underlying claim of ineffective assistance of trial counsel has some merit and is therefore 'substantial' under *Martinez*." App. p. 174a. The district court then held that post-

conviction counsel was ineffective for failing to raise the claim, and proceeded to the merits.

On appeal, the Eighth Circuit first reversed the district court's conclusion that the underlying claim of ineffective assistance of counsel was "substantial" within the meaning of *Martinez*. The Eighth Circuit characterized the claim as one that would "require the resolution of unsettled legal questions."⁵ The court then concluded,

When post-conviction counsel filed Deck's petition in 2010, the law was far from settled that a 10-year delay between conviction and sentencing would give rise to a constitutional claim, much less that trial counsel was ineffective for failing to raise the argument two years earlier.

App. p. 10a.

The court wrongly went on to say that Mr. Deck "cannot identify any 'controlling authority' . . . that had recognized a Due Process claim under these or similar circumstances." App. p. 10a. But Mr. Deck did not raise a due process claim alone. Rather, the claim invoked primarily the Eighth Amendment right to be free from cruel and unusual punishment. The district court expressly found that this right had been violated. App. p. 73a. And the cases on the Eighth Amendment issue are

⁵ *Citing Dansby v. Hobbs*, 766 F.3d 809, 836 (8th Cir. 2014)

clear. In order to impose a sentence of execution that complies with the U.S. Constitution, a court must afford the prisoner the right to present mitigating evidence.

The district court adopted the framework of *Betterman v. Montana*, 136 S. Ct. 1609 (2016), when it made its determination that the delay in Mr. Deck's case could not be attributed to him. *Betterman* was decided after Mr. Deck's trial, but it relied for its analysis on *United States v. \$8,850*, 461 U.S. 555, 562-565 (1983), as well as *Barker v. Wingo* 407 U.S. 514 (1972). These cases would have been available to counsel and the state court in 2008. The Eighth Circuit arrived at the wrong conclusion, in violation of this Court's cases. This Court should grant review to make clear that the right to mitigation must be enforced whatever the reason it has been denied, so long as the failure to present mitigation is not attributable to the prisoner.

II. THIS COURT SHOULD GRANT CERTIORARI AND CLARIFY THE STANDARD FOR INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL WHEN A FEDERAL COURT DECIDES WHETHER TO EXCUSE A PROCEDURAL DEFAULT (CIRCUIT SPLIT, RELATES TO QUESTIONS 2 AND 3).

In addition to finding incorrectly that the omitted claim was not “substantial” within the meaning of *Martinez*, the Eighth Circuit also made a serious error in determining whether post-conviction counsel was ineffective. The court held, ‘Moreover, “[d]eclining to raise a [post-conviction] claim . . . is not deficient performance unless that claim was plainly stronger than those actually presented.’ *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017).” App. p. 11a. *Davila*, of course, does not concern effective assistance of *post-conviction* counsel. Rather, it concerns the standard for determining effective assistance of *direct appeal* counsel.

In *Davila*, this Court was presented with the question whether it should expand the *Martinez* exception to allow federal courts to consider defaulted post-conviction claims of ineffective assistance of appellate counsel. The Court answered that question in the negative. In doing so, the Court found that in most instances where a claim is not preserved for appellate review, the prisoner could not make out a substantial claim of ineffective assistance of appellate counsel and *Martinez* would

be of no help. In discussing the standard for appellate counsel, the Court quoted *Smith v. Robbins*, 528 U.S. 259, 288 (2000), which discusses the contours of an ineffective assistance of appellate counsel claim.

Neither *Davila* nor *Smith* discussed the ineffective assistance of trial level post-conviction counsel, and certainly not that of capital post-conviction counsel. Missouri post-conviction counsel are required, as a matter of state law, to identify and investigate claims of trial counsel's ineffectiveness. Mo. Sup. Ct. R. 29.15 requires the appointment of counsel for any indigent movant and requires that counsel to investigate additional facts as needed to develop postconviction claims. Moreover, in evaluating the effectiveness of trial counsel, the court is to consider the whole record of counsel's actions. Cumulative errors may contribute to the grant of relief. *See Gardner v. State*, 96 S.W.3d 120, 132 (Mo. App. 2003) “[C]ounsel’s errors and overall performance in the conduct of the defense were such that [the court] cannot be confident in the trial having achieved a just result”; *Dorsey v. State*, 156 S.W.3d 825 (Mo. App. 2005); *Poole v. State*, 671 S.W.2d 787, 789 (Mo. App. 1983); *Kelley v. State*, 618 F.3d 722, 744 (Mo. App. 2021). There is no limit

under Rule 29.15 on the number of grounds for relief that can be raised or the length of the pleading.

Furthermore, the standard of representation of capital post-conviction counsel mandates that counsel litigate all issues. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1029, Guideline 10.8 (2003) (hereinafter “ABA Guidelines”) (“Counsel at every stage of the case . . . should consider all legal claims potentially available and thoroughly investigate the basis for each potential claim); at 1028-29 (when a legal claim is presented, it should be presented “as forcefully as possible and ensure that a full record is made”).⁶ Post-conviction counsel must “continue an aggressive investigation of all aspects of the case,” which unquestionably includes sentencing. *See* ABA Guideline 10.15.1(E)(4) at 1080. “Reinvestigating the client means assembling a more thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims.” *Id.* at 1086.

⁶ This Court has held that the ABA Guidelines are relevant to the issue of standards of practice. *See, e.g., Rompilla v. Beard*, 545 U.S. 384, 387 (2005).

The ABA Guidelines indicate that post-conviction counsel is tasked with “seek[ing] to litigate all issues, whether or not previously presented, that are arguably meritorious . . . , including challenges to any overly restrictive procedural rules.” *Id.* at 1079. “[W]inning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments . . . are unlikely to motivate a collateral court.” *Id.* at 1085, Guideline 10.15.1, cmt. New counsel must “keep under continuing review the desirability of modifying prior counsel’s theory of the case in light of subsequent developments.” *Id.* at (E)(3). Relying on the facts as they stand in the record is not good enough because post-conviction counsel must “continue an aggressive investigation of all aspects of the case.” *Id.* at (E)(4) and at 1085, Guideline 10.15.1, cmt. (collateral counsel “cannot rely on the previously compiled record”). “[T]he trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case.” *Id.* at 1086, Guideline 10.15.1, cmt.

In light of the above principles, there is no reasonable strategic reason for Missouri capital post-conviction counsel to omit any colorable claim of trial counsel’s ineffectiveness. And importantly, the district

court did not hold a hearing, preventing Mr. Deck from presenting testimony from trial and post-conviction counsel which would have established the lack of a strategic reason in their failure to challenge the delay. This Court will shortly resolve the hearing issue in *Shinn v. Ramirez*, No. 20-10092021 WL 1951793 (Cert. granted May 17, 2021), and this petition should be held until the issue of factual development under *Martinez v. Ryan*, 566 U.S. 1 (2012) is settled in that case.

Martinez prescribed that post-conviction counsel's effectiveness be analyzed under the standards of *Strickland*. For *Strickland* purposes, post-conviction counsel are most aptly compared to trial counsel. This is because post-conviction counsel—like trial counsel— are obligated to conduct a sweeping, independent investigation into the case.

The Fifth, Ninth and Eleventh Circuits have recognized the logic of this comparison. These holdings are in conflict with the standard articulated by the Eighth Circuit, as well as the Third and Seventh Circuits, and this Court should grant review to resolve the conflict.⁷

⁷ While *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 942 (3rd Cir. 2019), and *Brown v. Brown*, 847 F.3d 502, 515 (7th Cir. 2017), did not cite *Davila*, they used the same flawed analysis as the Eighth Circuit in Mr. Deck's case, applying the standard for effective assistance

In *Trevino v. Davis*, 829 F.3d 328, 347 (5th Cir. 2016), the court held, “*Martinez* suggests that a similar standard should apply to both state trial counsel and state habeas counsel.” The court then found that post-conviction counsel, like trial counsel, have a duty to investigate prior to initiating post-conviction proceedings. Also, in *Canales v. Stephens*, 761 F.3d 551 (5th Cir. 2014), the Fifth Circuit used an “objective standard of reasonableness” to determine state post-conviction counsel’s effectiveness. In reaching its decision, the court compared Canales’s state post-conviction counsel’s failure to conduct mitigation investigation (due to a misunderstanding about funding) to that of trial counsel in another case who failed to request funding for the same reason and who was found to be ineffective. The court found that Canales’s state post-conviction counsel’s failure to conduct a mitigation investigation was not a strategic choice. *Id.* at 569.

Like *Trevino* and *Canales*, *Sullivan v. Sec’y, Fla. Dept. of Corr.*, 837 F.3d 1195, 1204-1207 (11th Cir. 2016), confirms that post-conviction counsel have a responsibility to conduct their own

of appellate counsel. However, both courts (unlike the Eighth Circuit) found that postconviction counsel was ineffective because the omitted claim was stronger than those actually raised.

investigation into the case. In spelling out that responsibility, the Eleventh Circuit tellingly relied extensively—and exclusively—on cases describing the investigatory tasks that trial attorneys must perform. The *Sullivan* court cited *Strickland*; *Blankenship v. Hall*, 542 F.3d 1253, 1273 (11th Cir. 2008); *Wiggins*; and *Payne v. Allen*, 539 F.3d 1297, 1316 (11th Cir. 2008). Each of the cited passages deals with trial counsel’s duty to investigate. Thus, the Fifth and Eleventh Circuits have concluded, for sound and persuasive reasons, that post-conviction counsel’s effectiveness under *Martinez* must be measured against the trial-counsel standard.

The approach of the Fifth and Eleventh Circuits is supported by the holding of the Ninth Circuit in *Detrich v. Ryan*, 740 F.3d 1237, 1245-46 (9th Cir. 2013). There, the Court held that if post-conviction counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel, the petitioner need not show *Strickland* prejudice but need only show that the claim was “substantial,” clearly a lesser standard. The court held that a claim was insubstantial only if “it does not have any merit or . . . is wholly without factual support.” *Id.* at 1245 (quoting *Martinez*, 566 U.S. at 16).

Neither *Trevino*, *Sullivan*, nor *Detrich* compared the omitted issues to the issues actually raised in the post-conviction pleadings as part of the ineffectiveness of post-conviction counsel analysis. Rather they considered each omitted ground, without any reference to its relative strength to other claims in the post-conviction petition, to determine whether it was “substantial” within the lenient COA standard.

The Eighth Circuit seriously misapplied the *Martinez* standard to Mr. Deck’s prejudice. Under the factual findings of the district court (which are not shown to be clearly erroneous), Mr. Deck is entitled to relief. This Court should grant review and so hold, and in addition make clear the correct standard for ineffective assistance of post-conviction counsel under *Martinez*. Mr. Deck should have been allowed to present evidence at a hearing to support his *Martinez* claim.⁸ In the

⁸ As *Detrich* recognized “*Martinez* would be a dead letter if a prisoner’s only opportunity to develop the factual record of his state [postconviction relief (“PCR”)] counsel’s ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him.” 740 F.3d at 1247.

alternative, this Court should hold Mr. Deck's petition while it decides the important *Martinez* issues in *Shinn v. Ramirez*, No. 20-10092021 WL 1951793 (Mem. May 17, 2021).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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