No. _____

CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARD TAYLOR,

Petitioner,

vs.

PAUL BLAIR, Superintendent,
Potosi Correctional Center

Respondent.

On Petition For A Writ Of Certiorari
To The Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

KENT E. GIPSON
Mo. Bar #34524
Law Office of Kent Gipson, LLC
121 East Gregory Blvd.
Kansas City, Missouri 64114
816-363-4400 • Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

KEVIN L. SCHRIENER
Mo. Bar #35490
Law & Schriener, L.L.C.
141 N. Meramec Ave., Ste. 314
Clayton, Missouri 63105
314-721-7095 • Fax: 314-863-7096
kschriener@SchrienerLaw.com

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

In this Missouri capital habeas case, trial counsel followed petitioner Leonard Taylor's directive to waive closing argument at the penalty phase, notwithstanding the fact that a compelling argument could have been made to spare petitioner's life based upon residual doubt and his good behavior during prior incarcerations. In the courts below, petitioner raised a procedurally defaulted claim of ineffective assistance of counsel contending that trial counsel was ineffective in blindly following his client's directive because not to deliver a closing argument because it is a tactical decision for counsel to make and not a fundamental trial right over which a defendant has total autonomy under *Florida v. Nixon*, 543 U.S.175 (2004) and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

The district court held that trial counsel was not ineffective by finding a defendant has the ultimate authority to decide whether to present a closing argument in the penalty phase of a capital case under *Nixon* and *McCoy*. The Eighth Circuit affirmed the district court's judgment by finding petitioner's Sixth Amendment claim was defaulted under *Martinez v. Ryan*, 566 U.S. 1 (2012) because trial counsel's performance can never be deemed deficient where trial counsel follows the directives of a mentally competent defendant.

Based on the foregoing facts, this case presents the following questions:

1. Whether the decision to forego a closing argument in the penalty phase of a capital murder trial is a tactical decision for trial counsel to make or a fundamental trial right that a defendant controls.

2. Whether trial counsel's decision to follow a mentally competent defendant's directive to waive closing argument in the penalty phase of a capital trial forecloses a reviewing court from finding deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984).

3. Whether the Court of Appeals erred in finding that petitioner could not establish prejudice to overcome the procedural bar to his *Strickland* claim, without affording him an evidentiary hearing, by conflating the *Martinez* prejudice standard with the *Strickland* performance test.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leonard Taylor, respectfully requests that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals which affirmed the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, that challenged the constitutionality of his Missouri death sentences.

OPINIONS BELOW

The July 26, 2021, opinion and judgment of the Eighth Circuit Court of Appeals affirming the denial of petitioner's habeas corpus petition, is reported as *Taylor v. Steele*, 6 F.4th 796 (8th Cir. 2021), and is published in the appendix at A-1. The March 31, 2019, memorandum, order, and judgment of the United States District Court for the Eastern District of Missouri denying petitioner's habeas corpus petition is reported as *Taylor v. Steele*, 372 F. Supp. 3d. 800 (E.D. Mo. 2019) and is published in the appendix at A-13. The October 19, 2021, order of the Eighth Circuit Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc is unpublished and is published in the appendix at A-76.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its judgment on July 26, 2021. Petitioner's petition for rehearing and rehearing en banc was denied on October 19, 2021. Under 28 U.S.C. § 2201(c) and Rule 13.1,

the present petition for a writ of certiorari was required to be filed by petitioner within ninety days. Upon application of petitioner under Rule 13.5, Associate Justice and Eighth Circuit Justice Brett M. Kavanaugh extended the time for filing the petition for a writ of certiorari in this cause up to and including March 18, 2022. Jurisdiction of this Court is invoked under 28 U.S.C. § 2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution that states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense."

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution which provides in pertinent part: "No state shall make or enforce any law which will abridge the privileges or immunities of the 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 law."

STATEMENT OF THE CASE

A. Procedural History

Petitioner Leonard Taylor was convicted, after a jury trial, in the Circuit Court of St. Louis County, Missouri, on February 28, 2008. *See State v. Taylor*, 2104R-05338-01 (21st Judicial Circuit). Mr. Taylor was convicted of four counts of first-degree murder and four counts of armed criminal action. He was sentenced to death on each murder count and to consecutive life sentences on the armed criminal action counts.

Mr. Taylor filed a timely appeal raising eleven claims of trial court error. The Missouri Supreme Court also conducted a proportionality review as mandated by statute.

The Missouri Supreme Court affirmed his convictions and sentences on October 27, 2009. *See State v. Taylor,* 298 S.W.3d 482 (Mo. banc 2009). After rehearing was denied, Mr. Taylor filed a petition for writ of certiorari in this Court that was denied on May 24, 2010. *Taylor v. Missouri*, 560 U.S. 928 (2010).

On March 1, 2010, Mr. Taylor filed a timely *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15. Appointed counsel amended the motion. *See Taylor v. State*, No. 10SL-CC01158 (21st Judicial Circuit). Mr. Taylor's amended motion raised the following claims: (1) ineffective assistance of appellate counsel; (2) the death penalty is cruel and unusual

punishment; (3) his waiver of penalty phase evidence counsel was not knowing, voluntary and unequivocal; (4) trial counsel was ineffective for failing to investigate and present witnesses; (5) trial counsel was ineffective for failing to investigate and adduce evidence that Mr. Taylor traveled to and from St. Louis under an alias and did not have phone contact with the victim for several days; (6) trial counsel was ineffective for failing to adduce, through cross-examination of the State's witnesses, favorable evidence from the available telephone records; (7) trial counsel was ineffective for failing to call witnesses during the guilt phase; (8) trial counsel was ineffective for failing to object, move for a mistrial, properly preserve for appellate review, or otherwise seek appropriate curative relief during the *voir dire* and guilt phase; and 9) trial counsel was ineffective when counsel failed to object to the admission of telephone records or properly cross-examine and adduce evidence of their inaccuracies.

Counsel also attached Mr.Taylor's eight *pro se* claims to the amended motion. The Sixth Amendment claim at issue in this petition was procedurally defaulted because it was not raised by state post-conviction counsel in petitioner's amended Rule 29.15 motion.

After an evidentiary hearing, the post-conviction court denied Mr. Taylor's amended motion. Mr. Taylor timely appealed. On appeal, Mr. Taylor raised four claims that trial counsel was ineffective. These claims alleged trial counsel was

ineffective for failing to: (1) adduce issues with telephone records and the State's witness's false testimony; (2) object to telephone records' admission and the State's witnesses' opinion; (3) adduce favorable evidence from telephone records; and (4) object to State's improper comments during *voir dire* and closing argument. The Missouri Supreme Court, on October 30, 2012, affirmed the post-conviction court's denial of relief. *See Taylor v. State,* 382 S.W.3d 78 (Mo. banc 2012). This Court denied subsequent certiorari in *Taylor v. Missouri,* 569 U.S. 1032 (2013). The Missouri Supreme Court's mandate issued on December 4, 2012.

Mr. Taylor, through undersigned appointed counsel, filed a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 on December 3, 2013, in the United States District court for the Eastern District of Missouri. The case was assigned to the Honorable Rodney W. Sippel, Chief United States District Judge. On March 31, 2019, Judge Sippel denied relief but issued Mr. Taylor a certificate of appealability (COA) as to Mr. Taylor's claim that he was denied effective assistance of counsel when trial counsel failed to make a closing argument during the penalty phase of the trial. (A-13-75). After his timely Rule 59(e) motion was denied, Mr. Taylor filed a timely notice of appeal.

After briefing and argument, the Eighth Circuit issued an opinion on July 26, 2021, affirming the district court's denial of his habeas corpus petition. (A-1). Thereafter, the Court of Appeals denied petitioner's petition for rehearing and

suggestion for rehearing en banc on October 19, 2021. (A-76). Upon application of petitioner, Circuit Justice Kavanaugh extended the time for filing the present petition for a writ of certiorari until March 18, 2022.

B. Facts Relevant to this Petition

The bodies of Angela Rowe and her three children were found in their home in St. Louis County, Missouri on December 3, 2004. All four of them had been shot to death. (Tr. 821-826). On December 9, 2004, petitioner was arrested in Madisonville, Kentucky. (*Id*. 1316-1319). Petitioner had an airtight alibi from November 26, 2004, when he took a flight to Los Angeles, California until after the victims' bodies were found. (*Id*. 1254-1288).

The medical examiner, Dr. Phillip Burch issued an initial report that placed the time of death of the victims as two to three days before their bodies were found on December 3, 2004. (Tr. 1199-1201, 1206-1207). The medical examiner's initial opinion was based upon his investigator's report from the crime scene on December 3, 2004, that noted that Angela's body was still in rigor mortis. Rigor mortis sets in ten to twelve hours after death and remains for twenty-four to thirty-six hours. (Tr. 1208-1209). Only after Dr. Burch learned that petitioner had an airtight alibi from November 26, 2004, until the victims' bodies were discovered on December 3, 2004 did the medical examiner change his opinion during his trial

testimony that the victims could have been killed as much as two to three weeks before their bodies were discovered.

There were no eyewitnesses to the murders. Petitioner made no incriminating statements to the police after his arrest. There was also no clear motive established and there was no ballistic or other physical evidence that linked petitioner to these shootings.

The only direct evidence establishing petitioner's guilt were purported admissions he made to his brother, Perry Taylor, that he committed these murders. (Tr. 1026-1042). However, Perry Taylor recanted the statements he gave to the police implicating his brother during his trial testimony. (Tr. 864). Perry Taylor testified that these statements were false and that he made them because the police threatened him and his mother to get him to falsely implicate his brother and that the police told him what to say. (Tr. 900-902).

Petitioner's defense at trial, based upon statements given by several witnesses that they either saw the victims or spoke to them on the phone after November 26, 2004, was that someone else committed the crimes because petitioner had an airtight alibi that established he had flown to California on November 26, 2004, and remained out of state until his arrest on December 9, 2004, in Kentucky. Angela Rowe's sister, Gerjuan Rowe, told police that she saw Angela on the weekend of November 27-28. Gerjuan later testified that Angela

came to her house on the 27th of November to lend her fifty dollars. (G.R. Depo 26, 52-53, 73).[1] Gerjuan also testified that she got a phone call from her sister on the 28th of November at 3:00 a.m. or 4:00 a.m. (*Id*. 60-61, 73-74).

Angela Rowe's neighbor, Elmer Massey, told police he saw Angela and the children the weekend after Thanksgiving, which would have been November 27th or the 28th.[2] (Tr. 1602-1603). During the week of November 29th, Mr. Massey also observed a light-skinned black male leave Angela's house but, after this man was observed by Mr. Massey, he went back inside. (*Id*. 1603-1610). The children's aunts Beverly and Sherry Conley also testified that they had spoken with Alexis and Angela on the weekend of the 27th or the 28th of November. (Tr. 1673-1682, 1689-1691, 1708).

1. Facts Surrounding Trial Counsel's Waiver of Penalty Phase Closing Argument

After the jury returned guilty verdicts on all counts, Mr. Taylor directed his trial counsel team not to present any mitigating evidence or closing argument at the penalty phase of the trial.[3] The trial court thereafter questioned Mr. Taylor about this decision:

[1] Portions of Gerjuan Rowe's pretrial deposition were presented at trial because she could not be located to provide live testimony.
[2] Thanksgiving in 2004 was November 25th. (Tr. 1597).
[3] This occurred just before opening statements were delivered in the penalty phase by both the prosecution and defense counsel Robert Wolfram. (Tr. 1799-1821).

THE COURT: Mr. Taylor, do you want to come up with your lawyers?
(Whereupon the attorneys approached the bench and the following occurred outside the hearing of the jury.)

THE COURT: Mr. Taylor, we're about to proceed with this, the second stage of the trial, the punishment phase on the jury's finding of guilt to four counts of Murder in the First Degree. Just a few moments ago I was approached by your attorneys who indicated to me that you have instructed them in this phase of the trial that you do not want them to – well, let me ask you, first, you've given them certain instructions about how you want them to conduct this second phase of the trial. Why don't you tell me what it is that you told them, what limitations you're putting on them.

THE DEFENDANT: I have instructed my attorneys not to argue anything in this portion of the trial, this penalty phase. As a Muslim we do not ask for other men something they cannot give us or take from us. I would never ask another man or jurors for a dime which they could give me, and being that I definitely wouldn't ask them for my life, which they can't take nor can they give. Only Allah can do that. So to concede to that would be giving them a false sense of authority they don't have. Neither they have that nor you. And if it's Allah's will I'll die tonight, tomorrow, fifty years from now.

THE COURT: The second phase procedure following the second phase, both sides, the State and your lawyers are allowed to make opening statements. And the opening statements are basically confined to what they expect to present as evidence in this second phase of the trial. It's my understanding, and I'll direct this to [trial counsel],

you do have some evidence that you were going [to] present on behalf of Mr. [Taylor]; is that correct?

[TRIAL COUNSEL]: Well, I've discussed this with Mr. Taylor and I think he is okay with us basically indicating [to] the jury not much more than we do have some evidence by stipulation regarding his behavior while incarcerated, and think he's indicated he's okay with that.

THE COURT: And that's correct?

THE DEFENDANT: That's the only thing I will allow them to enter into stipulation as to whatever my conduct has been while incarcerated, or so forth. So on that matter not either – whatever else will be.

THE COURT: Once the evidence has been concluded then both sides are going to have an opportunity to argue this case and argue – I guess they'll argue the evidence that has been presented. And I'm sure if it follows, the course followed in the past, the State will be asking the jury to impose the death penalty. Your lawyers, if allowed, would ask the jury to spare your life. Are you asking them not to do that?

THE DEFENDANT: Your Honor, I would never ask another man not to do something they have no power to do. Only Allah can spare my life, only Allah gave me life. So if they impose a death sentence that means nothing to me, okay?

THE COURT: I understand. The position you're taking is going to severely hamper your attorneys in their efforts to try to spare your life, do you understand that?

THE DEFENDANT: I'm not going – I wouldn't ask you to spare my life, I would not allow them to do that because you have no power to do that, you have no power to take my life.

THE COURT: I guess my question to you, do you understand you're really hamstringing them in terms of presenting a defense for you?

THE DEFENDANT: What I understand is this here, Your Honor, I'm leaving the power of life and death in the hands of Allah who's the only person who has that power. It would not be the prosecutor, no juror, no one else for my life, only Allah can give that, only Allah can take that. At birth every man was sentenced to death, it may be a day, it may be a year, it may be a hundred years, but you're guaranteed to die, you know, so we're not afraid of that if it be that. It may not be that.

THE COURT: It is your decision, I'm satisfied it's not a decision forced on you by anybody. You're taking this position through your own volition and this is your decision; is that correct?

THE DEFENDANT: I'm a Muslim.

THE COURT: I understand.

THE DEFENDANT: And as we establish ourselves through positive action and live by that, whatever the course may be, and we except [sic] that. Now if they want to argue for death, go ahead, but we're not going to beg them or anybody else.

THE COURT: I want this record to be perfectly clear this is your decision.

> THE DEFENDANT: It's my decision. It's a last decision.
>
> THE COURT: You've gone through and communicated to your lawyers and now you've communicated to me it is your decision.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right.
>
> THE DEFENDANT: Ma sha Allah.
>
> (Tr. 1794-1798).

After the state closed its presentation of evidence at the penalty phase, the trial court invited Mr. Taylor's trial counsel to read the stipulation of his good behavior while incarcerated, which resulted in the following colloquy:

> [TRIAL COUNSEL]: Judge, we do not have any evidence.
>
> THE COURT: Ladies and gentlemen, at this time I'm going to – we're going to take a brief recess. There are some additional instructions that we're going to have to work on now.…
> (Whereupon the Court admonished the jury, after which there was a recess, after which the following occurred in open court outside the presence of the jury.)
>
> THE COURT: Mr. Taylor, it was my understanding after our discussion here at the bench a few minutes ago you were going to permit your attorneys to offer evidence by way of stipulation as it related to your behavior and conduct while incarcerated. When I called on [trial counsel] to present any evidence that she might have on your behalf, at that time you

motioned to her, she went over, she had a whispered conversation with you, and she offered no evidence. Was that at your direction?

THE DEFENDANT: Yes, sir, it was.

THE COURT: You haven't changed your mind.

THE DEFENDANT: I didn't want her the [sic] read it.

THE COURT: I thought you told me earlier you had no problem with the stipulation?

THE DEFENDANT: We were to stipulation that it could be entered but not that she would read it, that's not –

THE COURT: Well, without her reading it, it won't get in front of the jury; do you understand that?

THE DEFENDANT: That's fine.

THE COURT: I mean, I guess they could ask it be passed to the jury or the jury may be allowed the [sic] read it at some later time.

THE DEFENDANT: That was my understanding that would take place.

THE COURT: The jury would be allowed to view it but it would not be read to them, is that what you're saying?

THE DEFENDANT: Yes, sir.

[DEFENSE COUNSEL]: We would ask leave to mark it and offer it in evidence. There was a misunderstanding.

> THE COURT: All right. Sure. All right. You can have a seat.
>
> [DEFENSE COUNSEL]: Your Honor, at this time we would – we've marked the stipulation concerning corrections records as Defendant's Exhibit RR and we ask that it be admitted at this time.
>
> [PROSECUTOR]: No objection.
>
> THE COURT: It will be received.
>
> (Tr. 1821-1823).

After the penalty phase instructions were read to the jury, the prosecuting attorney gave a summation urging the jury to sentence Mr. Taylor to death for all four of the murders for which he was convicted. (Tr. 1843-1849). Defense counsel, thereafter, complied with Mr. Taylor's directive and waived petitioner's right to present oral argument. (Tr. 1849-1850). Not surprisingly, the jury returned death verdicts on all four murder charges after less than three hours of deliberation. (Tr. 1851).

2. District Court Proceedings

Mr. Taylor raised eight claims for relief in his timely filed petition for writ of habeas corpus under 28 U.S.C. § 2254. (8th Cir. App. 11-68). Specifically, the claims Mr. Taylor raised were: (1) the denial of his right to a speedy trial; (2) the denial of his right to present a complete defense when the trial court excluded favorable hearsay evidence; (3) trial counsel provided ineffective assistance of

counsel for failing to object to the admission of phone records and failing to adequately investigate those records; (4) the denial of his rights to a fundamentally fair trial when the trial court denied his motion to exclude forensic tests; (5) the denial of his rights to due process and to be free from cruel and unusual punishment when the trial court excluded a prospective juror; (6) the denial of his rights to due process of law and to be free from cruel and unusual punishment by the State's improper arguments during *voir dire* and closing; (7) the denial of his constitutional rights to due process of law and to be free from cruel and unusual punishment when he was handcuffed in front of the jury after the conclusion of the guilt phase of his trial; and (8) trial counsel was ineffective for failing to disregard his directive not to make a closing argument at the penalty phase of his trial. (*Id.*). As noted earlier, the district court denied relief on all of these claims, but issued a COA on Mr. Taylor's final claim of penalty phase ineffectiveness. (A-13-75).

In denying Mr. Taylor's claim that trial counsel was ineffective for following Mr. Taylor's directive not to give a closing argument at the penalty phase of the trial, the district court found that *Martinez v. Ryan,* 566 U.S. 1 (2012), did not appear to excuse Mr. Taylor's procedural default of this claim, and even if it did, the claim failed on the merits. (A-71-74). The district court in its discussion of the *Martinez* issue discounted *Emerson v. Gramley*, 883 F. Supp. 225 (N.D. Ill. 1995), and *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989), two of the cases that

Mr. Taylor cited in support of his argument that this claim was substantial and would have been advanced by competent counsel in his 29.15 motion. (A-71-73).

Regarding the merits of Mr. Taylor's Sixth Amendment claim, the district court found that neither *Florida v. Nixon*, 543 U.S. 175 (2004), nor *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) compelled trial counsel to disregard Mr. Taylor's wishes and deliver a closing argument. (A-73-74). The district court found that Mr. Taylor was aware of his attorney's objective of convincing the jury to reject the death penalty and nevertheless made a conscious decision to adhere to his religious tenets. (A-126). The district court held that Mr. Taylor had the ultimate authority to compel trial counsel to waive a closing argument at the penalty phase of his trial because "whether to present argument at all…is a basic trial right the Constitution reserves to the defendant." (*Id*.).

After denying relief on this claim, however, the district court determined that Mr. Taylor had made a substantial showing of the denial of a constitutional right and granted him a COA on this issue. (A-74-75). The district court concluded in this regard that:

> Upon a final review of Taylor's claims, I conclude that Taylor's counsel's decision to comply with Taylor's directive to forego a closing argument at the penalty stage of his trial may have violated Taylor's substantial right to constitutionally effective counsel at trial. Whether the decision to forego a closing argument at the penalty stage of a capital murder trial is a tactical decision for counsel or a basic trial right decision for the defendant is debatable among reasonable jurists. This is a question of law that the United States Supreme Court

> has not directly considered. Another court could resolve this issue differently and the issue deserves further review.

(*Id.* 74).

3. Eighth Circuit Proceedings

On appeal, a three judge panel of the Eighth Circuit affirmed the district court's judgment on a different ground. (A-1-12). Without directly deciding whether the district court's decision that the holdings in *McCoy* and *Nixon* gave a defendant the authority to require counsel to waive closing argument was correct, the panel affirmed the district court's judgment by finding that petitioner's claim was defaulted under *Martinez* because the underlying Sixth Amendment claim was not substantial because trial counsel's performance was not deficient. (A-7, 12). As a result, the court did not address the issue of whether "cause" was established under *Martinez* because state post-conviction counsel was ineffective in failing to raise this Sixth Amendment claim in petitioner's Rule 29.15 motion. (*Id.* 7-12).

The Eighth Circuit rested its decision on both the procedural bar issue and the merits of the underlying Sixth Amendment claim on its view that deficient performance can never be established under *Strickland v. Washington*, 466 U.S. 668 (1984) where trial counsel follows the directives of a mentally competent defendant to pursue or not pursue a particular trial strategy. (A-6-12). As a result, the Court of Appeals did not address the issue of *Strickland* prejudice. *Id.*

On the issue of *Strickland* prejudice, petitioner had argued both before the District Court and the Court of Appeals that a closing argument, focusing upon lingering doubt, would provide a powerful reason for the jury to reject the death penalty based upon the circumstantial nature of the State's evidence and the fact that Mr. Taylor had a strong alibi defense. A residual doubt argument would have also been compelling due to the fact that the initial coroner's report found that the victims' times of death occurred during a period of time when Mr. Taylor had an airtight alibi and, several of the victims' neighbors and family members provided testimony that they saw or spoke to the victims by phone during the time period when Mr. Taylor could prove that he was not in the State of Missouri.

The Eighth Circuit, thereafter, denied petitioner's petition for rehearing and suggestion for rehearing en banc, rejecting petitioner's arguments that the panel's decision was at odds with *Martinez*, *Nixon*, and *McCoy*. (A-76). The present petition for a writ of certiorari is now before this Court for its discretionary consideration.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DECISIONS BELOW THAT EXTENDED A DEFENDANT COMPLETE AUTONOMY OVER COUNSEL'S DECISION WHETHER OR NOT TO DELIVER A CLOSING ARGUMENT IN A CAPITAL CASE CONFLICTS WITH THIS COURT'S DECISIONS IN *NIXON* AND *MCCOY* AND THE VIEWS OF OTHER CIRCUITS.

In *Jones v. Barnes*, 463 U.S. 745 (1983) this Court made it clear that the defendant has the "ultimate authority" to decide "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id*. at 751. Conversely, strategic decisions that would benefit from the "professional judgment," and "superior ability of trained counsel" are better left to lawyers. *Id*. Thus, tactical decisions such as the best theory of defense or how to argue the case to a jury are decisions that counsel must make, regardless of the defendant's wishes. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004).

Under *Nixon*, notwithstanding Mr. Taylor's desire that counsel make no effort to spare his life, trial counsel had a professional duty to deliver a closing argument raising available arguments supported by the evidence to try to convince the jury to reject the death penalty. Here, trial counsel's acquiescence to petitioner's desire to waive oral argument in the penalty phase is also contrary to the ABA guidelines regarding the performance of counsel in capital cases. *See* Commentary to ABA Guidelines 10.11. (personal argument by counsel in support of a sentence less than death is important.)

In denying habeas relief, the District Court purportedly relied upon language from *Nixon* and from this Court's more recent decision in *McCoy v. Louisiana,* 138 S. Ct. 1500 (2018) to support its view that whether to present closing argument at all at the penalty phase is a basic trial right that can be waived personally by a

criminal defendant in a capital case. (A-74). The only authority the District Court cited in support of this position was "*Nixon*, 543 U.S. at 187." (*Id.*). Although the Eighth Circuit did not explicitly adopt the district court's view that a defendant controls counsel's decision whether to give a summation in a capital case penalty phase[4], the court of appeals implicitly did so by holding that counsel can never be found to have performed deficiently under the Sixth Amendment standards articulated by this Court in *Strickland* where he follows a client's directive to waive closing argument in a capital case. (A-7-12).

The passage the district court cited from the *Nixon* opinion indicated that a defendant's control over aspects of his defense is limited to the decisions as to whether to plead guilty, waive a jury, testify, or take an appeal. *Nixon* 543 U.S. at 187. In *McCoy*, this Court expanded upon *Nixon* by holding that the accused also controls his right to assert his innocence by finding that a Sixth Amendment violation occurred when defense counsel, as a matter of strategy, conceded guilt over the defendant's objection. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508-1512 (2018). Neither *Nixon* nor *McCoy* held that the defendant, rather than counsel, can

[4] Although Rule 10 articulates considerations governing this Court's exercise of discretion that focuses upon Court of Appeals' decisions, the published opinion of the District Court here, because it was not repudiated by the Eighth Circuit, is a binding precedent in this Circuit. If this decision is allowed to stand, it will undoubtedly sow confusion in this category of Sixth Amendment jurisprudence.

dictate the substance of counsel's summation or demand that counsel completely waive his closing argument at the penalty phase of a capital case.

In *McCoy*, this Court held that a criminal defendant's control over the case is limited to the specific rights that were articulated in *Nixon* and that were expanded by this Court's majority in *McCoy*. As noted in *McCoy* noted: "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the omission of evidence.'" *Id.* at 1508. This passage from *McCoy* indicates that the District Court erred as a matter of law in expanding the holding of *McCoy* to give a defendant the right to control counsel's strategic judgments regarding the substance of arguments to the jury or whether to give or completely waive a closing argument in the penalty phase of a capital case.

This reading of *McCoy* is also bolstered by Justice Alito's dissenting opinion in that case. As Justice Alito noted: "Among the decisions that counsel is free to make unilaterally are the following: choosing the basic line of defense, moving to suppress evidence, delivering an opening statement and deciding what to say in the opening, objecting to the admission of evidence, cross-examining witnesses, offering evidence and calling defense witnesses, and **deciding what to say in**

summation." *Id*. at 1516 (Alito, J., dissenting). c*iting New York v. Hill*, 528 U.S. 110, 114-115 (2000). (emphasis added).

In light of the fact that all of the members of this Court in *McCoy* agreed that trial counsel maintains strategic control over closing argument, the district court committed a clear legal error in holding that whether or not to present closing argument is one of the "basic trial rights the Constitution reserves to the defendant." (Add. 127). Under *McCoy*, *Nixon*, and other jurisprudence of this Court, trial counsel here performed deficiently in not delivering a penalty phase argument urging the jury to spare petitioner's life based upon the tenuous evidence of his guilt and in light of the fact that he exhibited good behavior when he was previously incarcerated.

The District Court's view that *McCoy* extends to situations beyond defense counsel's concession of guilt has not found favor before other reviewing courts. As one federal district judge recently pointed out, most courts have rejected attempts to expand *McCoy* beyond the context of an actual concession of guilt by counsel. *See Addison v. Brittain*, 219 U.S. Dist. Lexis 50509 at *6 (W.D. Pa. March 25, 2019).

In a case involving somewhat similar facts, a federal District Court rejected a New Hampshire prisoner's ineffectiveness claim that rested upon trial counsel's failure to honor his demand to forego presenting any defense to the charges and

remain silent. *Kellogg-Roe v. Warden, N.H. State Prison*, 2020 U.S. Dist. Lexis 51228 (D.N.H. March 25, 2020), aff'd, *sub. nom, Kellogg-Roe v. Gerry*, 19 F.4th 21 (1st Cir. 2021). The District Court in *Kellogg* noted that Sixth Amendment claims based upon *Nixon* and *McCoy* are properly labeled as "autonomy claims," which are premised on a violation of a defendant's right to make fundamental choices about his own defense. *Id.* at *15-16.

The District Court in *Kellogg* had little difficulty in concluding that a defendant's instructions to counsel to remain silent did not involve a fundamental right reserved for the defendant but instead was a trial strategy decision committed to trial counsel's judgment. *Id.* at *20. As a result, the court in *Kellogg* held that counsel made the right decision in ignoring his client's request to remain silent and in presenting a vigorous defense. *Id.* at 20-25. The court further noted that allowing a defendant to require his defense counsel to remain silent would take away from counsel the ability to make strategic decisions altogether. *Id.* at *23. Adopting this position would also be inconsistent with the line of this Court's decisions holding that there is a constructive denial of counsel when counsel fails to subject the state's case to any meaningful adversarial testing whatsoever. *Id.* at *24.

In affirming Kellogg-Roe's convictions, the First Circuit noted that this Court held in *McCoy* that "autonomy to decide that the objective of the defense is to assert innocence is protected by the Sixth Amendment because the proper role of

the attorney, as assistant, is limited to decisions about trial management." 19 F.4th *at* 26. Therefore, decisions reserved to the client "are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *Id.*

In rejecting Kellogg-Roe's request to extend *McCoy* to permit a defendant to direct his counsel to pursue a "silent defense," the First Circuit noted that the presentation of an active defense over a defendant's objection does nothing to subvert the client's desire to maintain his innocence. *Id.* at 27. This observation of the First Circuit would have applied with equal force to the circumstances of this case had counsel elected to deliver a penalty phase argument focusing on residual doubt because this decision would have not been inconsistent with petitioner's objective to maintain his innocence.

The decisions from the courts below in this case can also not be reconciled with the Fourth Circuit's recent decision in *United States v. Roof*, 10 F.4d 314 (4th Cir. 2021). In that case, the court held that defendants have no Sixth Amendment right to prevent their attorneys from offering mental health mitigation evidence at the sentencing phase of a capital trial after guilt has already been established. *Id.* at 352-353. Both the Second and Third Circuits have also recently held that *McCoy's* reach does not extend to any other tactical decisions beyond a total concession of

guilt. *See United States v. Rosemond*, 958 F.3d 111, 123 (2nd Cir. 2020); *United States v. Wilson*, 960 F.3d 136, 144 (3rd Cir. 2020).

A penalty phase closing argument in petitioner's trial focusing on lingering doubt regarding his guilt would have been extraordinarily compelling due to the undeniable fact that the State's evidence of guilt was based primarily upon tenuous circumstantial evidence. Petitioner also presented a very strong alibi defense. There was no physical evidence linking petitioner to these murders and a strong argument could have been made that his brother, Perry Taylor's statements to the police that petitioner admitted to him that he committed the crimes were unreliable because they were coerced by threats and intimidation. In fact, petitioner's brother recanted his statements to the police on the witness stand. (Tr. 864, 900-902).

Although there is no Eighth Amendment right to present residual doubt evidence, Missouri's statutory scheme and jury instructions clearly contemplate that a capital jury can consider any factor supporting a sentence less than death. *See Williams v. State*, 168 S.W.3d 433, 443 (Mo. banc 2005). In fact, petitioner's jury was specifically instructed in a final "catch all" instruction that they can reject the death penalty for any reason. (D.A.L.F. 1285-1288). *See also Jones v. State*, 784 S.W.2d 789, 793 (Mo. banc 1990) (finding catch-all instruction sufficient to encompass lingering doubt and that a more specific instruction was unnecessary). This instruction also encompasses the mitigating evidence regarding petitioner's

good behavior in prison under *Skipper v. South Carolina*, 476 U.S. 1 (1986); *See State v. Parker*, 886 S.W.2d 908, 929 (1994); *State v. Richardson*, 923 S.W.2d 301, 326 (1996).

In light of the weaknesses in the prosecution's case, the strength of petitioner's alibi, his good conduct while incarcerated, and prevailing case law, trial counsel's failure to present a closing argument was objectively deficient under *Strickland's* performance prong. Trial counsel's acquiescence to petitioner's command to completely waive penalty phase summation was also prejudicial. Had a compelling residual doubt argument been made to the jury, coupled with an argument that a life sentence would not have put any fellow prisoners or prison personnel at risk in light of petitioner's good behavior during prior incarcerations, there is a reasonable probability that at least one juror would have elected not to sentence petitioner to death. *See Antwine v. Delo*, 54 F.3d 1357, 1367-1368 (8th Cir. 1995).

The power of closing argument in a capital case cannot be overstated, especially when the jury's verdict at the guilt phase rested upon questionable evidence. The foundation of our adversarial system of adjudication depends upon a clash of advocates testing the evidence in the given case which theoretically guides a jury to reach a true and just verdict. When defense counsel remains silent at the

penalty phase of a capital case, such a failure unquestionably undermines any confidence in the jury's verdict.

As this Court has noted in regard to the paramount importance of summation in a criminal trial:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Herring v. New York, 422 U.S. 853, 862 (1975) (reversing conviction due to denial of closing argument in bench trial). Had an effective argument emphasizing residual doubt, and to a lesser extent petitioner's good conduct while incarcerated been delivered by counsel, there is a reasonable likelihood of a different penalty phase outcome.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION THAT TRIAL COUNSEL CANNOT BE FOUND INEFFECTIVE IF HE BLINDLY FOLLOWS HIS CLIENT'S DIRECTIVES ON AN ISSUE OF TRIAL STRATEGY CONFLICTS WITH PRIOR DECISIONS FROM THIS COURT AND FROM OTHER CIRCUITS.

The Eighth Circuit affirmed the denial of habeas relief to petitioner by finding that trial counsel's compliance with petitioner's command to waive summation cannot be deemed to be deficient performance under the Sixth

Amendment. (A-7-12). In reaching this result, the court of appeals found that it was immaterial as to whether counsel's failure is labeled as a trial strategy or a fundamental right reserved to the defendant. (*Id.* at 9). The court also observed that counsel's acquiescence to Mr. Taylor's wishes "was neither a trial strategy nor the absence of one." (*Id.* at 10). The court then held that there can be no Sixth Amendment violation if counsel follows the directions of a defendant to waive summation, despite the fact that this is normally a tactical decision reserved for the professional judgment of trial counsel. (*Id.* at 10-11).

Although the Court of Appeals did not explicitly agree with the District Court's extension of the holdings in *Nixon* and *McCoy* to the waiver of closing argument, the Court of Appeals prominently cited *McCoy* as persuasive authority for its view that counsel can never be found to have provided deficient performance where he abides by his client's wishes as to what course of action to take at his trial. (A-10). In this regard, the Court of Appeals repeated the same mistake that the District Court made by extending *McCoy* to situations that do not involve fundamental trial rights.

McCoy held that a criminal defendant has the ultimate authority to require his counsel to argue his innocence before the jury. *McCoy*, 138 S. Ct. at 1508-1509 (2018). However, *McCoy* explicitly recognized that counsel still had a duty to consult with their client about the benefits of more realistic strategies. *Id.* at 1509.

McCoy does not license an attorney to relinquish his sacred duty to give sound advice to his client.

There is nothing in the colloquy between the trial court, petitioner, and counsel that indicates that trial counsel informed Mr. Taylor that he could raise the issue of lingering doubt in his closing argument to the jury in favor of a life sentence. Because petitioner consented to counsel's desire to put on mitigating evidence about his good behavior during prior incarcerations, it is quite likely that Mr. Taylor would have also agreed to let counsel raise the issue of residual doubt to the jury in his penalty phase summation.

In the post-*Furman* era, capital defendants frequently advise trial counsel to go for an outright acquittal and, if this strategy fails, to do nothing to try to convince the jury to spare his life. *See e.g. Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983). Many defendants in that situation quite sincerely believe that the death penalty is a preferable alternative to life behind bars. Most capital defendants with this mindset, like petitioner, change their minds after they are condemned to die.

The Eighth Circuit's adoption of a "blind obedience rule" in this case that completely shields counsel's conduct from Sixth Amendment scrutiny conflicts with numerous decisions from this Court and other courts of appeal. It is well-settled that trial counsel may not, consistent with his duties under the Sixth

Amendment, settle on a tactic or strategy and limit his options in blind obedience to the client's wishes. As this Court has noted in a different context: " Regardless of whether a defendant asserts her innocence (or admits her guilt), her counsel 'must make independent examination of the facts, circumstances, pleadings and laws involved and then…offer his informed opinion as to what plea should be entered.'" *Burt v. Titlow*, 571 U.S. 12, 25 (2013) (Sotomayor, J., concurring).

Numerous Courts of Appeal have also explicitly rejected the view that following their client's directive on an issue of trial strategy precludes reviewing courts from finding that counsel was ineffective, including the Eighth Circuit en banc in *Chambers v. Armontrout*, 907 F.2d 825, 830-831 & n.7 (8th Cir. en banc 1990). Other Courts of Appeal have also held that a client's decision whether to pursue a certain defense or trial tactic does not end counsel's duty to investigate and provide competent advice to his client. *See Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008); *Phillips v. Woodford*, 267 F.3d 966, 978 (9th Cir. 2001); *Johnson v. Baldwin*, 114 F.3d 835, 840 (9th Cir. 1997) (when an attorney abdicates his duties to investigate the case and render professional advice, and instead acquiesces in the uniformed decisions of the client regarding trial strategy, that client receives no benefit from counsel's skill and knowledge and is deprived of his constitutional right to counsel).

Earlier this year, the Ninth Circuit addressed a similar issue of penalty phase ineffectiveness in *Sanders v. Davis*, 23 F.4th 966 (9th Cir. 2022). Trial counsel in *Sanders* focused his energies on trying to obtain an acquittal at the guilt phase. After Mr. Sanders was convicted, he told trial counsel that he did not want him to present a penalty phase defense because a life without parole sentence was unacceptable to him. *Id.* at 970. Trial counsel in *Sanders* viewed his client's wishes as a personal choice and believed that it was not his role to challenge his decision. *Id.* As a result, trial counsel presented no evidence and waived closing argument during the penalty phase. *Id.*

In finding counsel ineffective, the court in *Sanders* noted that trial counsel, among other things, failed to inform Mr. Sanders of the fact that lingering doubt would have been a significant mitigating factor that could have been presented to the jury. *Id.* at 989. Such a defense, as here, was permitted, under state law and would have been compelling because the state's evidence was not overwhelming and Sanders had presented an alibi defense. *Id.* at 989, 993-994.

The court in *Sanders* also held that granting penalty phase relief to Mr. Sanders was not foreclosed by this Court's decision in *Schriro v. Landrigan*, 550 U.S. 465 (2007). Because *Landrigan* only addressed the issue of *Strickland* prejudice, the court in *Sanders* held that it had no bearing on counsel's obligation

to investigate and advise his client when a client objects to presenting a mitigation case. *Id.* at 984.

The Eighth Circuit here also prominently cited *Faretta v. California*, 422 U.S. 806 (1975) to support its view that it was not trial counsel's duty to question or ignore a client's ill-advised decision regarding trial tactics. (A-10-12). *Faretta* is inapposite because self-representation is a fundamental right protected under the Sixth Amendment. Where a criminal defendant knowingly and voluntarily waives his right to counsel and elects to represent himself, he has complete control of his defense to the charges. On the other hand, when a defendant has elected to accept an attorney, he loses the "power to make binding decision of trial strategy in many areas." *Id.* at 820. Ironically, after petitioner directed counsel to abdicate his duty to deliver a closing argument, the trial court should have conducted a *Faretta* inquiry and only allowed petitioner to waive closing argument if he agreed to represent himself. *See Kellogg-Roe*, 19 F.4th at 27-28.

Finally, if the Eighth Circuit's "blind obedience rule" that completely shields trial counsel from being deemed ineffective when he follows a client's directive is allowed to stand, this would create a "slippery slope" as illustrated by the following hypothetical. Suppose that Mr. Taylor had commanded his counsel to deliver a closing argument to the jury that he would prefer that the jury sentence him to death instead of life imprisonment without parole. Under the Eighth

Circuit's decision here, trial counsel could not be deemed ineffective if he followed this command. This Court's discretionary intervention is warranted to abrogate this unwise and dangerous decision that erodes the Sixth Amendment's guarantee of effective assistance of counsel.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION FINDING THAT PETITIONER'S SIXTH AMENDMENT CLAIM WAS PROCEDURALLY BARRED BECAUSE PREJUDICE CANNOT BE ESTABLISHED BECAUSE THE UNDERLYING CLAIM LACKED MERIT CONFLICTS WITH *MARTINEZ* AND THE VIEWS OF OTHER CIRCUITS.

Certiorari should be granted because the Eighth Circuit's adjudication of the procedural bar issue in this case cannot be reconciled with *Martinez* and its progeny for two reasons. First, the court misapplied the test for prejudice articulated in *Martinez*. Second, because the state court record was not adequately developed on the question of whether trial counsel rendered deficient performance, an evidentiary hearing was required to give petitioner full and fair opportunity to establish cause and prejudice under *Martinez*. Petitioner will address each of these issues in turn.

It is not appropriate for reviewing courts to conflate the prejudice standard articulated in *Martinez* with the merits of the underlying defaulted claim. *Martinez* makes it clear that prejudice is established to overcome a procedural bar if the underlying claim of ineffective assistance of counsel is "substantial." *Martinez v.*

Ryan, 566 U.S. 1, 14 (2012). The Third Circuit has found that a claim is substantial if the claim has enough merit to warrant a COA. *See e.g. Cox v. Horn*, 757 F.3d 113, 119 (3rd Cir. 2014). Since the District Court in this case granted a COA, this establishes prejudice under *Martinez*. Mr. Taylor was not required to meet the *Strickland* standard at this juncture to obtain merits review of his claim under the *Martinez* exception. Rather, he must simply show that his ineffective assistance claim is factually supported and is not "without merit." *White v. Warden*, 940 F.3d 270, 276 (6th Cir. 2019), quoting *Martinez*, 566 U.S. at 16.

Second, because Mr. Taylor's underlying claim was "substantial," an evidentiary hearing was necessary under *Martinez* to establish cause. "*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." *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013 en banc).

Petitioner was also entitled to an evidentiary hearing on the issue of *Martinez* prejudice which the Eighth Circuit conflated with the issue of deficient performance by trial counsel. The state court record is silent regarding what motivated trial counsel to blindly follow his client's directive to waive closing argument.

At the time of trial, it is clear that *Nixon* was the prevailing law regarding which decisions concerning trial tactics and strategy were controlled by counsel rather than the defendant. As a result, a reasonably competent capital trial attorney would have been aware of the *Nixon* decision and pointed out to the trial court, after Mr. Taylor expressed his desire that counsel waive closing argument, that this decision did not ultimately rest with the defendant but instead was to be guided by counsel's professional judgment as dictated by *Nixon*[5].

Therefore, trial counsel's failure to inform the court of his obligation to exercise independent judgment under *Nixon* and thereafter deliver a closing argument was likely due to neglect or ignorance of the law, either of which constitutes deficient performance under *Strickland*. *See Hinton v. Alabama,* 571 U.S. 263 (2014). As this Court in *Hinton* pointed out: "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Id.* at 274.

Finally, petitioner's right to an evidentiary hearing to establish cause and prejudice under *Martinez* and fully develop the record in support of his Sixth Amendment claim will almost certainly be impacted by this Court's upcoming

[5] Counsel did not and could not have advanced any legitimate tactical reason to waive summation. In fact, at the commencement of the penalty phase, the trial court was informed that Mr. Wolfrum would present the closing argument for the defense. (Tr. 1794).

decision in *Shinn v. Ramirez, cert. granted*, 141 U.S. 2620 (2021). As a result, petitioner would respectfully request that this Court consider holding this case in abeyance until it issues its decision in *Shinn*.

Nevertheless, it is clear under currently prevailing law that it was improper for the courts below to adjudicate the issues in this case surrounding *Martinez* and the underlying Sixth Amendment claim without the benefit of a hearing. This Court's discretionary intervention is necessary to rectify this error and give petitioner a full and fair opportunity to litigate these important questions upon which his life depends.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Kent E. Gipson
KENT E. GIPSON
Mo. Bar #34524
Law Office of Kent Gipson, LLC
121 East Gregory Blvd.
Kansas City, Missouri 64114
816-363-4400 • Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

/s/ Kevin L. Schriener
KEVIN L. SCHRIENER
Mo. Bar #35490
Law & Schriener, L.L.C.
141 North Meramec Ave., Suite 314
Clayton, Missouri 63105
314-721-7095 • Fax: 314-863-7096

kschriener@SchrienerLaw.com

COUNSEL FOR PETITIONER