Capital Case – Execution May 3, 2022 at 6:00 p.m. Central

No. 21-_____

In The Supreme Court Of The United States

CARMAN DECK,

Petitioner,

v.

PAUL BLAIR, Warden, Potosi Correctional Center

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – EXECUTION DATE 5/3/2022 at 6:00 p.m. Central

QUESTION PRESENTED

The State of Missouri is set to execute an individual who, due to the passage of time and repetitive nature of his three capital sentencing proceedings, was deprived of the opportunity to fairly present his compelling mitigation in the form of live lay witnesses to the jury that sentenced him to death.

This case presents the following question:

Betterman v. Montana, 578 US. 437, 448 (2016), noted there is a due process limitation upon inordinate delays between conviction and sentencing. What is the proper test for determining whether the inordinate delay prejudiced the defendant's ability to obtain a fundamentally fair capital sentencing proceeding and if the delay prejudiced the defendant, what is the proper remedy?

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

State v. Deck, 994 S.W.2d 527 (Mo. banc 1999). Docket No. 808221. Judgment enetered June 1, 1999.

Deck v. State, 68 S.W.3d 418, 422 (Mo. banc 2002). Docket No. SC 83237. Judgment entered February 26, 2002.

State v. Deck, 136 S.W.3d 481 (Mo. banc 2004). Docket No. SC 85443. Judgment entered May 25, 2004.

Deck v. Missouri, 544 U.S. 622 (2005). Docket No. 04-5293. Judgment entered May 23, 2005, reversing the 2004 decision.

State v. Deck, 303 S.W.3d 527 (Mo. banc 2010). Docket No. SC 89830. Judgment entered January 26, 2010.

Deck v. State, 381 S.W.3d 339 (Mo. banc 2012). Docket No. SC 91746. Judgment entered July 3, 2012.

Deck v. Steele, 249 F.Supp.3d 991 (E.D.Mo. 2017). Docket No. 4:12 CV 1527 CDP. Judgment entered April 13, 2017.

Deck v. Jennings, 978 F.3d 578 (8th Cir. 2020). Docket No. 17-2055. Judgment entered October 19, 2020.

State ex rel. Deck v. Blair, No. SC 99412, Docket No. SC99412. Judgment entered January 31, 2022.

RULE 29.6 STATEMENT

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carman Deck respectfully prays that a Writ of Certiorari issue to review the decision of the Missouri Supreme Court.

OPINIONS BELOW

The Missouri Supreme Court's unexplained merits decision denying state habeas corpus relief is attached, *State ex rel. Deck v. Blair*, SC99412 (Mo. Banc Jan. 31, 2022). App. p. 1a. Mr. Deck filed a petition for habeas corpus in the Missouri Supreme Court, pursuant to Rule 91 of the Missouri Supreme Court Rules. App. p. 225a.

JURISDICTIONAL STATEMENT

The decision of the Missouri Supreme Court became final upon the denial of habeas relief on January 31, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review this decision.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI

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

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

U.S. Const Amend. VIII

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

U.S. Const. Amend. XIV § 1

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

STATEMENT OF THE CASE

I. INTRODUCTION

Mr. Deck has gone through three capital sentencing proceedings for the same crime. The crime occurred in July 1996, but Mr. Deck's last capital sentencing did not occur until 2008, twelve years later. After his initial trial, Mr. Deck's convictions and sentences of death were affirmed on direct appeal. *State v. Deck,* 994 S.W.2d 527 (Mo. banc 1999). App. p. 2a. However, on post-conviction review, the Missouri Supreme Court reversed the death sentences due to Mr. Deck's appointed counsel's failure to request the proper jury instructions on mitigation. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). App. p. 21a. In reviewing the mitigating evidence presented in that first penalty phase, the Missouri Supreme Court noted that the

mitigation was "substantial" and that several live witnesses testified "regarding his horribly abusive childhood." *Id.* at 422. For that reason, the court found the instructional error to be prejudicial to Mr. Deck.

On direct appeal after Mr. Deck's second sentencing hearing, the Missouri Supreme Court affirmed the sentences. *State v. Deck,* 136 S.W.3d 481 (Mo. banc 2004). App. p. 36a. However, this Court reversed the sentences, holding that the use of visible restraints upon Mr. Deck during trial was unconstitutional. The restraint were applied over objection, and this Court found, "If there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one." *Deck v. Missouri*, 544 U.S. 622, 635 (2005). App. p. 46a. By the time of the third capital sentencing, the lay witnesses who testified previously were no longer available. Not a single live lay witness was presented at his third capital sentencing. Instead, counsel only presented the testimony of two hired experts.

Counsel at the third capital sentencing testified that it was "absolutely" important to have live testimony from lay witnesses regarding Mr. Deck's horrific upbringing because "it would have been good to have at least one person, one person from Carman's family come in, look at the jury, and say, please spare his life. He is of value to me." (2nd PCR Tr.[1] at 143); *see also State ex rel. Deck v. Blair,* Supp. Ex. A ("We desperately needed family members to testify on Mr. Deck's behalf.") App. p.

[1] The reference is to the transcript which is part of the state court record in *Deck v. State*, 381 S.W.3d 339 (Mo. banc 2012).

261a. "Due to changed circumstances contributable [sic] to the passage of time" (*id.*) and the repetitive nature of three capital sentencing proceedings, Mr. Deck's final capital sentencing proceeding was devoid of these witnesses.

Mr. Deck's case is an egregious example of what happens when the state repeatedly violates the rights of a capital defendant. The state's earlier failures directly prevented Mr. Deck from preventing a compelling mitigation case at his third resentencing.

II. MITIGATION PRESENTED AT THE SECOND PENALTY PHASE

Unlike the third resentencing, counsel at the second penalty phase were able to present several live lay witnesses regarding Mr. Deck's traumatic and abusive childhood: his stepmother Rita Deck, his aunt Beverly Dulinski, his aunt Elvena Deck, and one of his foster parents Reverend Major Puckett. (2nd Sent. Tr. 454-473, 526-532)[2]. Coupled with expert testimony, these live lay witnesses painted a vivid picture of a traumatic childhood marred by severe neglect, physical and emotional abuse, as well as frequent foster home placements. His aunt Elvena recounted how his mother, Kathy, frequently left Mr. Deck and his three siblings alone or in the care of Mr. Deck's intellectually disabled uncle, who was ill-equipped to handle four children. (2nd Sent. Tr. 467-68). Kathy would choose men and bars over her own children. *Id.* The children were often left with no food to eat. (2nd Sent. Tr. 469, 471). Kathy's sister, Beverly Dulinski, would occasionally stop by Kathy's

[2] The reference is to the transcript which is part of the record on appeal in *State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004).

apartment and observe the children without food and either undressed or wearing dirty, shabby clothing. (2nd Sent. Tr. 460). Typically, the infant children had on no diapers, or were wearing the same diaper for days. (2nd Sent. Tr. 461, 488).

When Mr. Deck was around ten years old, Kathy and his father Pete ended their rocky relationship. (2nd Sent. Tr. 460, 489). Child welfare officers were contacted when the children were found alone, filthy and without food, while their mother took off with a truck driver for three days. (2nd Sent. Tr. 461, 468-69, 490). Pete picked up the children from the Sheriff's office and took them to his brother Norman's house for Thanksgiving. (2nd Sent. Tr. 461, 490). The children were so famished that the youngest child wolfed down his food, threw it up on the plate, and then tried to eat his own vomit. (2nd Sent. Tr. 456, 469, 490)

Mr. Deck's father then married a woman named Marietta, and the Deck children went to live with the couple. Marietta was particularly vicious to Mr. Deck. As an example, the children were told by Marietta to sit in the car and they were not allowed to leave to use the bathroom. (2nd Sent. Tr. 494). After waiting for several hours, Mr. Deck had a bowel movement in his clothes. (2nd Sent. Tr. 494) When Marietta finally returned and discovered what had happened, she took Mr. Deck's soiled underwear and smeared feces all over his face. (2nd Sent. Tr. 472, 494). She then photographed Mr. Deck with feces on his face, in order to humiliate him, and showed the picture to others. (2nd Sent. Tr. 470, 494).

Eventually Mr. Deck's father surrendered the children to child welfare services at Marietta' insistence. Mr. Deck spent about a year in the foster home of

Reverend Major Puckett. (2nd Sent. Tr. 526, 528, 530-31). Mr. Deck did well in this home and fit in "just like he was born there." (2nd Sent. Tr. 528). Major Puckett described Mr. Deck to the jury as very likable, never arguing and always doing his chores. (2nd Sent. Tr. 526, 528) . Mr. Deck was particularly close to his foster mother, who was blind, and he "would read the instructions off the cans to her [when she'd go to cook] and help her in the kitchen and he just tried to take all the work off of her that he could. He was like a son to her." (2nd Sent. Tr. 529). The Pucketts wanted to adopt Mr. Deck, but his mother prevented this by asserting her parental rights. *Id.* Mr. Deck desperately wanted to stay with the Pucketts, stating that leaving them was "killing me on the inside." (2nd Sent. Tr. 530). Child welfare officials forced Mr. Deck to return to his mother despite his wishes. *Id.*

III. THE THIRD PENALTY PHASE

Mr. Deck's case returned to the Missouri trial court for a third capital sentencing after this Court reversed his second death sentence due to the use of visible restraints. *Deck v. Missouri*, 544 U.S. 622, 635 (2005). App. p. 46a. The State requested a nine-month continuance to December 2006, to which Mr. Deck objected. *Deck v. Steele*, 249 F.Supp.3d 991, 1076-77 (E.D. Mo. 2017) App. p. 127a, rev'd by *Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020) App. p. 224a. The trial date was then pushed back to March 27, 2007. In August 2006, Mr. Deck's appointed attorneys had to withdraw due to a conflict of interest. *Id.* at 1077. His new attorneys requested a continuance to the summer of 2007 and a trial date of October 30, 2007 was set. Counsel filed motions requesting that prior videotaped and/or

deposition testimony be admitted because mitigation witnesses had become unavailable due to illness or were located out of state. *Id.* at 1077.

In October 2007, as the trial date neared, Mr. Deck's counsel learned of a conflict of interest in the prosecuting attorney's office. *Id.* The niece of the victims was employed by the prosecuting attorney in the Victim Services Unit and had been personally involved in a meeting with the prosecutor and the family regarding a plea to a sentence less than death proffered by Mr. Deck's counsel. *Id.* The niece had reported on this meeting to others in the courthouse, including the fact that the plea was rejected. *Id.* Because of this conflict, the prosecuting attorney's office was removed and the Missouri Attorney General's office took over the case. *Id.* The trial was reset, yet again, to September 15, 2008. *Id.*

By the time of the third penalty phase, counsel were unable to secure a single family member, or any other lay witness, to provide live testimony on Mr. Deck's behalf regarding the substantial mitigating evidence in his background.[3] In post-conviction proceedings, it was alleged that counsel was ineffective for failing to call mitigation witnesses on Mr. Deck's behalf. (2nd PCR Tr. 113). At the post-conviction hearing, counsel explained how the passage of time and the repetitive nature of three capital sentencing hearings negatively impacted their ability to present live lay mitigation witnesses on Mr. Deck's behalf.

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[3]In contrast, the state at one point received a continuance in order to secure the live testimony of one of its key witnesses. (*Deck v. Steele*, Case No. 4:12-CV-01527-CDP, DCD 35-33 at pp.124, 146.)

Mr. Deck's father was subpoenaed, but his doctor wrote a letter on his behalf saying it would endanger his health to testify. (*Id.* at 115). Counsel considered using the father's deposition, but decided against it, thinking it would lead the jury to wonder "where is his father?" (*Id.* at 117).

Third sentencing counsel wanted to call stepmother Rita Deck, who testified at the second penalty phase. (*Id.* at 119). However, she failed to appear. (*Id.* at 121). Counsel also wanted to call Mr. Deck's aunt Elvena Deck, who had testified at the second penalty phase, but they were unable to locate her and a message left at a possible phone number was never returned. (*Id.* at 123, 125). Another aunt, Wilma Laird, could not be located. (*Id.* at 246). The same was true of a prior girlfriend. (*Id.* at 250)..

Counsel was asked whether it was "important to have somebody there live, a family member, other than the experts?" (*Id.* at 142-43). Counsel answered "absolutely," because "it would have been good to have at least one person, one person from Carman's family come in, look at the jury and say, please spare his life. He is of value to me." (*Id.* at 143). Counsel acknowledged that "the only way the jury was ever going to be able to hear Carman Deck's life story was by way of witness testimony." (*Id.* at 179). Mr. Deck's other trial counsel noted: "We desperately needed family members to testify on Mr. Deck's behalf." *State ex rel. Deck v. Blair*, Supp. Ex. A. App. p. 261a. And the difficulty in securing family to testify was "due to the changed circumstances contributable to the passage of time." (*Id).*

IV. PROCEDURAL BACKGROUND

Mr. Deck's lawyers at his third resentencing and the subsequent post-conviction lawyers failed to raise a claim in any state court that the passage of time had left sentencing counsel unable to present a constitutionally sufficient mitigation case. However, in federal district court, Mr. Deck was granted federal habeas corpus relief on this basis. *Deck v. Steele*, 249 F.Supp.3d 991, 1013 (E.D. MO. 2017) App. p. 127a, rev'd by *Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020) App. p. 224a. After balancing the relevant facts, the district court found that

> [T]he inordinate passage of time between Deck's conviction and his final penalty-phase trial deprived Deck of his constitutional right to present mitigation evidence, thereby rendering his final trial fundamentally unfair. Deck's inability to present mitigation evidence prevented the jury from adequately considering compassionate or mitigating factors that warranted mercy. And, as the Missouri Supreme Court found in *Deck II*, the mitigating evidence presented at the first rial was substantial. *Deck II*, 68 S.W.3d at 430-31. Because the last jury was not able to consider this substantial mitigation evidence, imposition of the death penalty violates Deck's right to be free from cruel and unusual punishment.

(Id. at 1082. The reference "Deck II" refers to *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). App. p. 21a.

The Eighth Circuit Court of Appeals overturned this decision, finding the claim procedurally defaulted. App. p. 224a. This Court denied certiorari. *Deck v. Blair*, 142 S.Ct. 186 (2021).

Mr. Deck then filed a petition for state habeas corpus relief in the Missouri Supreme Court requesting either 1) relief on the basis of the current record or 2) the appointment of a special master for an evidentiary hearing on the claim that due to

the passage of time, and his attorneys' failures to raise this claim in state court, Mr. Deck's third death sentence was unconstitutional. The Missouri Supreme Court denied the claim on the merits without a written opinion. App. p. 1a. This is a determination on the merits that allows Supreme Court review, without the problem of procedural default previously noted by the Eighth Circuit. *Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). The Missouri Supreme Court has recently reiterated, in a capital case, there is no absolute bar to successive Rule 91 petitions, especially in a case like Mr. Deck's, where the issue was not previously litigated in state court. *See State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 381 (Mo. banc 2021).

REASONS FOR GRANTING THE WRIT

I. MR. DECK'S DUE PROCESS RIGHTS WERE VIOLATED DUE TO THE INORDINATE DELAY BETWEEN HIS FIRST AND THIRD DEATH SENTENCES. HE WAS PREJUDICED BY THIS DELAY DUE TO THE LOSS OF LIVE MITIGATION WITNESSES TO TESTIFY ON HIS BEHALF. ALTHOUGH THIS COURT HAS ARTICULATED A DUE PROCESS LIMIT TO DELAY IN SENTENCING PROCEEDINGS, IT HAS YET TO PROVIDE CLEAR GUIDANCE TO THE LOWER COURTS ON THE NATURE AND EXTENT OF THIS LIMITATION.

The principle of prompt legal recourse is a concept as old as the law itself, being first articulated in English jurisprudence in the Magna Carta. *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). In *Betterman v. Montana*, 578 US. 437 (2016), a non-capital case, this Court noted in dicta that the due process clause

protects a defendant against inordinate delay in sentencing. Although the right to a speedy trial may not be implicated in delay between trial and sentencing, "due process serves as a backstop against exorbitant delay."[4] *Id.* at 448. Even though the defendant's right to liberty is diminished after his conviction, he still "retains an interest in a sentencing proceeding that is fundamentally fair." *Id.*

In addressing cases arising out of Missouri, this Court has noted the due process right is heightened in the context of the penalty phase of a Missouri capital trial, which is more akin to a trial than an ordinary, non-capital sentencing proceeding. *See Bullington v. Missouri*, 451 U.S. 430, 438 (1981) (noting that a capital sentencing proceeding "was itself a trial on the issue of punishment."); *Deck v. Missouri*, 544 U.S. 622, 632 (2005) (At a capital penalty phase, "The jury, though no longer deciding between guilt and innocence, is deciding between life and death,

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[4] *Betterman* specifically left open the question of whether the right to a speedy trial applies to capital sentencing proceedings. *Betterman*, 578 U.S. 451, n.2 ("We reserve the question whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined (e.g., capital cases in which eligibility for the death penalty hinges on aggravating factor findings)." This open question is a subsidiary question pursuant to S. Ct. R. 14.1(a). Under Missouri law, aggravating factors necessary for the imposition of a death sentence are not found by a jury until the penalty phase. *See* Mo. Rev. Stat. § 565.030(4) ("If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances. . ., may be presented subject to the rules of evidence at criminal trials.").

which given the sanction's severity and finality, is no less important . . . . Nor is accuracy in making that decision any less critical."). App. p. 46a.

Although resentencing proceedings are fairly common in capital cases and conventional wisdom holds that delay normally benefits the defendant, this is not always the case. *See Barker v. Wingo*, 407 U.S. 514, 526 (1972) (noting that "it is not necessarily true that delay benefits the defendant. There are cases in which delay appreciably harms the defendant's ability to defend himself."). The delays in Mr. Deck's proceedings directly negatively impacted his ability to put on a compelling mitigation case. The remedy for this delay is not the release of Mr. Deck, but simply the conversion of his death sentence into a sentence of life without the possibility of parole, the only other penalty provided by Missouri law for first degree murder. *Cf. Barker*, 407 U.S. 514, 522 (1972) (noting that the only possible remedy for a denial of the right to a speedy trial is that a guilty defendant may go free). The State should not be allowed to serially violate constitutional rights in capital cases and then benefit from these violations by fundamentally hampering the defendant's ability to present mitigation.

The bulk of Mr. Deck's mitigation evidence focused on his "horribly abusive childhood." *Deck*, 68 S.W.3d at 422, 431. App. p. 21a. This is precisely the type of childhood evidence that inspires fact-finders to leniency in death penalty case. *See Wiggins v. Smith*, 539 US. 510, 535 (2003) (noting that evidence of a disadvantaged background is significant to juries because society has a long-held belief that these defendants are less culpable). However, by the time of the third penalty phase,

counsel was unable to secure a single family member, or any other witness, to provide live lay testimony on Mr. Deck's behalf. These were the witnesses who knew Mr. Deck and were able to detail for previous juries the poverty, neglect and abuse they personally observed. In post-conviction, it was alleged that counsel was ineffective for failing to call mitigation witnesses on Mr. Deck's behalf. (2nd PCR Tr. at 113).

Necessarily, this evidence focused on events that took place long before the offense occurred, involving witnesses who were adults at the time and could competently convey what they had witnessed. In the twelve years between the original trial and the final penalty phase, memories faded and witnesses "die[d] or disappear[ed]," making the prejudice to the defendant obvious. *See Barker*, 407 U.S at 532 ("If witnesses die or disappear during a delay, the prejudice is obvious."); *see also United States v. Ray*, 578 F.3d 184, 198 (2nd Cir. 2009) (examining a 15-year delay between remand and resentencing and noting that "we recognize that the passage of time could impair a defendant's ability to make a showing that his criminal conduct warrants a lesser sentence.").

If Mr. Deck's death sentences are reversed, he will still be punished for his crimes. Under Missouri law, he will spend the rest of his life in prison. But the death penalty is not appropriate where the lengthy delay prevented his attorneys from adequately preparing his mitigation case. *See, e.g, Barker*, 407 U.S at 532 (noting that the most serious factor in determining prejudice from delay is the limitation imposed upon the defendant's ability to prepare his case); *United States*

v. $8,850, 461 U.S. 555, 569 (1983) (noting that the prejudice to the ability to present a defense could be a "weighty factor indicating that the delay was unreasonable); *State v. Green*, 389 S.W.3d 684, 691 (Mo. Ct. App. 2012) (the most important element in determining a speedy trial violation is the prejudice to the defense caused by the delay).

Betterman left open the question of how delay in sentencing was to be analyzed and what the proper remedy should be. *See* Sarah R. Grimsdale, *The Better way to Stop Delay: Analyzing Speedy Sentencing Claims in the Wake of Betterman v. Montana*, 72 Vand. L. Rev. 1031, 1031 (2019) (noting that *Betterman* left open questions regarding "[w]hat analytical framework is appropriate to address due process claim of delay between conviction and sentencing? And if a court finds that sentencing was unduly delayed, what is the proper relief?"). Given the delay inevitable in criminal cases due to the COVID-19 crisis, and the regularity of resentencings in capital cases, these are questions that lower courts frequently struggle with. Some courts have addressed the issue using the four-factor test set forth in *Barker* for violations of the right to a speedy trial, while other courts have used the two-prong test set forth in *United States v. Lovasco*, 431 U.S. 783 (1977). In addition, the remedy for a speedy trial violation in *Barker*, the dismissal of charges, is obviously not appropriate in the sentencing context, where the conviction itself is valid.

This Court should grant certiorari to consider the specific considerations required in capital re-sentencings. *See Bullington*, 451 U.S. at 438 (noting that the

punishment phase of a capital trial "in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment . . . ."); *Deck,* 544 U.S. at 632 ("Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the 'severity' and 'finality' of the sanction, is no less important than the decision about guilt. *Monge v. California*, 524 U.S. 721, 732 (1998) (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977))." App. p. 46a.

As an example of the conflict in the lower courts, in *United States v. Brown*, 709 F. App'x 103 (2nd Cir. 2018), the Court employed the *Lovasco* test to determine whether the sentencing delay prejudiced the defendant. *Id.* at 103-104. The *Lovasco* test has been interpreted as requiring the defendant to show bad faith by the government. *See United States v. Sanders*, 452 F.3d 572, 581 (6th Cir. 2006) (analyzing delay claim under test set forth in *Lovasco* and noting that "Sanders has put forth no evidence of malice or bad faith on the part of the government."); *see also State v. Lopez*, 410 P.3d 226, 232-33 (N.M. Ct. App. 2017) (noting the split among the lower courts regarding the proper test to use after *Betterman*, and choosing to use the *Lovasco* test over the *Barker* test). Other courts have analyzed the delay between conviction and sentencing under the four-factor test set forth in *Barker,* which is more of a balancing test and does not require showing of bad faith on the state's part. *See United States v. James*, 712 F. App'x 154, 161 (3rd Cir. 2017) (noting that *Betterman* left open the question of how to analyze delay between conviction and sentence, and employing the *Barker* test in the absence of

guidance from the Supreme Court); *see also*, *Grimsdale*, *supra*, at n. 168-170 (collecting cases and describing those that have employed the *Lovasco* test and the *Barker* four-factor tests). Other courts have fused the language in both *Barker* and *Lovasco* to address claims of prejudicial sentencing delay, or relied on their own circuit precedent in the absence of guidance from this Court. *See United States v. Yupa Yupa*, 796 Fed.Appx. 297, 299 (7th Cir. 2019) (citing to both tests and noting that "The Supreme Court majority in *Betterman* did not describe how to evaluate a due process challenge to a sentencing delay, . . ."); *United States v. Cain*, 734 F. App'x. 21, 24 (2nd Cir. 2018) (relying on their own two-part Circuit test).

This split in authority over how to address and remedy inordinate delays in sentencing needs to be addressed. Although the test laid out in *Barker* may offer a starting point, the analysis requires fine-tuning for the sentencing context, and especially in the capital sentencing context, where the only remedy set forth in *Barker*, dismissal of the charges, is unworkable. *See Betterman*, 578 U.S. at 449 (Thomas, J., concurring) ("The factors listed in *Barker* may not necessarily translate to the delayed sentencing context."); *see also United States v. Ray*, 578 F.3d 184, 202 (2nd Cir. 2009) (concluding 15-year delay between remand and resentencing violated due process and noting in terms of remedy, that "courts endeavor to fashion relief that counteracts the prejudice caused by the violation."). However, given the heightened need for due process protection in the capital sentencing phase, and the common occurrence of capital penalty re-sentencings, this is a question that is ripe for certiorari.

II. THE DELAY IN MR. DECK'S CASE VIOLATED HIS RIGHT TO PRESENT MITIGATING EVIDENCE , WHICH IS CONSTITUTIONALLY REQUIRED IN DEATH SENTENCING PROCEEDINGS.

Due to the passage of time, Mr. Deck's third resentencing jury was left without first-hand live witness testimony regarding his traumatic childhood and its effects. Although expert witnesses are often invaluable in capital cases, their testimony needs to be coupled with live testimony from family and friends who can share first-hand accounts of the brutality of a capital defendant's childhood. *See* Scott Sundby, *The Jury as Critic: An Empirical Look at how Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1185 (1997). Because they are perceived as "hired guns," capital juries often distrust expert testimony: "A defendant strategy that revolves solely or even primarily around professional expert testimony, especially psychological or psychiatric testimony, is likely to meet with failure." *Id.* at 1124, 1185. A study of capital juries indicated "that if an expert is to be used, the expert's testimony must be effectively integrated with persuasive lay testimony." *Id.* at 1185.

Live lay mitigation witnesses are needed to support a life sentence for precisely the reason Mr. Deck's third capital resentencing attorneys recognized: "At the most basic level, from an emotional viewpoint, the testimony shows that someone cares about the defendant and believes that he has some redeeming value." *Id.* at 1152. In addition, live lay testimony provides "critical first-hand factual input by providing a context for understanding the defendant's actions. Especially valuable in this sense is the family historian, the individual who can tell the stories,

both good and bad, that help the jurors picture what life was like for the defendant." *Id.* at 1156. This Court has recognized that in the American legal system, "the common-law tradition is one of live testimony," in order to ensure the "ultimate goal" of the "reliability of evidence." *Crawford v. Washington*, 541 U.S. 36, 43, 61 (2004).

Mr. Deck's third resentencing lawyers recognized this: "We desperately needed family members to testify on Mr. Deck's behalf." Rule 91 Supp. Ex. A. App. 261a. These witnesses existed and testified at the first and second penalty phases. However, due to state created error at serial capital resentencing proceedings (the failure of appointed counsel in the first, and the failure to allow Mr. Deck to appear without restraints in the second), Mr. Deck was subjected to yet another capital resentencing. By the time of the third resentencing proceeding however, because effective live lay witnesses had disappeared, were dead, or unavailable to testify, Mr. Deck's ability to present a compelling mitigation case had evaporated. Whether deliberate or negligent, the ultimate responsibility for the inordinate delay here lies with the state, not with the defendant. *Barker*, 407 U.S. at 531.

This Court has held repeatedly that a death sentence is only permitted when the sentence is permitted to "consider. . . in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind*," Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

In *Lockett v. Ohio*, 438 U.S. 586, 604, (1978), a plurality of this Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but

the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original). The Court held that the sentencer must have full access to "highly relevant" information. *Id.* at 603. A majority of the Court adopted the *Lockett* ruling in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). "The use of mitigation evidence is the product of the requirement of individualized sentencing." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (citations omitted).

The definition of mitigating evidence which must be available to the sentencer is extremely broad. Any evidence which might serve to reduce the jury's urge to impose death must be deemed mitigating. *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Skipper v. South Carolina,* 476 U.S. 1 (1986); *Wiggins v. Smith*, 539 U.S. 510 (2003).

This Court has previously held that the right to mitigating evidence is violated when state laws or rules exclude it (*Skipper,* 476 U.S. 1; *Lockett*, 438 U.S. at 604; *Eddings v. Oklahoma*, 455 U.S. at 110; *Penry v. Lynaugh*, 492 U.S. 302 (1989); or when it is not presented because of ineffective assistance of counsel (*Wiggins*, *Sears v. Upton* 561 U.S. 945 (2010). There is no effective difference between those cases and Mr. Deck's insofar as they uphold the right to mitigating evidence before a sentence of death. This Court should grant review, and hold that when sentencing delay prevents the presentation of mitigating evidence, the defendant's right under the Eighth and Fourteenth Amendments are violated.

CONCLUSION

The Missouri Supreme Court's decision, denying this claim without a hearing or written opinion, should be reversed and the case remanded to that court for further proceedings. This Court should grant certiorari, stay the execution, determine the proper test and remedy for inordinate delays in capital re-sentencing, and hold that Mr. Deck's sentences of death violate the Constitution.

/s/ Elizabeth Unger Carlyle

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