

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

Nos. 21A606/21-7542

**In The Supreme Court Of The United States**

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CARMAN DECK,

Petitioner,

v.

PAUL BLAIR,

Respondent.

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

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REPLY BRIEF IN SUPPORT OF STAY OF EXECUTION

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## INTRODUCTORY STATEMENT

The right to a speedy trial is enshrined in our Constitution and in capital proceedings, this right includes the penalty phase. A state should not be allowed to repeatedly attempt to obtain a death sentence, bungle the process, and then claim victory when no one is left to show up for the defendant at the mitigation phase. This is precisely what occurred in this case.

The state asserts that a delay of 12 years is “extreme.” Reply p. 13. Mr. Deck agrees. The state conveniently ignores the fact that Mr. Deck **won** his claim during federal habeas proceedings. The state won on a procedural technicality to successfully avoid a ruling on the merits – and now seeks to bootstrap that ruling (and the time it took) to claim irreparable harm to the state. Having delayed for twelve years and robbed Mr. Deck of the chance to present mitigation, it rings hollow to say the state is harmed for the twelve years that occurred since.

The proper query is why the delay the state complains of can be “extreme” and harmful, while a virtually identical delay caused by the state cannot be “extreme” and harmful. At its heart, the state, an entity with incredible resources, seeks one set of rules for themselves, while an indigent, incarcerated defendant is subject to the prosecutors’ whims for twelve years and for that would have no legal recourse. The inconsistency demonstrates the callousness of the state’s argument.

## REPLY TO THE STATE'S ARGUMENTS

### I. THIS COURT HAS JURISDICTION TO REVIEW THE MERITS DETERMINATION OF THE MISSOURI SUPREME COURT.

Mr. Deck is asking for direct review of a post-conviction decision of the Missouri Supreme Court that was a determination on the merits. The constitutional principle at stake is that of undue delay between a conviction and the final capital sentencing proceeding. There is no jurisdictional bar to this Court's consideration of both a stay and the certiorari petition itself.

It is true that when Mr. Deck presented a similar claim in federal habeas, premised on the ineffectiveness of his trial and post-conviction counsel, the Eighth Circuit Court of Appeals found the claim procedurally defaulted. *See Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020). However, the claim he presented in state habeas corpus, after the federal habeas review process had ended, was premised upon the underlying substantive claim that undue delay prevented him from presenting a compelling mitigation case, as a result of the loss of live witnesses due to the passage of time and the serial nature of three capital sentencing proceedings.

The Eighth Circuit's finding was premised on the theory that because Mr. Deck's legal claim was not clearly established in Supreme Court case law at the time of trial and post-conviction, trial and post-conviction counsel could not have been ineffective for failing to present it. ("When postconviction counsel filed Deck's petition in 2010, the law was far from settled that a 10-year delay between conviction and sentencing would give rise to a constitutional claim, much less that trial counsel was ineffective for failing to raise the argument two years earlier." *Id.*

at 583.). Under that logic, a substantive underlying claim of undue delay will never be reviewed in federal habeas because no counsel will ever be held ineffective for failing to raise it until this Court establishes it on direct review of a state court decision. Although the limitations on federal habeas review prevented that claim from being reviewed when Mr. Deck presented it there, there is no such limitation upon this Court's direct review. *See, Roper v. Simmons*, 543 U.S. 851 (2005) (conducting direct review of a Missouri state habeas corpus case, exactly the procedural posture here). *See also Sears v. Upton*, 561 U.S. 945 (2010) (conducting direct review of a state post-conviction decision in a capital case).

The state wrongly argues that the Missouri Supreme Court did not make a ruling on the merits but rather found the issue procedurally defaulted. Although the Missouri Supreme Court's rejection of the issue came in the form of a silent denial, Missouri Supreme Court case law, as well as precedent from this Court, makes it clear that this was a rejection on the merits. In *State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 381 (Mo. banc 2021), Ernest Johnson, like Mr. Deck, presented a state habeas claim just prior to his execution under Mo. Sup. Ct. R. 91. The State argued that the claim was procedurally barred and even asked the court to reconsider prior precedent which held that there was no absolute procedural bar against successive state habeas petitions. The Missouri Supreme Court declined to do so and reiterated that in capital cases, for claim not previously litigated in state court, "[t]here is no absolute procedural bar . . . to seeking habeas relief. Successive *habeas corpus* petitions are, as such, not barred." *Id.* at 381 (citation omitted) (emphasis in

original). Procedural bars exists in Missouri state habeas actions only if the claim has already been litigated. *Id.*

Consistent with Missouri law, this Court's precedent also establishes that the silent denial of the Missouri Supreme Court was a denial on the merits.

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.

*Harrington v. Richter*, 562 U.S. 86, 99 (2011). As noted in *Johnson*, state law procedural principles would only bar Mr. Deck's claim if he had litigated it before in state court. He did not and the state cannot get around the rule of *Harrington* and *Johnson*.

The state's reliance on *Byrd v. Delo*, 942 F.2d 1226 (8th Cir. 1991) is misplaced for two main reasons. First, in *Byrd*, the Missouri Supreme Court did not issue a silent denial. The State sought clarification of the state court's order and obtained an order which stated the claims were procedurally barred. *Byrd*, 942 F.2d at 1229. There was no such clarification in this case. Thus, the state's argument is a bold mischaracterization of what actually occurred in *Byrd*.

In addition, *Byrd* predates both *Harrington* and *Johnson* and both are controlling. Under *Harrington*, the unexplained order must be construed as a ruling on the merits and under *Johnson*, there is no procedural bar because Mr. Deck did not previously litigate the claim in a prior Rule 91 proceeding.

## II. THE UNDERLYING MERITS OF THIS CLAIM LED THE DISTRICT COURT TO GRANT FEDERAL HABEAS RELIEF, ILLUSTRATING THAT BOTH A STAY AND CERTIORARI REVIEW IS APPROPRIATE.

Mr. Deck was prejudiced in his ability to mount an effective mitigation case due to the passage of time from an “extreme” delay caused by the state. The state’s arguments to the contrary are belied by the findings of the district court, granting federal habeas relief on this basis. *See Deck v. Steele*, 249 F.Supp.3d 991, 1076-87 (E.D. Mo. 2017), *rev’d by Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020). These findings illustrate a likelihood of success on the merits and the need for certiorari review.

Although the state was able to present live testimony from thirteen witnesses at the third resentencing<sup>1</sup>, Mr. Deck was only able to present live testimony from two hired experts. *Id.* at 1077. At the first penalty phase, Mr. Deck was able to present testimony from his stepmother, aunt, foster father, and his brother. *Id.* at 1078. The Missouri Supreme Court found this testimony to present a mitigation case that was “substantial.” *Id.* At the second penalty phase, Mr. Deck presented essentially the same live testimony with the addition of another aunt, his brother’s testimony via video deposition only, and the testimony of a hired expert. *Id.* However, by the time of the third penalty phase, counsel’s attempt to obtain some of these same witnesses fell flat. The passage of time meant that many of these family members or other lay witnesses could no longer be located or were simply unwilling to subject themselves

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<sup>1</sup>As noted by the district court, live testimony was so important to the state it moved for a continuance to ensure the availability of a witness. *Id.* at 1077.

to testimony for yet a third time. *Id.* Counsel testified in post-conviction that “[A] lot of time has passed . . . [T]here were so few and so scarce of live family members who would come and say anything on Carman’s behalf, that we would try to grasp anybody that we could.” *Id.* Contrary to the assertion that it was strategy to only present live testimony from expert witnesses, counsel testified “that if they could have found any person who could have helped to spare Deck’s life, they would have presented them at trial.” *Id.*

These changed circumstances lead the district court to find

That the ten-and-a-half year delay between Deck’s conviction and his final penalty-phase trial triggers the remainder of the due process analysis, especially given the negative implications such a delay could have on a capital defendant’s constitutionally protected right to adequately provide the sentencing jury with mitigating evidence.

*Id.* at 1080.

The district court analyzed the reasons for the delay. Because the time between the first and second resentencing was due to constitutionally ineffective assistance of counsel, “that error is imputed to the State.” *Id.* at 1081. Similarly, although counsel requested that Mr. Deck appear free from shackles before his second penalty phase jury, the request was denied and the Missouri Supreme Court declined to intervene, causing this Court to reverse the second death sentence. *Deck v. Missouri*, 544 U.S. 622 (2005).

The district court then analyzed the delay between the Supreme Court’s reversal and the final resentencing, noting the State’s requests for continuances and the “undisclosed conflict of interest” in the local prosecutor’s office involving the

employment of the victims' family member and the resulting ten-month delay for that reasons alone. *Deck*, 249 F.Supp.3d at 1081. Finally, the trial court itself “repeatedly continued the trial for several months at a time, with such continuances greatly exceeding the time requested by the respective party. While these delays may have been for neutral reason, such as a crowded docket, they nevertheless cannot be weighed against *Deck*.” *Id.* The district court also noted that it could not be said that *Deck* “passively acquiesced in delayed proceedings,” as he objected to some of the State’s requested continuances and only “sought one limited continuance so that his counsel could secure mitigation witnesses and prepare documents to be reviewed by their expert.” *Id.* at 1082. The district court found this limited continuance to be reasonable, not proof of a “lack of diligence.” *Id.*

The district court explicitly found that Mr. *Deck* was prejudiced in his ability to present mitigation due to delay:

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

*Id.* at 1082 (emphasis added).

Not only was prejudice, shown, the district court found that “[w]ith the demonstrated unavailability of mitigation evidence (previously found to be

substantial),” the prejudice suffered by Mr. Deck due to the “significant passage of time,” was “obvious.” *Id.* at 1082. The stunted mitigation presentation counsel was forced to put on “prevented the jury from adequately considering compassionate or mitigating factors that might have warranted mercy.” *Id.* at 1082. Deck went into the third resentencing and “proceeded through a death penalty trial that was fundamentally unfair from even before it began.” *Id.* at 1086.

The state complains that Mr. Deck failed to provide any precedent which indicates a preference for live testimony over that of video depositions or written transcripts. However, any trial lawyer will tell you that when testimony is aimed at emotional impact, as mitigating testimony is, there is simply no substitute for live witnesses. The Constitution enshrines the preference for live testimony in the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36, 43, 61(2004), the Supreme Court noted that the tradition in common-law “is one of live testimony,” because it ensures the “ultimate goal” of the “reliability of the evidence.” *See also*, *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (“In sum, our precedents establish that “the Confrontation Clause reflects a preference for face-to-face confrontation at trial, . . .”); *McDowell v. Blankenship*, 759 F.3d 847, 852 (8th Cir. 2014) (noting that “live witness testimony is axiomatically preferred to depositions, particularly where credibility is a central issue . . .”) The power of live witness testimony is especially crucial when it comes to mitigating testimony, delivered from friends and family that personally knew the defendant and personally witnessed the extensive abuse Mr. Deck was subjected to throughout his life. The fact that counsel was able to

present some of this testimony in the form of deposition transcripts does not take away from the fact that the jury could not personally adjudge the witnesses' credibility live, from the witness chair.

There is a notable omission in the state's argument. This is their second opportunity before this Court to explain why the district court wrongly applied *Barker* in applying this Court's precedent – and it is the second time they passed on it. If the state had something to contest the district court's application of *Barker*, they would have presented it. The failure to marshal a single merits argument to dispute the district court's analysis provides support that Mr. Deck is likely to succeed on the merits.

This Court expressed the most important factor in determining whether an unconstitutional delay occurred is prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). The most serious of these concerns is the impact of the delay upon the defendant's "ability to adequately prepare his case," with emphasis upon the loss of witnesses. *Id.* The state points to the inability of Mr. Deck's final resentencing counsel to obtain cooperation from some of the family members as a reason unrelated to the delay. However, the inordinate delay cases explain how time institutionalized "disrupts family life," and time spent incarcerated is "simply dead time." *Id.* at 532-33. By the time the third resentencing occurred, Mr. Deck had been on death row for twelve years and obviously his ability to prevail on mitigating witnesses for help was hindered: "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare

his defense.” *Id.* at 533. The longer someone is in prison, the more relationships with family and other mitigating witnesses becomes diminished. This is a function of both time and incarceration. These witnesses were present and accounted for at the first two resentencings, however by the time of the final resentencing, Deck was simply incapable of assisting counsel in this effort given the obvious limitations placed upon his ability to communicate with witnesses from the confines of prison.

### **III. MR. DECK HAS PURSUED RELIEF ON THIS ISSUE SINCE HIS FIRST OPPORTUNITY TO DO SO.**

Mr. Deck first raised the substantive underlying claim of undue delay in his habeas corpus petition in 2013, . Because prior counsel did not raise the issue in state court previously, Mr. Deck premised the substantive underlying claim on the ineffectiveness of both trial and post-conviction counsel. The federal district court granted relief on this basis, which was overturned by the Eighth Circuit Court of Appeals. When federal habeas review concluded with the denial of certiorari on the *Martinez v. Ryan*, 566 U.S. 1 (2012) issue, Mr. Deck promptly raised the substantive underlying claim of undue delay in state habeas corpus, as state procedural law allows him to do. Mr. Deck’s federal habeas corpus proceedings finally concluded on October 4, 2021. Mr. Deck initiated state habeas corpus proceedings less than two months later, on December 2, 2021. It would have been premature to present the issue in state court earlier, as federal proceedings were still ongoing, and Mr. Deck had been **granted** relief in the district court.

On January 31, 2022, the Missouri Supreme Court denied the request for state habeas corpus relief and set Mr. Deck's execution date for May 3, 2022.

Although the petition for certiorari from the Missouri order was not due until May 2, 2022, Mr. Deck filed his petition early, on April 1, 2021. Thus, there have been no unnecessary delays in bringing this issue to this Court in a timely manner.

Finally, the state admits in its opposition that delays of the length described herein are "extreme" and prejudicial. If rules are applied consistently, this demonstrates that an irreparable injury would occur if the execution prevents meaningful consideration of an admitted "extreme" and prejudicial delay. Regardless of the party, the rules should be applied the same.

## CONCLUSION

Mr. Deck has illustrated the likelihood of success on the merits given the grant of federal habeas relief in federal district court. The federal district court granted relief based upon the prejudice that inured to him due to the unconstitutional delay between his conviction and final resentencing that prevented him from putting forth a compelling mitigation case. Mr. Deck will suffer irreparable harm if he is executed before the important federal question his petition for writ of certiorari presents is fully and fairly considered. Mr. Deck brought his claim at the first opportunity to do so, once competent counsel was appointed in federal habeas. Once federal habeas concluded, he promptly presented the underlying substantive claim to the Missouri courts and received merit review.

It is time for this Court to step in and analyze the question of how long and how many times the state courts can insist upon a death sentence after unfairly and repeatedly endangering the constitutional rights of a capital defendant. At some point, a life sentence should be enough.

/s/ Elizabeth Unger Carlyle

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