**No. 21-7449**

---

**IN THE SUPREME COURT OF THE UNITED STATES**

---

**LEONARD TAYLOR,**

Petitioner,

v.

**PAUL BLAIR,**

Respondent.

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

# BRIEF IN OPPOSITION

---

**ERIC S. SCHMITT**
Missouri Attorney General

D. JOHN SAUER
Solicitor General

KATHARINE A. DOLIN
Assistant Attorney General
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573)751-3321
Katharine.Dolin@ago.mo.gov
Attorneys for Respondents

CAPITAL CASE

## QUESTION PRESENTED

Should this Court grant a writ of certiorari to review a procedurally-defaulted claim that presents no conflict with this Court's or any other court's precedents, and is belied by a record which demonstrates that counsel, after conducting investigation and advising his client appropriately, agreed to follow the unequivocal, coherent, sincere, and faith-based desire of her client to waive closing argument?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Rules**

## STATUTE INVOLVED

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable

written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## STATEMENT OF THE CASE

On December 3, 2004, police discovered the bodies of Angela Rowe and her three children—aged 5, 6, and 10—in their home, all dead of gunshot wounds to the head. [Tr. 820, 825–26, 1188–90].[1] At the time of her death, Rowe was dating Petitioner Leonard Taylor in Missouri while he was still married to another woman, Debrene, in California. [Tr. 1094, 1245].

[1] The Warden filed Taylor's trial transcripts in the district court as Respondent's Exhibits M–T to Show Cause Response [Doc. 29]. For clarity, the Warden utilizes the page numbers of the full transcript here rather than each of the eight exhibits.

Taylor's last call to Rowe was on November 22, 2004. [Tr. 1429; State's Ex. 232[2]]. Her children were last seen at school on November 23, 2004. [Tr. 1228–29]. Rowe, a "good employee," did not show up to work or call out on November 26, 2004. [Tr. 1164–70]. An unread newspaper on Rowe's front lawn was dated November 26, 2004. [Tr. 983–86, 1003–04].

On November 23, 2004, Taylor called his brother Perry and confessed that he had killed Rowe and that he was going to kill, or already had killed, her three children because they had witnessed her murder. [State's Ex. 196B]. In another phone call to Perry the same day, Taylor admitted that he was still at Rowe's home. [State's Ex. 196B]. Phone records corroborated the timing of the calls between Taylor and Perry that day and also showed that Taylor's cell phone connected to a cell tower just a half a mile from Rowe's home. [Tr. 1431–34, 1315; State's Exs. 231, 233]. Perry later testified at trial that he did not tell, or did not remember telling, the police about these calls; upon being confronted with his recorded police statement, he claimed that it was coerced by police. [Tr. 856, 864–66, 877, 880–84, 1036–40]. But Perry's own girlfriend testified that on November 24, 2004, and again on November 25, 2004, Perry told her that Taylor had confessed to the killings of Rowe and her three children. [Tr. 1079–82]. A week before trial began, Taylor called Perry to tell him that

---

[2] The Warden did not file the State's trial exhibits in the district court, but the contents of those exhibits are described in the State's brief on direct appeal, attached to the Warden's Show Cause Response [Doc. 29] as Respondent's Exhibit V.

if Perry fled the state, he could fight extradition and could not be returned to Missouri. [Tr. 1557–63; State's Ex. 259].

On November 24, 2004, nine calls were made from Rowe's house: two to Taylor's family friend, five to Perry, and two to Southwest Airlines. [Tr. 1528–30; State's Ex. 220]. All calls after 9:50 am on November 25, 2004 were forwarded to voicemail and no more outgoing calls were placed. [Tr. 1530–31].

Perry received another call from Taylor on November 25, 2004, during which Taylor stated he was still at Rowe's home. [Tr. 1083]. When asked how he could stay in the house "with them people," Taylor responded, "they dead," and he had turned on the air conditioner. [Tr. 1083]. He told Perry "the bitch wouldn't let him go." [Tr. 1083].

In the early morning hours of November 26, 2004, Taylor appeared at his sister-in-law Elizabeth's home, said he had been sleeping in his Chevy Blazer, needed a ride to the airport, and wanted his Blazer be put in her garage. [Tr. 869, 1247–48, 1250–51]. He told her he needed to get out of St. Louis and that she was going to hear things about him, maybe on the news, but she should not believe them. [Tr. 1255]. Before leaving for the airport, Taylor disposed of a dark metal, long-barreled revolver in a nearby sewer. [Tr. 1253–54, 1260–61]. Taylor had been seen in possession of a dark metal, long-barreled revolver the month before. [Tr. 1096–97]. Taylor boarded a Southwest Airlines flight to Phoenix, then California, under the alias "Louis Bradley." [Tr. 1287–88]. His flight reservations were made by someone named "Deb." [Tr. 1287–88].

The following day, November 27, 2004, Debrene and Taylor called Elizabeth from California, and Taylor again insisted that his Blazer be put in her garage. [Tr. 1256–57, 1263]. Perry picked up the Blazer from Elizabeth's home later that week. [Tr. 1264]. A later search of the Blazer revealed a box of .38 Winchester ammunition. [Tr. 1121–23, 1135].

When officers responded to Rowe's home for a welfare check on December 3, 2004, all the windows and doors were locked and the air conditioner had been set to the coldest setting. [Tr. 821–22, 957–58]. There were no signs of forced entry. [Tr. 821, 824, 829, 914]. Rowe, found in a spare bedroom, had been shot four times, once in the head. [Tr. 826, 1178–79, 1182–83]. All three of her children, found lying side by side on the master bed, had also been shot in the head. [Tr. 825, 1183–91]. All shots were fired by the same gun: a .38 or .357 caliber revolver, both of which could fire .38 ammunition like the kind found in Taylor's Blazer. [Tr. 960, 977, 987–89, 1001–02, 1144–45, 1152]. The medical examiner testified the family could have been killed two to three weeks before they were discovered. [Tr. 1195–96, 1219–21, 1223]. Their bodies were already decomposing and emitting a foul odor. [Tr. 1194].

During a search of Rowe's home, police found an envelope, postmarked from California on November 22, 2004, containing an unsigned letter warning Rowe that her "man" was not hers. [Tr. 912–13]. Police also found a can of air freshener with Taylor's fingerprints on it. [Tr. 1009, 1269–70, 1273]. A continued search revealed a driver's license with Taylor's photo and a social security card, but both were in the name of "Terrence Carter." [Tr. 920–21].

Police arrested Taylor in Kentucky on December 9, 2004, while he was leaving the home of yet another girlfriend, destined for Alabama. [Tr. 1303–05, 1317, 1329]. Police watched as a driver pulled a car up to the home, loaded luggage from the home, left the rear passenger door ajar, backed the car up to the garage, and looked up and down the street. [Tr. 1305–07]. Taylor then came out of the home, stooped low along the car, got into the car through the open door and got down into the floorboard. [Tr. 1306–07]. When police stopped the car, Taylor identified himself as "Jason Lovely." [Tr. 1318–19]. He had an identification card for "Jason Lovely" as well as a birth certificate for "Jason Anthony Richardson" and several pamphlets and books on how to create a new identity. [Tr. 1318, 1324–28, 1330; State's Exs. 154–56, 191]. A DNA test of possible blood on Taylor's glasses, with him at the time of his arrest, could not rule out Rowe as the donor. [Tr. 929–30, 1094–95, 1098, 1249–50, 1331, 1468, 1503, 1509; State's Exs. 124, 168, 169].

On February 28, 2008, a St. Louis County jury found Taylor guilty of four counts of first-degree murder and four counts of armed criminal action. App'x A-15. Prior to the start of the penalty phase, defense counsel informed the court that Taylor had requested that they not present evidence or arguments on his behalf in penalty phase with the exception that he would allow the presentation of stipulated records concerning his favorable behavior while incarcerated. (Tr. 1794–96). The following exchange occurred thereafter:

> 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. 1794–98].

At sentencing, both the State and Taylor gave opening statements. [Tr. 1799–1800]. The State presented evidence of Taylor's convictions for cocaine possession with intent to distribute, forcible rape, forgery, and stealing. [Tr. 1802–05]. Taylor's stepdaughter then took the stand, testifying that Taylor raped her at gunpoint when she was sixteen, a crime of which he was not convicted. [Tr. 1805–09]. The State then presented victim-impact testimony from Rowe's children's father and two of the children's aunts. [Tr. 1809–18]. When the State closed their evidence, the following exchange occurred:

> [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. 1821–23].

The jury deliberated for three hours before recommending the death penalty for each of Taylor's four victims. *Id.* On April 17, 2008, the trial court sentenced Taylor to death on each murder count and to consecutive life sentences on the counts of armed criminal action. *Id.*

Taylor filed a federal habeas corpus petition in 2013, raising eight grounds for relief, including a claim of ineffective assistance of trial counsel for waiving closing argument at sentencing. The district court denied relief but issued Taylor a certificate of appealability as to the ineffective assistance of counsel claim. App'x A-74–75.

The Eighth Circuit affirmed the district court's denial of habeas corpus, finding that the claim was procedurally defaulted. App'x A-6. It evaluated whether *Martinez v. Ryan,* 566 U.S. 1 (2012), might serve to excuse that default. App'x A-6. The Eighth Circuit found that the claim was not "substantial" enough continue the analysis. App'x A-12. The Eighth Circuit denied Taylor's petition for rehearing or rehearing en banc. App'x A-76.

## SUMMARY OF THE ARGUMENT

The petition should be denied because Taylor has not alleged that a lower court (1) has decided an unsettled question of federal law or (2) has acted in such a way that this Court's supervisory power is necessary, and he has not shown that a lower court has entered a decision in conflict with another court. *See* Sup. Ct. R. 10.

Taylor argues, based on the principle of ineffective assistance of counsel, that holding capital trial counsel may waive sentencing argument upon demand of his client conflicted with this Court's precedents. Pet. 27. But that question was not

before the court below, as Taylor procedurally defaulted his claim, so it was unreviewable on the merits. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Taylor argues that the Eighth Circuit's evaluation of the applicability of *Martinez v. Ryan,* 566 U.S. 1 (2012), conflicts with decisions of this Court and other courts because it conflates substantiality with prejudice. Pet. 33. But it is Taylor, not the Eighth Circuit, who conflates the standards. At various points throughout his petition, Taylor argues that he should have had a hearing regarding the applicability of *Martinez* to his ineffective assistance of trial counsel claim. Pet. 33–36. But a hearing was not necessary because the underlying claim was both plainly insubstantial and also based on a question of law. No evidence adduced at a hearing would have assisted the court. The Eighth Circuit correctly applied *Martinez*.

To the extent that the Eighth Circuit did evaluate the merits of Taylor's underlying claim in its substantiality analysis, its decision was not in conflict with this Court's precedents or that of other circuits. Taylor attempts to extend those precedents to manufacture a conflict.

Even if there were a conflict for this Court to resolve, this case is a poor vehicle to decide the issue for two reasons. *First*, Taylor was not prejudiced by the actions of trial counsel. *Second*, even if Taylor could show prejudice, then he would not receive the retroactive benefit of any decision of this Court. *Teague v. Lane*, 489 U.S. 288, 316 (1989).

## REASONS FOR DENYING THE PETITION

### I. The petition should be denied because the Eighth Circuit's procedural-default analysis did not conflict with precedent of this Court or other circuits.

An analysis of *Martinez*'s applicability begins with a review of the defaulted claim to determine whether it is "substantial" enough to evaluate post-conviction counsel's performance. *Martinez,* 566 U.S. at 14; *Dansby v. Hobbs,* 766 F.3d 809, 834 (8th Cir. 2014). Then, the court evaluates post-conviction counsel's performance to determine if his or her ineffective assistance caused the default. *Martinez,* 566 U.S. at 10. If post-conviction counsel was ineffective, thereby providing cause for the default, the court evaluates whether post-conviction counsel's ineffectiveness prejudiced the defendant. *Id.*

Here, the court below first found, by agreement of both parties, that Taylor defaulted his claim of ineffective assistance of trial counsel by failing to raise it in his state post-conviction proceedings. App'x A-6. It then evaluated whether *Martinez* could serve to excuse that default. *Id*. It determined that the claim was not substantial enough to warrant further analysis. App'x A-7–A-12. These holdings were correct and do not implicate any split of authority.

#### A. The Eighth Circuit properly applied this Court's *Martinez* holding and did so consistently with other Circuits.

Taylor argues that the Eighth Circuit "misapplied the test for prejudice articulated in *Martinez*" because it "conflate[d] the prejudice standard articulated in *Martinez* with the merits of the underlying defaulted claim." Pet. 33. But then he argues that "prejudice is established to overcome a procedural bar if the underlying

claim of ineffective assistance of counsel is 'substantial.'" Pet. 33. It appears that he both believes and does not believe that substantiality and prejudice are the same thing. He is wrong on both counts; they are not the same thing and the Eighth Circuit did not hold that they were.

Substantiality is a threshold determination made initially to decide whether to even begin an analysis of post-conviction counsel's performance. It is not synonymous with prejudice. Taylor cites *White v. Warden*, 940 F.3d 270, 276 (6th Cir. 2019), for the proposition that he "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.'" Pet. 34. But *White* says no such thing. *White* sets forth, accurately, the prongs of *Martinez*: (1) the underlying claim must be substantial, (2) the defendant had no or ineffective assistance of counsel at collateral review, (3) collateral review was the initial review of the claim, and (4) the state law requires the claim to have been raised on collateral review. *White*, 940 F.3d at 276. *White* clearly indicates that substantiality of the underlying claim of ineffective assistance of counsel is a separate consideration than ineffective assistance of post-conviction counsel.

Taylor next contends that because the substantiality requirement has been equated to the standard used for issuance of a certificate of appealability, and the district court issued a certificate of appealability, he automatically met the prejudice prong of *Martinez*. Pet. 34. He cites *Cox v. Horn*, 757 F.3d 113 (3rd Cir. 2014), for the

proposition that a claim is substantial if the claim has enough merit to warrant a certificate of appealability. This argument has several flaws. *First*, as already stated, it conflates substantiality with prejudice. *Second*, even if the district court found that the underlying claim was substantial, the Eighth Circuit reviews the applicability of *Martinez* de novo and is not bound by the legal conclusions of the district court. *Stephen v. Smith*, 963 F.3d 795, 800 (8th Cir. 2020). *Third*, while the district court in *Cox* did grant a certificate of appealability, the Third Circuit did not indicate that that meant that the claim was automatically substantial. In fact, there was no evaluation of *Martinez* to the facts of the case at all. Instead, the court had to decide whether *Martinez* could serve as the basis for a Rule 60(b)(6) motion. *Cox*, 757 F.3d at 115.

The Eighth Circuit, unlike Taylor, did not conflate substantiality with prejudice. In fact, the Eighth Circuit did not evaluate prejudice at all. It simply found that the underlying claim was not substantial, and stopped its analysis. It did not evaluate post-conviction counsel's performance, and it did not conduct a merits analysis of trial counsel's performance other than to determine that the claim was not substantial.

### B. Taylor was not entitled to a *Martinez* hearing, therefore this Court need not hold this case in abeyance pending *Shinn v. Ramirez*, No. 20-1009, 2021 WL 1951793 (cert. granted May 17, 2021).

Taylor continues to argue that the district court should have held an evidentiary hearing to allow him to develop his *Martinez* claim. It is unclear whether he believes he should have received a hearing on the underlying merits of his claim

or on the performance of post-conviction counsel, as he seems to blend the two issues: "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*." Pet. 33.

In either event, a hearing is unnecessary for two reasons. *First*, the claim was procedurally defaulted. Taylor cannot do an end-run around the requirements of procedural-default analysis and jump to either a hearing on the performance of post-conviction counsel or a full hearing on his underlying claims. *Second*, the complaint Taylor has is a legal one, not a factual one. The underlying question Taylor seeks to litigate is whether counsel was legally obligated to give a closing argument over the objection of his client. This is a question of law, not of fact. All facts necessary to decide that legal question are clear in the state record. There is no need to take the testimony of Taylor's counsels, because, as the Eighth Circuit pointed out, the motivation of trial counsel is irrelevant. App'x A-10. An evidentiary hearing would do nothing to assist the court.

Taylor asserts that this Court should hold his case in abeyance, as it will "almost certainly be impacted by this Court's upcoming decision in *Shinn v. Ramirez*, No. 20-1009, 2021 WL 1951793 (Cert. granted May 17, 2021)." Pet. 36. But *Shinn* presents a different issue from that raised here.

The underlying claim in *Shinn* is about whether trial counsel was ineffective for failing to call certain witnesses at a mitigation hearing. The Ninth Circuit found

that the district court should have held a hearing to learn what evidence the potential witnesses would have presented and question trial counsel on her reasoning for not calling those witnesses. *Ramirez v. Ryan,* 937 F.3d 1230, 1248 (9th Cir. 2019). In this case, assuming Taylor met the substantiality requirement and the *Martinez* analysis continued, the question is not whether counsel should have presented certain *facts*; the question is whether counsel should have taken or not taken an action given the state of the *law*. In other words, whether Taylor's claim that trial counsel was obligated to ignore Taylor's directive, or whether post-conviction counsel was ineffective for failing to raise such a claim, are questions of law, not of fact. Additionally, the question in *Shinn* is whether the petition was entitled to a hearing or whether 28 U.S.C. § 2254(e) barred the hearing. Pet. for Cert. at i, *Shinn v. Ramirez*, (No. 20-1009), 2021 WL 294337. For both these reasons, *Shinn* is not on point.

This Court should not delay this for a decision that has no bearing on its outcome. The Warden has a duty to carry out the lawful sentence imposed by the people of the State of Missouri 14 years ago. The victims of Taylor's 2004 murders have now been waiting 18 years for justice. Congress has conferred on crime victims—in this case the Rowe family—the right "to proceedings free from unreasonable delay." 18 U.S.C. § 3771(a)(7). As part of the comity between the federal government and the States, Congress has expressly extended the right "to proceedings free from unreasonable delay" to federal habeas review of a state court conviction. 18 U.S.C. § 3771(b)(2)(A). This Court has recently written that "[b]oth the State and the victims

of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133–34 (2019) ("The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better.").

## II. The petition should be denied because the Eighth Circuit's finding that Taylor's underlying claim was insubstantial did not conflict with the authority of this Court or any other circuit.

In his petition, Taylor repeats his argument that counsel was ineffective for refraining from giving closing argument at Taylor's request. Taylor suggests that the Eighth Circuit decided several important federal questions in a way that conflicts with relevant decisions of this Court and other circuits. Sup. Ct. R. 10. He alleges first that the Eighth Circuit issued an unqualified holding about a defendant's autonomy: "the decisions below [ ] extended a defendant complete autonomy over counsel's decision whether or not to deliver a closing argument in a capital case." Pet 18. He next alleges that the Eighth Circuit issued the following sweeping and absolute holdings about a defendant's right to effective assistance of counsel: "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," "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," "trial counsel's compliance with petitioner's command to waive summation cannot be deemed to be deficient performance under the Sixth Amendment," "there can be no Sixth Amendment violation if counsel follows

the directions of a defendant to waive summation," and "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." Pet 17, 20, 27, 28.

But the Eighth Circuit made no merits decision on Taylor's underlying claim. The Eighth Circuit instead found that the claim of ineffective assistance of counsel was procedurally defaulted without excuse. App'x 8a, 11a.

Further, Taylor repeats several times that counsel acted "blindly" or that the Eighth Circuit created a "blind-obedience" rule. Pet. ii, 27, 29, 30, 32, 34. These words never appear in the Eighth Circuit's decision and are not that court's holding. Moreover, Taylor's description does not comport with the facts at trial. The transcript reflects a detailed discussion at two separate times between the court, Taylor, and counsel about who was making the decision at hand, the discussion that went on before the decision was made, whether it was a knowing and intelligent decision, and what the consequences of it would be. It cannot possibly be said that anyone acted blindly.

Notwithstanding Taylor's over-reading of the Eighth Circuit's decision, the case remains, ultimately, fact-bound. What Taylor asks this court to do is evaluate the applicability of *Strickland v. Washington*, 466 U.S. 668, 688–96 (1984), to a hypothetical set of circumstances not present here, something this Court has said it will not do. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 95–96 (1968) (this Court's long-standing rule is that it will not issue advisory opinions).

### A. A finding that, under the facts of this case, it was not ineffective assistance of counsel to respect a client's sincere, firmly held, faith-based desire to forgo closing argument would not conflict with this Court's precedent.

A defendant alleging ineffective assistance of trial counsel must make two showings: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688–96. Taylor did not present, and the Warden could not find, any requirement that, to be constitutionally effective, counsel give a closing argument over the defendant's vehement, unequivocal, faith-based objection.

But Taylor argues that the Eighth Circuit's decision runs contrary to *Florida v. Nixon*, 543 U.S. 175 (2004), *McCoy v. Louisiana,* 138 S.Ct. 1500 (2018), *Jones v. Barnes*, 463 U.S. 745 (1983), *Burt v. Titlow*, 571 U.S. 12, 25 (2013), and the American Bar Association's guidelines. He attempts to extend the holding of each of the above cases past their breaking point.

In *Nixon,* trial counsel conceded the defendant's guilt without the express permission of the defendant. 543 U.S. at 178. Throughout the representation, the defendant did not assist his counsel with his own defense or provide answers to questions his counsel would pose. *Id*. at 557. There, counsel was forced to make decisions without either the express consent or refusal of the defendant. *Id*. Specifically, counsel proposed conceding the defendant's guilt as a strategic choice so that he could credibly urge mitigation at sentencing, and the defendant took no position. *Id.* This Court found that the actions of counsel were not deficient given

Nixon's perpetual silence. *Id.* at 561. *Nixon* does not aid Taylor, in that it confirms that counsel can make decisions about closing argument, including concessions of guilt—so long as the defendant has not stated an objection to such a concession. Here, counsel made a closing argument that was exactly in line with Taylor's desires.

Taylor also cites *Nixon* for the proposition 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." Pet. 20. Even if a defendant's autonomy were so limited, it does not mean that a defendant's right to effective assistance of counsel is violated if counsel respects the defendant's deeply held belief in making decisions regarding the progression of the trial.

*McCoy,* another case upon which Taylor relies, explains the problems with Taylor's position. In that case, unlike *Nixon*, this Court did not resolve a claim of ineffective assistance of counsel; rather, the Court examined a claim that the defendant's Sixth Amendment autonomy had been violated. There, the defendant firmly objected to counsel admitting his guilt. *McCoy*, 138 S.Ct. at 1503. This Court explained that counsel, in ignoring the defendant's objections, violated the defendant's Sixth Amendment autonomy. "[T]he Sixth Amendment 'contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.'" *Id.* at 1508 ("For the Sixth Amendment, in grant[ing] to the accused personally the right to make his defense, speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant.") (citations omitted). Counsel's decision to admit a

defendant's guilt, over the defendant's vehement objection, essentially revokes counsel's position as agent of the defendant. *Id.* at 1509–10.

In scenarios where counsel makes a decision against the defendant's stated wishes, a court must decide if the dispute concerned a tactical decision committed to counsel's judgment or a decision concerning the objectives of the defense reserved strictly for the defendant. *Id.* at 1508. The question is whether the choices regard "how best to *achieve* a client's objectives" and "what the client's objectives in fact *are*." *Id.* at 1503; *see also id.* at 1509 (citing ABA's Rule of Professional Conduct 1.2(a) (2016) that a "lawyer shall abide by a client's decisions concerning the objectives of the representation"). If the choice is one reserved strictly for the defendant, then usurping control from the defendant violates his right of autonomy and results in a structural error warranting reversal. *Id.* at 1511.

Here, of course, counsel did not take an action *against* his client's stated desire. Counsel instead *respected* that desire and chose a course of conduct that would comport with it. It was unequivocally Taylor's desire to refrain from asking the jury to spare his life, as, in Taylor's faith, only Allah could properly do that. [Tr. 1794–98]. If Taylor's desire was an "objective" as contemplated in *McCoy*, then counsel's decision to pursue Taylor's stated objective, which was based upon deeply held and expressly stated beliefs, did not violate Taylor's Sixth Amendment right to autonomy, and, as a matter of law, preserving that autonomy could not be deemed ineffective

assistance of counsel. Thus, insofar as *McCoy* confirms that a defendant has Sixth Amendment autonomy to dictate the objectives of the defense, it does not aid Taylor.[3]

Taylor cites *Jones* to support his assertion that "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." Pet. 19. But *Jones*'s reasoning hurts, rather than helps, Taylor. *Jones* recognizes that a defendant has the ultimate authority to decide whether to plead guilty, waive a jury, testify on his or her own behalf, take an appeal, or, with some limitations, act as his or her own attorney. 463 U.S. at 751. *But,* if the client does choose to appeal, then he has no right to force counsel to raise issues that counsel, in his or her professional judgment, declines to raise. *Id.* That is because counsel has a "superior ability" to examine, research, and marshal arguments. *Id.* Here, even assuming that counsel *could* have opted to ignore Taylor's wishes based on the principle that counsel can dictate the content of closing arguments, that does not mean that counsel was *obligated* to ignore Taylor's wishes and deeply held beliefs.

There is nothing in *Strickland* and its progeny that demands that counsel ignore the desires and deeply held beliefs of the defendant in deciding "what arguments to pursue." To the contrary, *Strickland* acknowledges that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by

---

[3] Alternatively, counsel's conduct arguably preserved Taylor's First Amendment right to exercise his religion, and counsel should not be faulted for acceding to Taylor's express desire to exalt his faith over the assistance of counsel.

the defendant's own statements or actions." 466 U.S. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id*. Here, while Taylor's choice was not the choice that many people would have made, it was a choice that counsel—after consultation with Taylor—could respect in deciding what arguments (if any) to present.

Taylor cites *Titlow* (Sotomayor, J., concurring), for the proposition that "[r]egardless 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.'" Pet. 30. In *Titlow*, the defendant pled guilty, then declared his innocence, and then his new counsel moved to withdraw his guilty plea after explaining the consequences of doing so. The defendant went to trial and was found guilty. *Id.* at 15–16. This Court found that counsel was not ineffective for doing as his client wished. *Id.* at 22.

To be sure, a trial attorney does not abdicate all responsibility for representation any time a client voices his opinion. But that was not the record in *Titlow* and is not the record here. Taylor makes no argument that his attorney did not conduct a mitigation investigation, that he was not prepared to put on a mitigation case, or that he did not advise or misadvised Taylor on the consequences of the decision. Trial counsel performed his duty while respecting the wishes of his

client. As the majority opinion in *Titlow* noted, echoing *Strickland*, the type of advice that an attorney gives may rightfully be affected by the client's wishes. *Id.* at 22.

Taylor cites to the Commentary to ABA guideline 10.11 for the proposition that personal argument by counsel in support of a sentence less than death is important. Pet. 19. This is not persuasive for two reasons. *First*, the guidelines do not anticipate circumstances where the client vigorously objects to that argument and instructs counsel not to make it; and *second*, while the guidelines suggest the giving of a closing argument, the court rules governing the proceedings do not require one.

Both the state and federal rules of criminal procedure anticipate a capital defendant's waiver of closing argument. Federal Rule of Criminal Procedure 29.1 sets forth the order of closing arguments. The Rule does not distinguish between capital and noncapital cases, or guilt-phase and sentencing-phase arguments. In Note B of the Notes of the Committee on the Judiciary 1975 Amendment, the Committee notes that, after hearing the arguments of the prosecution, "*the defendant* is faced with the decision whether to reply and what to reply" (emphasis added). Missouri Supreme Court Rule 27.02 sets forth the order of Missouri state felony trials. Subsection (n) indicates that, at the guilt phase, "*either side* may waive its right to argument" (emphasis added). Section 546.070 of the Missouri Revised Statutes also discusses the order of trial without distinguishing between capital and noncapital cases, or guilt-phase and sentencing-phase arguments. Subsection 5 contemplates cases that may be "submitted without argument." Missouri Approved Instruction-Criminal

314.49, read to Taylor's jury at the start of the penalty phase of his trial, instructs the jury that the defendant "may" give a closing argument.

In focusing on *Nixon, McCoy, Jones,* and *Titlow,* Taylor fails to acknowledge two Supreme Court cases much more on-point here: *Bell v. Cone*, 535 U.S. 685 (2002), and *Schriro v. Landrigan*, 550 U.S. 465, 470 (2007).

In *Bell*, trial counsel at sentencing gave an opening statement and cross-examined witnesses, but did not present evidence or give a closing argument. The defendant argued, as Taylor does on pages 23 and 26 of his petition, that counsel's choice to forgo evidence and argument failed to "subject the State's case to meaningful adversarial testing." *Id.* at 686. This Court found that to be successful on such a claim, a petitioner must show that trial counsel completely failed to test the prosecutor's case. *Id.* Here, Taylor's trial counsel gave an opening statement, objected during parts of the State's evidence, and read a stipulation on Taylor's behalf. [Tr. 1800–23]. He did not fail to subject the case to meaningful adversarial testing.

*Bell* applied the *Strickland* standard to counsel's decision to obey the wishes of the client to forgo evidence and argument at sentencing. *Bell,* 536 U.S. at 701–02. It found that counsel was not ineffective because the evidence he would have presented at the sentencing had already been presented at the guilt phase, that trial counsel reasonably decided not to present other evidence, and that the decision to forgo a closing argument effectively blocked the State from arguing a second time. *Id*. at 701–02.

Those considerations also apply to this case. The arguments that Taylor now claims should have been made at sentencing were either already made at the guilt phase or would not have changed the outcome of the sentencing phase. Trial counsel had what might be the most appropriate reason for forgoing argument: his client's clear desire to do so. And the State was deprived of another opportunity to argue, likely passionately, that Taylor should be sentenced to death for his crimes. As this Court recognized, "[i]ndeed, it might sometimes make sense to forgo closing argument altogether." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (citing *Bell,* 535 U.S. at 701–02).

In a similar case, *Schriro v. Landrigan*, 550 U.S. 465, 470 (2007), the defendant, as Taylor did here, instructed his attorney not to present mitigation evidence and objected to counsel's every attempt to present argument. This Court agreed with the Ninth Circuit's characterization of the facts in that case: "In the constellation of refusals to have mitigating evidence presented…this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one." *Id.* at 478 (citing *Landrigan v. Stewart*, 272 F.3d 1221, 1226 (9th Cir. 2001)). This Court affirmed the post-conviction court's determination that trial counsel was not ineffective for forgoing mitigation at sentencing, as Landrigan "instructed his attorney not to bring any mitigation to the attention of the [sentencing court]," and that no matter what counsel would have done, Landrigan would not have allowed it, defeating any showing of prejudice. *Id.* at 477.

Here, the thoroughness of the court's inquiries and Taylor's unequivocal and coherent responses are similarly paragons of clarity. The court questioned Taylor at two different bench conferences, and its questioning spanned over six pages of transcript. [Tr. 1794–98, 1821–23]. There is no doubt that Taylor instructed his counsel to forgo argument. And as in *Landrigan,* there is no doubt that if trial counsel had disregarded those wishes, Taylor would have objected. Trial counsel is not ineffective in these circumstances. This Court should deny the petition because the opinion of the Eighth Circuit did not conflict with this Court's precedents.

### B. A finding that, under the facts of this case, it was not ineffective assistance of counsel to respect a client's sincere, firmly held, faith-based desire to forgo closing argument would not conflict with other circuits.

Taylor alleges that the court erred in "extending" *McCoy* to decisions other than concessions of guilt, citing two district court decisions for the proposition that "*most* courts have rejected attempts to expand *McCoy* beyond the context of an actual concession of guilt by counsel." Pet. 22 (emphasis added). One case is from the Western District of Pennsylvania, *Addison v. Brittain*, 219 U.S. Dist. Lexis 50509 at *6 (W.D. Pa. March 22, 2019), and the other from the district of New Hampshire, *Kellogg-Roe v. Warden, N.H. State Prison*, 2020 U.S. Dist. Lexis 51228 (D.N.H. March 25, 2020). Pet. 22–23. Taylor's argument is unavailing for at least four reasons: *first*, Supreme Court Rule 10 speaks of a conflict involving a "United States court of appeals," not a district court; *second*, both cases were decided after the denial of habeas corpus relief in this case; *third*, both opinions are slip opinions not for publication; and *fourth*, *Addison* is currently on appeal and *Kellogg-Roe* has already

completed review. While the First Circuit affirmed *Kellogg-Roe*, the relevant portion regarding a "silent defense" was evaluated under a right-to-autonomy framework, not an ineffective-assistance-of-counsel framework. Further, the facts are inapposite. When Kellogg-Roe was questioned about his desire to not put on a defense, his answers were nonresponsive and inscrutable, and he could not articulate that he and his attorney had differing objectives of representation. *Kellogg-Roe v. Gerry*, 19 F.4th 21, 27 (1st Cir. 2021). These opinions do not establish a meaningful split of authority here.

Taylor next attempts to manufacture a circuit split. Taylor argues *United States v. Rosemond*, 958 F.3d 111, 123 (2nd Cir. 2020), and *United States v. Wilson*, 960 F.3d 136, 144 (3rd Cir. 2020), "held that *McCoy's* reach does not extend to any other tactical decisions beyond a total concession of guilt." Pet. 24. *Wilson* was only analyzed under an autonomy framework, while *Rosemond* was analyzed under both an autonomy framework and an effective-assistance-of-counsel framework.

In *Rosemond*, trial counsel conceded a single element of the offense over his client's objection. 958, F.3d at 115. (The court noted that the client had not *entirely* objected to the concession, as he had actually asked his attorney to admit criminal liability on his behalf, just for different crime than the one charged. *Id.* at 124.) The court found there was no violation of the client's right to autonomy nor his right to effective assistance of counsel because both client and counsel shared the same goal, and the attorney merely used a reasonable trial strategy with which the client disagreed to achieve it. *Id*. at 123, 125. In *Wilson*, the attorney also conceded a single

element of the offense. 960 F.3d at 142. This time, though, it was jurisdiction, rather than an element regarding any particular conduct of the client. *Id.* at 144. The client did not object. *Id*. The court found there was no violation of the client's right to autonomy. *Id.*

Neither case is analogous to what occurred here. Taylor expressed his desire, and counsel respected it. Thus, there was no possibility that counsel's conduct violated Taylor's Sixth Amendment autonomy. Likewise, counsel's decision, made after and guided by an informed discussion with his client, was not objectively unreasonable. There is no circuit split on the legal question presented by these cases.

Taylor cites *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021), a case on which there is currently a petition for writ of certiorari pending, for the proposition 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." Pet. 24. But Taylor's claim is not about what type of evidence should or should not have been presented.

Taylor writes that "[n]umerous 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." Pet. 30. *First*, again, the Eighth Circuit never took the view that following a client's directive on an issue of trial strategy cannot be ineffective. *Second*, the cases Taylor cites are all inapposite here, and none conflict with the Eighth Circuit below.

In *Chambers v. Armontrout*, 907 F.2d 825, 830–31 (8th Cir. 1990), counsel failed to call the only witness whose testimony could rebut the prosecution's theory of the case and establish self-defense. The State pointed to a letter the defendant wrote indicating that because the cross-examination of that witness went poorly in the past, and he feared it would go poorly again, he agreed with his lawyer not to call the witness. *Id.* at 830. But as the court pointed out, the defendant's reasoning was not based on any information that only the defendant possessed, it was merely the parroting of counsel's own justification. *Id.* at 831. Unlike in *Chambers*, here, the motivation for the decision did not come from counsel, nor did the defendant agree to any course of action. The request came from the defendant himself, and he voiced a position different from that which his attorney had previously planned to take.

Taylor cites *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008); *Phillips v. Woodford*, 267 F.3d 966, 978 (9th Cir. 2001); and *Johnson v. Baldwin*, 114 F.3d 835, 840 (9th Cir. 1997), for the proposition 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. Pet. 30. While this is certainly true, it is not at issue here. There is no allegation that counsel did not investigate mitigation evidence or provide competent advice to his client. Taylor's only complaint is that after both of those things were complete, counsel still should not have followed the wishes of his client.

In *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008), before the case was even charged and before the decision to seek capital punishment had even been made, the

defendant, struggling with mental health issues, said he did not want to hire a mental health expert because he did not want to spend the money and did not need a psychiatrist. *Id*. at 226. The defense turned down an opportunity for free expert services and never raised the issue after that, even after the defendant became indigent. *Id*. at 230–31. Of course, a competent and coherent religious man wishing to refrain from asking another person to sit in judgment of him because only Allah may do that is not the same as leaving the decision of whether to use mental health testimony in the hands of a mentally ill man. And a decision made at the final hour of trial, with the benefit of having experienced a full criminal prosecution and been examined on that decision multiple times in open court, is quite different from being bound to a decision before one is even charged with a crime.

In *Phillips v. Woodford*, 267 F.3d 966, 978 (9th Cir. 2001), trial counsel chose to accept the alibi defense of his client, which he did not believe and which conflicted with other evidence, without investigating how to corroborate it or how to address its weaknesses. The facts in *Johnson v. Baldwin*, 114 F.3d 835, 840 (9th Cir. 1997), were very similar. In *Johnson*, counsel accepted his client's assertion that he was not at the scene of the crime despite evidence to the contrary, and did not endeavor to corroborate it. *Id*. at 839–40. Unlike *Phillips* and *Johnson*, there was no blind acceptance of anything in this case. Further, it is entirely different to accept a client's *version of the facts* when there is clearly evidence to the contrary that the State will exploit, than it is to accept a client's religious beliefs.

In *Sanders v. Davis*, 23 F.4th 966, 970 (9th Cir. 2022), the defendant, as Taylor here, did not want his attorney to present a penalty defense, and the attorney did not present one. But unlike here, the issue in *Sanders* was not whether it was appropriate for counsel to follow that directive, but rather whether counsel was ineffective for conducting only a minimal investigation, failing to interview anyone about the defendant's background, and failing to properly advise the defendant about how the penalty phase worked. *Sanders*, 23 F.4th at 970. The court in *Sanders* reasoned that if counsel had done a proper investigation and advised his client properly, then the defendant would have not waived penalty phase. *Id.* at 991. Unlike here, the defendant's reasoning in *Sanders* was not based on any sincere moral, ethical, or religious belief, but rather that he did not want his attorney to argue for death *or* for life because he simply wanted to "leave the courtroom and go home"—which in and of itself highlighted the problems with counsel's advice. *Id.* at 974. Given the many differences between the cases Taylor cites, there is no circuit split regarding the constitutional effectiveness of an attorney who forgoes closing argument under facts analogous to these.

## III. This case is not an appropriate vehicle for this Court to decide whether counsel can waive argument at sentencing based upon his client's firmly held religious beliefs.

Taylor admits, at bottom, that he has simply changed his mind. Pet. 29. But all decisions have consequences, and all of us are expected to live with the consequences of those decisions every day. Taylor's victims, a mother and her three children, do not have the ability to regret their decisions. They do not have the ability

to live at all. Taylor made a permanent decision when he took their lives and he made a permanent decision to put his own fate in Allah's hands. Like Taylor's victims, Taylor does not have the ability to change his mind. This is not an appropriate vehicle to evaluate Taylor's claim of the division of responsibility between client and counsel.

### A. Taylor does not show that the closing argument he proposes, if given, would have changed the outcome of the proceeding, and therefore he was not prejudiced by counsel's actions.

In the context of capital sentencing proceedings, "prejudice exists if there is a reasonable probability that, but for his counsel's ineffectiveness, the jury would have made a different judgment about whether [the defendant] deserved the death penalty as opposed to a lesser sentence." *Andrus v. Texas*, 140 S.Ct. 1875, 1886 (2020) (citing *Wiggins v. Smith*, 539 U.S. 510, 536 (2003)).

Here, Taylor did not and cannot show prejudice. Taylor only argues that a closing argument focusing on "lingering doubt regarding his guilt," the "tenuous circumstantial evidence" at trial, and "a very strong alibi defense" would have been "extraordinarily compelling." Pet. 25. That, coupled with an argument that "a life sentence would not have put any fellow prisoners or prison personnel at risk in light of appellant's good behavior during prior incarcerations" would have raised a reasonable probability that the jury would not have sentenced him to death. Pet. 26. He is incorrect.

*First*, "lingering doubt," Taylor's "strong alibi," and the State's "circumstantial" evidence are arguments more appropriate for the guilt-phase than the sentencing phase of trial. *Second*, those arguments were clearly not compelling to the jury. At

the time Taylor's sentencing began, the jury had, just a few hours earlier, found Taylor guilty of the premeditated murder of his girlfriend and her three children [Tr. 1787–98]. In doing so, they necessarily disbelieved Taylor's "strong" alibi. If he argued these topics again, Taylor would essentially be arguing to the jury that they just convicted an innocent man. It should be noted that Taylor's whereabouts after November 26 were known, but that does not provide him an "airtight alibi" because the evidence showed the victims were already dead by then. Additionally, characterizing the State's evidence as "circumstantial" is inaccurate, given that Taylor confessed to the murders, not once, but multiple times. [State's Ex. 196B; Tr. 1083]. The long-standing and well-settled rule is that Taylor's flight from the scene, efforts to hide him from the police, and multiple fake identities are strong evidence of consciousness of guilt. *See, e.g. Allen v. United States*, 164 U.S. 492, 499 (1896).

Taylor contends that trial counsel should have argued that Taylor would not endanger prisoners or staff because he had adjusted well during his previous stints in prison. Pet. 26. That topic had already been discussed in counsel's opening statement, during which he told the jury "he is not a trouble maker … he is not a danger … he treats others with respect and he follows the rules." [Tr. 1800]. To the extent that argument on this point would have been somehow more compelling, it is still highly doubtful that it would have changed the outcome of the sentencing, in light of the State's evidence.

The State first presented evidence of Taylor's convictions for forcible rape, cocaine possession with intent to distribute, stealing, and forgery. [Tr. 1802–05].

Then, it called Taylor's stepdaughter to testify about how he raped her at gunpoint in a vacant grocery store parking lot when she was only sixteen years old, after which he threatened the lives of her entire family. [Tr. 1802–09]. Finally, the State presented the emotional victim-impact testimony of the murdered children's father and their two aunts. [Tr. 1809–20]. One of the aunts testified that she did not want to get too close to her remaining nieces and nephews because of her fear that she would lose them as well. [Tr. 1813]. The other testified that Rowe's mother was so distraught over the loss of her daughter and grandchildren that she no longer wanted to live. [Tr. 1817]. None of the arguments that Taylor claims trial counsel should have made are compelling enough to show a reasonable probability that the jury would have not sentenced Taylor to death. *Andrus*, 140 S.Ct. at 1885–86.

Therefore, even if Taylor was correct that the decision to give a closing argument fell below an objective standard of reasonableness, he cannot show prejudice from counsel's decision to abide by Taylor's wishes and forgo a closing argument here. This case is not an appropriate vehicle to decide whether trial counsel should follow the wish of his client to waive sentencing argument when that argument would not have been effective.

### B. Taylor cannot receive the benefit of his requested ruling because its application to him would be barred by *Teague v. Lane*, 489 U.S. 288 (1989).

A new constitutional rule of criminal procedure is not applicable to a case that has become final before the new rule is announced.[4] *Teague v. Lane*, 489 U.S. 288, 316 (1989). So even if this Court finds that counsel must give a closing argument in order to protect a defendant's right to effective assistance of counsel, that rule would not retroactively apply to Taylor's case. Any argument that *Nixon* or *McCoy* dictated the rule Taylor advocates would be incorrect, as both would require significant extension. *See Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (cases may "lend support" to a new rule, but that does not mean that the rule is not new–a test at that level of generality would be meaningless). As a result, this Court's review is not warranted.

## CONCLUSION

This Court should deny the petition for writ of certiorari.

---

[4] Previously, "watershed" rules of criminal procedure may have applied retroactively on collateral review, but this Court recently held, "[n]ew procedural rules do not apply retroactively on federal collateral review." *Edwards v. Vannoy*, 141 S.Ct. 1547, 1560 (2021).

Respectfully submitted,

**ERIC S. SCHMITT**
Attorney General

D. JOHN SAUER
Solicitor General

KATHARINE A. DOLIN
Assistant Attorney General
Counsel of Record
Missouri Bar No. 64817
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573)751-7406
Facsimile: (573)751-2096
Katharine.Dolin@ago.mo.gov
Attorneys for Respondents