

**\*\*THIS IS A CAPITAL CASE\*\***  
No. 20-8333

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IN THE  
SUPREME COURT OF THE UNITED STATES

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CARMAN DECK, Petitioner

v.

PAUL BLAIR and ERIC S. SCHMITT, Respondents

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

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**REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

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## Introduction

Time has passed because the state committed a succession of errors, for which trial and post-conviction counsel failed to hold the state accountable. Instead of doing it right the first time, the state erred twice, and this impacted the third sentencing, limiting what had been previously described by the Missouri Supreme Court as “substantial” mitigation. *Deck v. State*, 68 S.W.3d 418, 431 (Mo., 2002) (noting that at Deck’s first sentencing, counsel was able to present “substantial mitigating evidence.”). This Court should not countenance the state’s attempt to rely on the passage of time as a basis to deny certiorari, particularly when the state fails to take account of the disqualification of the prosecutor’s office due to its own misconduct, and a state-requested continuance of trial over Mr. Deck’s objections.

Mr. Deck raised a colorable claim pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), upon which the district court granted relief. However, the district court never held a hearing at which counsel could have testified regarding their strategy, or lack thereof, as well as presenting evidence on the prejudice prong due to counsel’s errors. Instead, the district court granted relief upon the same record in which it found post-conviction counsel ineffective. The lack of an evidentiary hearing allowed the Eighth Circuit to impute strategy to counsel where no actual strategy existed.

Counsel have a duty to raise all viable constitutional claims in a capital case. Here, trial counsel knew that the passage of time and multiple sentencing hearings, due to state created constitutional error, and had unfairly prejudiced their ability to

present an effective case in mitigation at the third resentencing, yet failed to raise a constitutional claim in the trial court. Post-conviction counsel failed to raise this deficiency. Had a *Martinez* hearing been held, Mr. Deck could have shown that these failures were not the result of an intentional strategy. Due to similarities between this case and *Shinn v. Ramirez*, resolution of this petition should be stayed until this Court decides the issues regarding factual development and *Martinez* in that case.

## I. CONFLICT WITH THIS COURT'S AUTHORITIES

The state quibbles with Mr. Deck's argument that the Eighth Circuit decided Mr. Deck's case in a way that conflicts with this Court's authorities. To conclude that the issue upon which the district court granted relief was not "substantial" under *Martinez*, as the state concedes, the Eighth Circuit evaluated the merits of Mr. Deck's claim: "When postconviction 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. This is an explicit merits ruling.

The state concedes that any application of the AEDPA to this *Martinez* claim would have been error. *See* BIO p. 12 n. 4. However, the Eighth Circuit assessed the merits of the defaulted claim by examining whether it was supported by existing or "well-established" authority, which erroneously conflates the AEDPA standard with

the duties of counsel in a capital case to preserve meritorious constitutional objections.

The state asserts that the Eighth Circuit was correct to conclude that none of the cases cited by Mr. Deck specifically hold that delay can deny the right to present mitigating evidence. Of course, each case in the end relies on its own facts. But the principle of *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); *Skipper v. South Carolina*, 473 U.S. 1 (1986); and *Sears v. Upton* 561 U.S. 945 (2010), is clear: Whatever the reason that the prisoner is denied his right to present mitigating evidence, he has been deprived of a constitutional right. All of these cases concern the denial of the right because of state action. *Skipper*, *Lockett*, *Eddings*, and *Penry* specifically concern state statutory or evidence rules. *Wiggins* and *Sears* concern ineffective assistance of counsel, which is attributable to the state under *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

Similarly, the state disputes Mr. Deck's reliance on this Court's analysis in *Barker v. Wingo*, 407 U.S. 514 (1972), and *United States v. \$8,850*, 461 U.S. 555, 562–65 (1983). In those cases, this Court made clear the factors a reviewing court should use to determine whether a delay deprives a defendant of his constitutional rights. These precedents announce general principles that must be applied to other similar factual situations. Counsel should have been cognizant of these principles and raised them at Deck's third resentencing. That Mr. Deck was unable to present mitigating evidence due to the state's delay of his case, rather than a state rule that

excluded evidence or his trial counsel's failures, is a distinction without a difference. The general principle that there is a constitutional right to present mitigating evidence before being sentenced to death is a well-established principle that counsel knew was in jeopardy in this case due to the passage of time.

The Eighth Circuit erred in holding that trial counsel had no duty to raise claims unless they could cite to a case that is a mirror image both factually and legally in terms of unconstitutional delay due to state action. The ABA Guidelines require that “[c]ounsel at every stage of the case . . . 1.) consider all legal claims potentially available; and thoroughly investigate the basis for each potential claim.” See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1028 (2003). The Guidelines further state that post-conviction counsel must seek to “litigate all issues, whether or not previously presented, that are arguably meritorious . . . .” *Id.* at 1079.

Trial counsel knew that the passage of time had greatly prejudiced their ability to put on an effective mitigation case and *Barker v. Wingo*, 407 U.S. 514 (1972), set forth the test for determining whether a delay has resulted in a violation of the Sixth Amendment. Counsel did not need to find a case addressing the exact same legal and factual scenario in order to raise this claim. For post-conviction purposes, the claim would be asserted under *Strickland v. Washington*, 466 U.S. 668 (1984). See *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (“[T]he *Strickland* test provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims. . . .”)

Based on its finding that Mr. Deck’s constitutional right to relief was not “settled,” the Eighth Circuit concluded that post-conviction counsel could not have been ineffective for failing to raise this claim as an instance of ineffective assistance of trial counsel. When, as here, the Eighth Circuit reads this Court’s precedents too narrowly, this Court should grant certiorari.

## **II. CIRCUIT SPLIT CONCERNING THE STANDARD FOR EFFECTIVENESS OF STATE POST-CONVICTION COUNSEL.**

The State points out that the Eighth Circuit acknowledged the *Strickland* standard as the basis for making a determination of the effectiveness of post-conviction counsel. Thus, the state contends, the Eighth Circuit’s “passing reference” to *Davila v. Davis*, 137 S.Ct. 2058, 2067 (2017), should be ignored. (BIO, p. 15.) However, as this Court recognized in *Davila*, the reviewing court must apply the “objective standard of reasonableness” in a way consistent with the Sixth Amendment and with *Strickland*. Thus, simply saying that the court deciding a deficiency issue with respect to post-conviction counsel must apply the *Strickland* standard unreasonably oversimplifies this Court’s jurisprudence about that standard.

This Court held in *Strickland* itself, for example, “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. . . .” *Strickland* at 691. With respect to the duties of appellate

counsel, this Court has held that declining to raise a claim on appeal is not deficient performance under the *Strickland* standard unless the omitted claim was plainly stronger than those actually raised. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000), cited in *Davila*, 137 S.Ct. at 2067.

The State apparently does not dispute that some circuits refer to the *Strickland* standard for appellate counsel and some refer to the *Strickland* standard for trial counsel when determining the deficiency prong of *Martinez*. Since the filing of the petition in this matter, the Fourth Circuit has decided *Stokes v. Stirling*, No. 18-6, 2021 WL 3669570 (4th Cir. August 19, 2021). There, the court found that Mr. Stokes had established ineffective assistance of post-conviction counsel where counsel withdrew a meritorious mitigation-related post-conviction claim. The court concluded that counsel's decision was not reasonable under the *Strickland* standard because counsel's investigation of the claim was inadequate. The court noted, "The adequacy of counsel's investigation informs the strength of the presumption of strategy."

*Id.* at \*7.

*Stokes* recognizes that post-conviction counsel has a duty to investigate before deciding on what strategies are reasonable, unlike appellate counsel.

There is a significant circuit split which this Court should resolve. Otherwise, prisoners in some circuits will be held to an inappropriate and significantly higher burden to show that their post-conviction counsel did not provide effective assistance.

Finally, the state argues that the appellate standard is more appropriate than the trial standard for evaluating the performance of Missouri post-conviction counsel. The state suggests that all Missouri post-conviction counsel are required to do under the Missouri post-conviction relief rule is identify claims known to the movant. BIO, p. 16.

But the rule requires counsel to “file an amended motion that sufficiently alleges the additional facts and claims.” Mo. Sup. Ct. R. 29.15(e). This necessarily requires investigation to develop the underlying facts. Under Missouri law, the duty of post-conviction counsel is significantly broader than reviewing the movant’s pro se pleadings and interviewing the client. Counsel must investigate potential claims and develop supporting facts. And, as discussed in the petition, there is little or no reason to omit any arguably meritorious claim from the post-conviction motion. The rule provides for evidentiary hearings in which the movant can present evidence supporting the post-conviction claims, which requires locating, interviewing, and presenting witnesses or evidence.

The actual practice of post-conviction counsel in Missouri rebuts the state’s oversimplified view of what attorneys do in the Missouri post-conviction process. Indeed, Mr. Deck’s case illustrates this process. *See e.g. Deck v. State*, 68 S.W. 3d 418 (Mo. 2002) (First post-conviction counsel presented Mr. Deck’s trial counsel, his sister’s trial counsel, ten mitigation fact witnesses and one mitigation expert). It is clear that the Missouri post-conviction process requires far more than identifying and pleading claims. *See Yates v. State*, 623 S.W.3d 184 (Mo. App. 2021)

(acknowledging the duty of post-conviction counsel to investigate the facts underlying the movant's claims); *Moore v. State*, 934 S.W.2d 289, 292 (Mo. banc 1996) (acknowledging post-conviction counsel's responsibility to review the trial record); *Riley v. State*, 364 S.W.3d 631, 637 (Mo. App. 2012 ) (same).

Considering the federal analog, 28 U.S.C. § 2255, this Court described the need for off-the-record claims to be asserted in collateral proceedings. *Massaro v. United States*, 538 U.S. 500 (2003). The trial record was developed for the purpose of determining whether the prisoner was guilty of the charged offenses, rather than whether the prisoner was adequately represented, and collateral review in the trial court was the proper forum for assessing the performance of counsel. *Id.* The trial record would be inadequate in establishing alleged errors of trial counsel, the reasons underlying counsel's actions, or any prejudice the prisoner might have suffered due to the alleged errors. *Id. See also Martinez*, 566 U.S. at 11 (“Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy.”)

This duties of post-conviction counsel are clearly analogous to the duties of trial counsel to investigate the facts of the case and present a defense. Appellate counsel, on the other hand, are bound by the trial court record. They need only review the record, determine what trial court errors are most likely to result in reversal, and brief and argue those issues to the court. Thus, the *Davila* observation that appellate counsel cannot easily be found ineffective for failing to include a ground for relief is appropriate.

The Missouri post-conviction remedy is robust, and the effectiveness of post-conviction lawyers must be evaluated in the same manner as the duty to investigate and present evidence at trial. This Court's attention to this significant standard is appropriate and necessary.

### **III. MR. DECK WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT MITIGATION EVIDENCE DUE TO DELAY AND COUNSEL FAILED TO ADEQUATELY PROTECT THIS RIGHT.**

The district court found that Mr. Deck suffered prejudice as a result of the delay in his case. Specifically, the court held,

Here, prejudice resulting from the delay weighs heavily in favor of Deck. As described above, his inability to present substantial mitigation evidence at his third penalty-phase trial was directly attributable to the passage of many years' time. Witnesses who previously cooperated and provided favorable testimony were no longer available. . . . These witnesses provided mitigation testimony at earlier trials that the Missouri Supreme Court itself found "substantial" – indeed to the extent that it found that without constitutional error, a reasonable probability existed that the jury would not have voted for death.

App. pp. 158a-159a.

This factual finding stands unless it is found to be clearly erroneous. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). The state argues, however, that presenting some of the older mitigation testimony by video or deposition was equivalent to the live witnesses who testified earlier. This ignores the statement of Mr. Deck's third trial counsel 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.)

Presenting this evidence by deposition or even video clearly left the jury with the impression that no one was willing to come to court for Mr. Deck.

Mr. Deck requested an evidentiary hearing in district court to allow him to further develop the factual basis for his assertion that he was prejudiced by the delay. The hearing was denied, because the district court believed the record contained sufficient evidence to support its factual findings. App. p. 15a. At a minimum, if Mr. Deck has not presented sufficient evidence to show prejudice or deficient performance, he is entitled to remand for a hearing to allow him to do that.

#### **IV. THERE IS NO *TEAGUE* ISSUE IN THIS CASE.**

Mr. Deck premises his arguments on this Court's long-standing *Strickland* and *Eddings* line of cases. He does not seek a new rule of criminal procedure in a habeas case. Rather, he seeks to protect his right to present mitigating evidence and the duty on his trial counsel to enforce that right when it was denied by delay imputed to the state. *Teague v. Lane* is simply inapposite to this case.

#### **V. THE COURT SHOULD HOLD MR. DECK'S CASE IN ABEYANCE PENDING *SHINN V. RAMIREZ*.**

This Court granted certiorari in, *Shinn v. Ramirez*, No. 20-1009, 2021 WL 1951793, on May 17, 2021. *Ramirez* is directly related to Mr. Deck's petition because it deals with the availability of factual development and evidentiary hearings in cases where a claim of "some merit" has been raised under *Martinez*. See *Martinez*, 566 U.S. at 14. Mr. Deck was denied evidentiary development in

federal district court, as was Mr. Ramirez. The Ninth Circuit reversed this decision, and this Court has now agreed to resolve the question.

Mr. Deck, like Mr. Ramirez, should be given the opportunity to present evidence supporting the deficient performance of both trial and post-conviction counsel at a hearing, as well as evidence supporting the prejudice prong.

In order to show cause for the post-conviction default, *Martinez* only requires the underlying claim to be substantial and post-conviction counsel's performance to be ineffective. 566 U.S. at 16. The Court described the substantiality standard for the underlying claim as whether it has "some merit," citing to the standard for issuance of a Certificate of Appealability ("COA"), whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Gonzalez v. Thaler*, 565 U.S. 134, 40 (2012) (citation omitted).

The *Martinez* standard is intended to screen out only clearly frivolous claims. Any doubt as to whether the petitioner has advanced a nonfrivolous claim should be resolved in the petitioner's favor. The issue in both *Ramirez* and the case at bar is whether factual development and an evidentiary hearing may be held in order to address the *Martinez* question.

The state argues, "An evidentiary hearing would do nothing to assist the court in making" a determination regarding post-conviction counsel's decision not to raise a claim regarding state-created delay, describing it as "irrelevant" and a

straight legal question. BIO, p. 20. This is the same multi-layered error committed by the Eighth Circuit.

The first layer of error is that the *Strickland* prongs are mixed questions. *Strickland*, at 698 (“[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.”) The Eighth Circuit committed a rudimentary error by ignoring this Court’s basic tenet regarding the nature of the required review in assessing a *Strickland* prong. Such a rudimentary error alone compels granting certiorari.

The second layer of error is that facts matter – rank speculation does not. As this Court stated in *Wiggins*, 539 U.S. at 526-27, it is error when the finding that the alleged strategic decision to justify counsel’s decision-making “resembles more a post-hoc rationalization of counsel’s conduct than an accurate description of their deliberations. . . .”) A ruling in a death penalty case should be premised on facts, not speculation; any holding must be tethered to the record.

Because the Eighth Circuit committed a legal error, applying a standard contrary to *Strickland*, and a factual error, relying on its erroneous view of *Strickland* to generate a post-hoc rationalization as a basis to deny relief, there is no doubt that *Shinn* will impact Mr. Deck’s case, and it should be held pending the decision in *Shinn*. Had an evidentiary hearing been afforded to Mr. Deck, he could have shown that his trial and post-conviction counsel did not reasonably or strategically omit a claim regarding delay and that he was prejudiced as a result. *Martinez* is meaningless if Mr. Deck’s only opportunity to develop the factual record

of his PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him.

One of the bases for the opinion in *Martinez* was that ineffectiveness claims require investigation and the presentation of evidence outside the trial court record. "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." 566 U.S. at 11. For this reason, Mr. Deck should be allowed to present his evidence at hearing in federal court. His claim clearly was debatable and had some merit, as illustrated by the district court's grant of relief.

For the foregoing reasons, this Court should, at a minimum, suspend its decision regarding Mr. Deck's petition for certiorari until the potentially decisive issue regarding the availability of factual development and hearings under *Martinez* is resolved in *Ramirez*.

## CONCLUSION

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

Respectfully submitted,

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