No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH G. MIDDLETON,

Petitioner,

vs.

RONDA PASH, Superintendent,
Crossroads Correctional Center

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Kenneth G. Middleton is a Missouri prisoner serving a sentence of life without parole after being convicted of first degree murder involving the shooting death of his wife. Petitioner was convicted solely on the basis of circumstantial evidence and has steadfastly contended since he was initially arrested in 1990 that the death of his wife was an accident. Both his trial and post-conviction counsel were demonstrably ineffective, a fact that has never been disputed by respondent.

Petitioner was represented at trial and on consolidated appeal by Robert G. Duncan, who failed to conduct any investigation or call any witnesses at trial on petitioner's behalf. Mr. Duncan subsequently lost his law license during petitioner's direct appeal. *In Re Duncan*, 844 S.W.2d 443 (Mo. banc 1992). Petitioner's first state post-conviction motion court counsel, Gerald Handley, also demonstrated a shocking lack of diligence and professionalism. As a result, petitioner's convictions and sentence were affirmed on consolidated appeal and his subsequent federal habeas corpus proceedings were doomed to failure because his claims of ineffective assistance of trial counsel were procedurally barred due to Mr. Handley's incompetence. *State v. Middleton*, 854 S.W.2d 504 (Mo. App. W.D. 1993).

In 2003, petitioner filed a motion to reopen his initial state post-conviction action alleging he was abandoned by his post-conviction counsel. After conducting extensive evidentiary hearings, Judge Edith Messina, who was also the trial judge, granted petitioner post-conviction relief, finding that his claims of abandonment of post-conviction counsel and his underlying claims of ineffective assistance of trial counsel were sufficiently compelling to warrant a new trial. The Missouri Court of Appeals, after conducting *de novo* review, reversed Judge Messina's decision on state procedural grounds, finding that the 29.15 motion court had no jurisdiction to reopen the case. *Middleton v. State*, 200 S.W.3d 140 (Mo. App. W.D. 2006). ("*Middleton II*").

In 2010, petitioner filed a second motion before the trial court to reopen his Rule 29.15 motion due to the abandonment and ineffectiveness of his state post-conviction counsel in light of intervening caselaw from the Missouri Supreme Court expanding upon the possible scenarios where abandonment of counsel occurs and this Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Judge Messina denied this motion to reopen primarily because of the Court of Appeals' previous reversal of her 2005 decision to reopen the case and grant

petitioner a new trial. The Missouri Court of Appeals, after reviewing Judge Messina's decision under the clearly erroneous standard of review set forth under Mo. S. Ct. Rule 29.15(k), affirmed Judge Messina's judgment.

Petitioner commenced the present post-conviction action by filing a petition for a writ of habeas corpus, pursuant to Mo. S. Ct. Rule 91, in the Circuit Court of DeKalb County Missouri. This petition, apart from raising ineffectiveness of trial and post-conviction counsel claims addressed by Judge Messina in 2004, also raised a free-standing claim of actual innocence that was not cognizable in his prior Rule 29.15 proceedings. This petition was summarily denied on August 7, 2017. Petitioner refiled the same petition in the Missouri Court of Appeals Western District. This petition was summarily denied by the Court of Appeals on November 8, 2017. Petitioner, thereafter, filed the same petition in the Missouri Supreme Court. The Missouri Supreme Court denied this petition on August 21, 2018.

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

1. Whether the continued incarceration of a state prisoner who has presented a truly persuasive case of actual innocence violates the Eighth and Fourteenth Amendments.

2. Whether the due process clause of the Fourteenth Amendment requires that state prisoners be afforded a full and fair corrective process in state court to adjudicate claims of actual innocence and other federal constitutional claims.

3. Whether the Sixth and Fourteenth Amendments require state courts to guarantee that prisoners receive effective assistance of counsel during initial post-conviction proceedings in states where that is the first forum in which a prisoner may raise a claim of ineffective assistance of trial counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Middleton respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Supreme Court denying his petition for a writ of habeas corpus.

OPINIONS BELOW

The judgment of the Missouri Supreme Court is attached in the Appendix at A-1. The judgment of the Missouri Court of Appeals is attached in the Appendix at A-237. The judgment of the Circuit Court is attached in the Appendix at A-238.

JURISDICTIONAL STATEMENT

The judgment of the Missouri Supreme Court was issued on August 21, 2018. Under Rule 13, this petition is required to be filed within ninety days. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

This case also involves the Eighth Amendment to the United States Constitution that states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case also involves the Fourteenth Amendment to the United States Constitution that states, in pertinent part: "no state shall…deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Mo. S. Ct. Rule 29.15(k) which states in pertinent part:

> "Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 22, 1991, petitioner was tried by a jury and convicted of the offenses of first degree murder and armed criminal action in the Circuit Court of Jackson County, Missouri before Judge Edith Messina. On April 5, 1991, petitioner was sentenced to concurrent sentences of life without parole and two hundred years. Petitioner was represented at trial and on consolidated appeal by Kansas City attorney Robert G. Duncan, who was subsequently disbarred during the pendency of Mr. Middleton's direct appeal for income tax evasion and other ethical lapses. *In re Duncan*, 844 S.W.2d 443 (Mo. banc 1992).

During his consolidated appeal after his appointed public defender took no action on his behalf after he filed a timely *pro se* motion for post-conviction relief

under Mo. S. Ct. Rule 29.15, petitioner hired Kansas City attorney Gerald Handley to represent him on his 29.15 motion before the trial court. Mr. Handley filed a clearly defective three page amended motion that he did not allow Mr. Middleton to review beforehand, which omitted numerous viable claims for relief. At the subsequent 29.15 evidentiary hearing in 1992, Mr. Handley presented little or no evidence in support of any claim of ineffective assistance of trial counsel and abandoned other meritorious ineffectiveness claims. Thereafter, the Missouri Court of Appeals affirmed petitioner's convictions on consolidated appeal in *State v. Middleton*, 854 S.W.2d 504 (Mo. App. W.D. 1993).

Mr. Middleton, in 1995, filed a *pro se* motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Missouri. *Middleton v. Bowersox*, No. 95-01302-CV-W-GAF. (*Middleton II* L.F. 520-553). After two amended motions were filed by retained counsel, Judge Gary Fenner, on April 29, 1998, denied the petition in its entirety. With regard to petitioner's claims of ineffective assistance of trial counsel, the federal court found that all of his claims were procedurally barred due to the failure of Mr. Handley to properly raise or present evidence in support of these claims before the 29.15 motion court. The Eighth Circuit subsequently denied petitioner's application for a certificate of appealability and this Court denied a subsequent

petition for a writ of certiorari. *Middleton v. Bowersox*, 8th Cir. No. 98-3009; *Middleton v. Bowersox*, S. Ct. No. 99-268.

On July 16, 2003, petitioner filed a motion in the state trial court to reopen his previous Rule 29.15 proceeding due to the abandonment of state post-conviction counsel, which included all of the claims of ineffective assistance of trial counsel that Judge Fenner had found to be procedurally barred. Judge Messina held an evidentiary hearing on the issue of whether she had the authority to reopen the motion and, on February 2, 2004 reopened petitioner's 29.15 action due to abandonment of counsel. On June 24 and 25, 2004, Judge Messina held two days of evidentiary hearings on the merits of petitioner's claims of ineffective assistance of trial counsel. On May 26, 2005, Judge Messina issued a thirty-eight page order granting petitioner's 29.15 motion, setting aside his convictions and sentences based upon its finding that Mr. Duncan was ineffective at trial. (A-127-164).

The Missouri Court of Appeals subsequently reversed Judge Messina's decision on procedural grounds, holding, after conducting de novo review, that the motion court had no jurisdiction to reopen the case. *Middleton v. State*, 200 S.W.3d 140 (Mo. App. W.D. 2006). The Court of Appeals did not address the 29.15 motion court's ruling on the merits of petitioner's claims of ineffective assistance of trial counsel. *Id*.

Petitioner commenced the present post-conviction action by filing a petition for a writ of habeas corpus pursuant to Mo. S. Ct. Rule 91 in the Circuit Court of DeKalb County Missouri. This petition, which consisted of approximately 100 pages and approximately 50 exhibits, raised four claims for relief: a claim of actual innocence; a claim of ineffective assistance of trial counsel; and a claim of prosecutorial misconduct involving the prosecutor's personal financial interest in convicting Mr. Middleton, the suppression of exculpatory evidence, and the use of perjured testimony and other improprieties that occurred during trial. The Circuit Court of DeKalb County summarily denied this petition on August 7, 2017. (A–239).

Petitioner, thereafter, refiled the same petition in the Missouri Court of Appeals Western District. This petition was also summarily denied by the Court of Appeals on November 8, 2017. (A-237). Petitioner refiled the same petition and supporting exhibits in the Supreme Court of Missouri. (A-2-126). That court summarily denied the petition on August 21, 2018. (A-1).

THE TRIAL AND STATE POST-CONVICTION PROCEEDINGS

On February 12, 1990, Kenneth Middleton was home alone, ill. At 1:30 p.m. he telephoned his wife, Katherine, at work, and asked her to come home to help him.

(Tr. pp. 41, 104-105, 469).[1] Mr. Middleton had taken medication for an infection earlier in the day. Petitioner had a medical history of suffering from epileptic grand mal seizures.

When Mrs. Middleton arrived home some 15-20 minutes later, she noticed that petitioner looked quite sick. He was sitting in a living room chair, where he had been wiping down a handgun. Mrs. Middleton decided to call the doctor, and on her way to the telephone in the dining room, she took the gun from petitioner. As she got near the phone, she dropped the pistol and it misfired, striking her in the face. Petitioner called 911, screaming for help. The time was 1:51 p.m. Mrs. Middleton was dead by the time police arrived. (Tr. pp. 41-42, 53-55, 104-105, 115-117, 167, 470). Officers arrived at the scene and found a hysterical, distraught and frantic Ken Middleton. They frisked him, searched his home room to room, took his clothing from his person, and ran preliminary tests at the scene, as well as more thorough and complex forensic tests later at the Jackson County Crime Laboratory.

At the scene, the paramedics determined that petitioner's blood pressure was high, and he was hyperventilating. They urged him to go with them to a hospital. Before he was taken away, one of the officers conducted paraffin wax (gun powder

[1] The trial transcript will be cited as "Tr." The transcript from the 2004 29.15 hearing will be designated as "29.15 Tr." These transcripts and all of the relevant portions of the state court record were attached as exhibits to the petition filed in the Missouri Supreme Court. (A-169-236).

residue) tests on petitioner's hands. (Tr. pp. 56-57; 171-172). No gun powder or blood was detected on Mr. Middleton's hands, his long sleeve shirt, or the hand towel from the bathroom which was given to Mr. Middleton by an officer when he got sick while being frisked. (Tr. pp. 333, 339-339, 342; 29.15 Exh. 32).

Middleton was admitted to three hospitals in the next 24 hours: St. Mary's, Independence Regional (for mental health commitment); and, Western Missouri Mental Health Center. Soon after his discharge from Western Missouri, Middleton was interrogated by a detective who claimed that Middleton said he was sitting in the living room chair as his wife was walking past him, heading to the dining room telephone. He rose to hand the gun to her, but blacked out. When he awoke, they were both lying on the floor, but she had been shot. (Tr. pp. 71-72). (The living room chair is 14 feet away from where Mrs. Middleton died). (29.15 Tr. p. 110; Tr. pp. 117-118).

At trial, the prosecution characterized this account as inconsistent with what police contend petitioner told them at the scene. The state also attempted to corroborate its theory that petitioner shot his wife by referencing select pieces of physical evidence, taken out of context. The prosecution elicited from the coroner that Mrs. Middleton was shot just above her left eye at close range. Mrs. Middleton had faint bruises on her chest "consistent with being pushed" against a

wall, suggesting a struggle. The state also argued that petitioner left a boot print on the wall next to where Mrs. Middleton died, again suggesting an altercation.

However, Mrs. Middleton had no powder burns or soot on her hands, the type of evidence which the coroner stated is usually indicative of a defensive posture common to most gunshot victim struggling with their purported assailant. And Mrs. Middleton's chest bruises were just as likely to have been caused by her carrying heavy boxes against her chest at work or by falling against the top of the tubular-backed, metal dining room chair before she hit the floor. Further evidence of this scenario is the fact that Mrs. Middleton also had bruises on her legs, which were determined to have occurred when she carried large boxes at work. The prosecutor also argued that there was no telephone in the dining room, which Mr. Middleton said his wife was going to use after she took his gun, located right next to where she died. After trial, however, the state conceded there was a phone in the dining room in the exact location petitioner has described. (Compare Tr. pp. 546-548 with Tr. pp. 564-565, 572).

In addition, perhaps the most disturbing aspect of the shoddy police work in this case is that gunshot residue tests were performed on Mrs. Middleton's left hand, and then never relinquished to the defense. This is significant because Mrs. Middleton was shot in the left side of her head. The police document ordering GSR testing on both of her hands was altered to omit the reference to her left hand.

(See 29.15 Exh. 55 – Dave Link's deposition; Exh. 18, admitted into evidence at 29.15 Tr. p. 89). Under "number of articles" (indicating the number of test kits used on Mrs. Middleton's hands), a number has been whited out and replaced with the number "1." When the original report is held to the light, the number "2" can be read underneath the white-out. (*Id.*). The following line states "gunshot residue *tests* for right hand." A space appears between "right" and "hand," and it is apparent that a word has been whited-out. (A-166). When the original report is held to the light, "& left" can be read underneath the white-out. (*Id.*).

When comparing the inventory report filed for Mr. Middleton with the report filed for Mrs. Middleton, it is apparent that both documents were prepared by the same person and that "& left" has been removed from Mrs. Middleton's report. The detective responsible for the testing, Dave Link, later admitted under oath in a deposition that he never tested just one hand on a person. It is also hard to believe that only one hand was tested for GSR, in light of the fact that Link scraped Mrs. Middleton's fingernails for trace evidence before the autopsy was performed (see Pet. Exh. 5) (A-165).

After sentencing in April of 1991, Mr. Middleton filed a timely *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15. Judge Messina appointed the Appellate Public Defender to prepare an amended motion on his behalf. (Back in 1991, Missouri law required that the post-

conviction proceeding occur before the direct appeal, and that trial and post-conviction errors be taken up in a consolidated appeal). Judge Messina also granted an extension of time for filing the amended motion.

After hearing nothing from the public defender as the deadline approached for the amended motion, Mr. Middleton retained attorney Gerald Handley to handle his 29.15 motion. Handley failed to provide Middleton a copy of the amended motion he subsequently filed, and never met with him to discuss the issues to be raised. Instead, on the Friday before the Monday on which the amended motion was due, Handley sent petitioner the affidavit which Rule 29.15 mandates has to be appended to the end of the amended motion. Handley provided petitioner instructions that the affidavit "*must*" be signed and delivered back to Handley's office by Monday, or the motion would be jurisdictionally denied as untimely. *See Isaiah v. State,* 926 S.W.2d 181 (Mo. App. W.D. 1996). However, Handley did not enclose a copy of the proposed amended motion for petitioner to review, despite the fact that Rule 29.15 requires the prisoner to sign an affidavit swearing that he or she has read the amended motion to which it is appended. (L.F. Vol. I, pp. 104-105, Exh. 6, "Tomorrow I will Federal Express a rough draft…").

Mr. Middleton was never able to read the amended motion prior to its filing on Monday, November 25, 1991, or contribute to its contents. However, he was

"coerced" into signing the affidavit so that at least something would be timely filed. (Exh. F). The affidavit was delivered by fax to Mr. Handley's office at 9:55 a.m. on Monday, November 25th, and the amended motion was filed that day. (Exh. N).

After Handley filed the three-page amended motion, Assistant Jackson County Prosecutor James Pener filed a motion to dismiss the amended motion as defective because it contained no supporting facts and raised several noncognizable claims that were only cognizable on direct appeal under Missouri law. (Exh. E). Judge Messina did not rule on this motion to dismiss and instead set the case for an evidentiary hearing in 1992. At this hearing, Mr. Handley abandoned almost all of petitioner's claims of ineffective assistance of trial counsel, including the claims on which Judge Messina subsequently granted him relief in 2005. (Exh. B). Mr. Handley also did not present any medical evidence to support the only viable claim he did not abandon, involving trial counsel's failure to present exculpatory evidence regarding petitioner's medical condition and history of grand mal seizures. (*Id*.). Mr. Handley's lack of effort resulted in the district court finding all of petitioner's ineffective assistance of trial counsel claims to be procedurally barred in petitioner's subsequent federal habeas corpus action.

Eleven days before his scheduled March 13, 1992 29.15 evidentiary hearing, petitioner filed, *pro se*, a supplemental witness list that included his crime scene expert Charles Gay. At this evidentiary hearing, trial prosecutor Patrick Peters was seen conferring with a uniformed guard who immediately thereafter stationed himself outside Judge Messina's courtroom door. This guard would not let any of Mr. Middleton's nine out-of-state witnesses, including expert witness Charles Gay, enter the courtroom, despite the fact that the rule for exclusion of witnesses was never invoked. (Exh. G). At this hearing, Mr. Handley inexplicably refused to call Mr. Gay as a witness despite the fact that he was present and available to testify. Mr. Gay would have testified consistently with the testimony he provided in June of 2004. Mr. Handley also refused petitioner's request to testify on his own behalf at the 1992 hearing. (Exh. I). Mr. Handley also refused to call the eight other witnesses who were present outside the courtroom and available to testify at the March 13, 1992 evidentiary hearing.

Mr. Handley was also ineffective in failing to investigate and present testimony in 1992 from a medical expert in support of an ineffectiveness of trial counsel claim involving Mr. Duncan's failure to present medical testimony and records indicating that Mr. Middleton did not fake illness after the police arrived at the scene of the shooting. At the subsequent 2004 29.15 hearing, the state stipulated to the report and CV of Dr. William S. Logan, who examined

petitioner's medical records and history and wrote a detailed report of his findings. (Dist. Ct. Exh. C, Vol. II pp. 267-270). Dr. Logan's CV and report were introduced into evidence during the 2004 29.15 proceeding. (See Exh. H).

Dr. Logan's report indicates that, if he had been called to testify at trial, he could have stated to a reasonable degree of medical certainty, based upon his review of petitioner's medical records and medical history, that petitioner had a history of suffering from grand mal epilepsy due to which he was discharged from the military in 1965. (*Id*. p. 8). Because of this condition, Mr. Middleton regularly experiences seizure-like episodes. Dr. Logan's testimony would have also rebutted several aspects of the prosecution's theory that Mr. Middleton was feigning illness in the aftermath of the death of his wife.

Trial counsel and Mr. Handley also failed to utilize Mr. Middleton's medical records from St. Mary's Hospital, Independence Regional Medical Center, and Western Missouri Mental Health Center, which would have refuted the prosecution's testimony that Mr. Middleton was not tearful and was not remorseful following his wife's death. (*Id*. p. 9). Had trial counsel obtained Mr. Middleton's medical records, he would have also learned that medical tests at St. Mary's Hospital reflected an abnormal cardiac status consistent with petitioner's reports of chest pain. (*Id*.). The records from St. Mary's emergency room also expressly contradicted the testimony of Officer Spartz that Mr. Middleton just was tested at

that facility and received no medication. (*Id*. p. 10). These records indicate that petitioner did, in fact, receive anti-anxiety medication from that hospital. Dr. Logan or a similarly qualified expert could have provided the same testimony at trial or at petitioner's 1992 29.15 hearing had either Mr. Duncan or Mr. Handley conducted a minimal investigation.

On July 16, 2003, petitioner filed an eighty-one page motion to reopen his 29.15 litigation due to abandonment of counsel so that all issues and evidence not raised in 1991 could be properly presented. A hearing was scheduled by Judge Messina for December 18, 2003, solely to address the issue of her jurisdiction to reopen Middleton's 29.15 proceeding. After hearing evidence, Judge Messina found that Middleton had been abandoned by his state post-conviction counsel in November of 1991. (A-127-164). Judge Messina explicitly ruled that this case should be reopened because Mr. Handley had filed a fatally defective amended motion which failed to confer jurisdiction on the circuit court back in November 1991. (*Id*.).

Mr. Middleton's reopened 29.15 motion was subsequently heard on the merits during two days of evidentiary hearings on June 24 and 25, 2004. (A-169-236). After due deliberation, on May 26, 2005, Judge Messina set aside Mr. Middleton's 1991 convictions and sentences, and granted him a new trial because Mr. Duncan was ineffective. (A-127-164).

In this first degree murder case where the penalty upon conviction was life without parole, trial attorney Robert Duncan's conduct constituting ineffective assistance of counsel can be summarized as follows: Mr. Duncan took no depositions; interviewed no witnesses; retained no independent experts to evaluate the state's scientific evidence; gave no opening statement; called no witnesses for the defense; and, advised the defendant not to testify. (A-138). Perhaps most disturbingly, Duncan also had in his possession the altered document about the requisitioning of the gunshot residue test for the victim's left hand, which could have exculpated his client. (A-166-168). However, Duncan failed to present this evidence to the jury or question a single witness about it. (A-139).

Judge Messina also found that Duncan failed to interview or depose any potential witnesses, and failed to challenge the integrity of circumstantial evidence on which the state based its case by hiring independent experts to evaluate such evidence. Middleton explicitly asked Duncan to do this. (A-139). Had Duncan interviewed and/or deposed witnesses, he would have uncovered many favorable facts to use in defending Mr. Middleton. (*Id*.). Duncan also failed to discover that the police crime scene diagram was inaccurate, and that the boot print on the wall near the spot where Katherine Middleton was found, which the state claimed was evidence of a struggle between Kenneth and Katherine, was actually made two

weeks prior to Mrs. Middleton's death, and was obstructed and covered the day of her death by a vase and planter. (A-136).

Duncan also failed to present evidence that petitioner told the truth to the first police officers at the scene when he claimed that there was a telephone near the spot where Katherine Middleton was found, the existence of which the state denied until after the trial had concluded. (compare Tr. pp. 506-507, 546-548 with Tr. pp. 564-565, 572). Duncan also presented no evidence that there was no marital discord preceding Mrs. Middleton's death. (29.15 Tr. 105-106, 117-118).

Regarding expert witnesses, Judge Messina found that, had Duncan consulted and retained experts, he would have uncovered many favorable facts and opinions to use in defending Mr. Middleton. (A-139). Duncan would have learned that the model weapon from which the fatal bullet fired had a "hair trigger," and indeed could accidentally discharge, as claimed by petitioner. (29.15 Tr. 123, 125, 153-158). Duncan would have also discovered that the crime scene evidence collection, and subsequent testing, were improperly performed.

Duncan also failed to discover that, based on the measurements collected and used by the police and prosecution, Mr. Middleton would have had to be kneeling underneath the dining room table (which the chair shown in the diagram would have prevented), shooting upward at his wife to have shot his wife. Of course, this scenario could not be reconciled with the state's theory that the boot

print on the wall near Mrs. Middleton's body indicated that petitioner was strangling Katherine while pinning her to the wall with his boot when she was shot. (29.15 Tr. pp. 187-202). And Duncan would have learned that the crime scene evidence, as presented by the state, did not support the conclusion that Kenneth Middleton could have shot his wife at close range without leaving incriminating physical evidence – blood and gunshot residue – on his person. (*Id*. pp. 165-166, 202, 214 – conclusion by expert Robert Tressel that state's theory of shooting impossible).

Judge Messina also found that Mr. Duncan did little or nothing to challenge the manner in which the evidence was collected and preserved. (A-139). In this regard, the trial court noted that the GSR test results of Mrs. Middleton's left hand were requested, but then never subpoenaed or otherwise obtained. (*Id*.).

Judge Messina also found that Mr. Duncan failed to appreciate the significance of the most important piece of discovery provided to him by the state, the document requisitioning the gunshot residue test for Katherine Middleton's left hand. (*Id*.). Duncan made no reference to the omission of the test result for Katherine's left hand at any time throughout the trial. Duncan did not argue that the altered requisition document undermined the state's case in any way, despite advancing a theory of defense that Mrs. Middleton accidentally shot herself.

Mr. Duncan's failure to utilize this altered gunshot residue report at trial is particularly egregious in light of the fact that Missouri courts recognize and follow the common-law spoliation doctrine. *See Pomeroy v. Denton*, 77 Mo. 64, 86-87 (1882). In situations where the police have altered or destroyed evidence that could have assisted a criminal defendant, such evidence can be introduced and relied upon by the trier of fact to draw an adverse inference against the party or its agent who has destroyed or tampered with material evidence. *See Zahner v. Director of Revenue*, 348 S.W.3d 97, 99-101 (Mo. App. W.D. 2011). Given the importance of the gunshot residue tests that were altered and/or destroyed here, this misconduct by the Blue Springs Police Department would have undermined the integrity of their entire investigation in the eyes of the jury.

Mr. Middleton called two former police officers as expert witnesses at the 2004 29.15 hearing who were police academy instructors in their respective states. Experts Charles Gay and Robert Tressel both addressed evidentiary deficiencies in the prosecution's case and evidence from the scene that demonstrated that petitioner is innocent.

Mr. Gay is a 16-year police veteran who is a certified law enforcement instructor in the areas of crime scene investigations and evidence collection. Prior to his retirement from the Long Beach, California Police Department, Mr. Gay was in charge of that city's major crimes investigations. He later went to work for the

Department of Defense as administrator of all counter-intelligence in communist countries. Upon leaving public service, Mr. Gay opened his own company, providing investigative services. (2004 29.15 Tr. pp. 147-150, 154-157; 29.15 Exh. C).

Mr. Tressel is also a forensic investigator who served as a detective for the Cobb County Police Department, just north of Atlanta, Georgia. Mr. Tressel was placed in charge of the robbery-homicide division for eight years, at which time he moved over to the County's medical examiner's office where he served as its chief forensic investigator. Mr. Tressel was involved in over 500 homicide investigations and 6,000 death cases during his career. He, too, is a certified law enforcement instructor with both the Cobb County PD and the medical examiner's office. Mr. Tressel has testified in state and federal courts as an expert in blood spatter interpretation, crime scene analysis, interpretation of laboratory reports, and most significantly, in bullet trajectory analysis. (Exh. C, pp. 176-180).

Mr. Gay testified that the altered GSR test documentation pertaining to Mrs. Middleton's hands violates police documenting and crime scene evidence recording procedures. Mr. Gay concluded that the GSR test of Mrs. Middleton's left hand would have had a significant impact on the outcome of the trial because, given that Mr. Middleton's hands and clothing all tested negative for residue and blood, the tests on Mrs. Middleton's left hand would have either shown she self-

inflicted the fatal wound, or dropped the gun, which then accidentally fired up at her. (Exh. C, 151-153, 157-160).

Mr. Gay also testified that the gun which killed Mrs. Middleton was improperly tested by the forensic examiners in this case. They had disassembled the weapon and reassembled it prior to testing, thereby affecting the integrity of their tests and their resulting conclusions. Furthermore, Mr. Gay has tested the same make and model of weapon at issue, and concluded that this type of gun often exhibited a "hair-trigger" characteristic. Moreover, he carried the same weapon when he was a police officer, and once he dropped it and the gun accidentally fired, shooting a bullet past Gay's head, into an air conditioning duct, just as may have happened to Mrs. Middleton. (*Id*. 153-154, 157-158, 168-170).

Finally, Mr. Gay opined that the police who investigated this case improperly preserved the entire crime scene. For example, one of the first officers on the scene immediately picked up the gun, examined it, opened its cylinder, and then hid it behind a television set. The officer was later asked by the lead detective to place the weapon back where he best recollected it was located. That detective was also the one responsible for taking photographs of the crime scene many days later, after he reconstructed the scene as best as he could remember, and yet those photos do not match detailed drawings he made the day of the tragedy.

Furthermore, Mrs. Middleton's body was moved, unclothed and re-clothed before being turned over to the medical examiner. (*Id*. pp. 160-167).

Forensic expert Robert Tressel testified that the crime scene diagrams and police reports documenting Mrs. Middleton's death demonstrated that it was physically impossible that Mr. Middleton shot his wife. Mr. Tressel retraced the trajectory of the fatal bullet based on the angles and measurements made by the state's crime scene investigators in 1990, and determined where the gun was located at the time Mrs. Middleton was shot. Mr. Tressel's conclusion was, that if Mr. Middleton had fired the gun at his wife, he would have had to have been crouched under the dining room table (somehow entangled in the chair which the police crime scene diagram shows occupying that same space). After firing the gun, Middleton would have needed to vacate that area within a tenth of a millisecond in order to explain the lack of blood spatter, brain matter, and gunshot residue on his clothing or hands. This, of course, was a physical impossibility. Mr. Tressel was 100% sure of his conclusions because they were based on math and geometry. (*Id*. 187-202, 205-206, 212-214). Mr. Tressel also echoed the testimony of Mr. Gay about the improprieties associated with the police investigation and documentation of Mrs. Middleton's death, especially pertaining to the altered gunshot residue report for her left hand. (*Id*. pp. 203-205).

In 2016, petitioner filed a petition for a writ of mandamus in the Circuit Court of Jackson County, Missouri, alleging that both the Blue Springs Police Department and the Jackson County prosecutors had violated the Missouri Sunshine Law by failing to turn over exculpatory evidence to petitioner in connection with his post-conviction appeals. *See Middleton v. McCoy*, No. 1616-CV06593. In connection with this mandamus action, petitioner took the deposition of retired Blue Springs chief of detectives, Jeff Rogers. Detective Rogers admitted under oath that it was he who signed the altered forms that had been whited-out on the original report that was on green paper that chronicled the gunshot residue (GSR) testing of Mrs. Middleton's hands and that he probably did the GSR tests. (Exh. UU). Detective Vasquez, in a police report, stated that he observed Detective Rogers conduct GSR tests of both the hands of petitioner and his deceased wife. (Exh. VV). When viewed in tandem with the prior deposition of Detective Dave Link and the other available evidence, the Rogers deposition is the final piece of the puzzle that indicates that the Blue Springs Police Department violated petitioner's due process rights by first concealing and then destroying exculpatory evidence regarding the GSR test results from Mrs. Middleton's left hand.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER A "TRULY PERSUASIVE" SHOWING OF INNOCENCE REQUIRES THAT STATE PRISONER'S CONVICTION BE REVERSED BECAUSE HIS CONTINUED INCARCERATION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The facts of this case present this Court with an ideal opportunity to address the question it has left unanswered in *Herrera v. Collins*, 506 U.S. 390 (1993) and in subsequent innocence cases that have come before the court in the last two decades regarding whether the execution and/or the continued incarceration of a state prisoner who has presented compelling evidence that he is actually innocent violates the Eighth and Fourteenth Amendments. More than two decades have passed since this Court issued its fragmented opinion in *Herrera*. The *Herrera* decision, undoubtedly because it generated no less than six separate opinions by the members of the Court, has engendered much confusion and disagreement among state and inferior federal courts as to whether freestanding claims of actual innocence advanced by state prisoners are constitutionally viable.

A thorough review of the opinions from the Justices in *Herrera* demonstrates, beyond any doubt, that the majority of the Court believed that executing an innocent person would violate the United States Constitution. The only two disagreements among this majority of Justices in *Herrera* involved the appropriate test for actual innocence and whether this Constitutional right was

rooted in the cruel and unusual punishment clause of the Eighth Amendment or the due process clause of the Fourteenth Amendment.

Justice Renquist's opinion for the Court, after stating *in dicta*, that claims of innocence are not historically cognizable in habeas proceedings, actually held that, assuming that a persuasive demonstration of innocence would violate the Constitution, that *Herrera* could not come close to meeting the extraordinarily high threshold showing necessary to obtain any relief from his conviction and death sentence. 506 U.S. at 417-419.

Justice O'Connor, in her concurring opinion that was joined by Justice Kennedy, wrote that she "cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution…, regardless of the verbal formula employed." *Id*. at 419-420 (O'Connor, J., concurring). However, Justice O'Connor concluded that Herrera was not entitled to habeas relief because his claim of innocence was unpersuasive to her under any standard of review. *Id.*

Justice White, echoing Justice Rehnquist, stated in his concurring opinion that he would make the assumption that a persuasive claim of actual innocence would violate the constitution. *Id*. at 429 (White, J., concurring). Justice White proposed that the test for granting habeas relief should at least be as stringent as the sufficiency of the evidence test of *Jackson v. Virginia*, 443 U.S. 307 (1979). In his

view, Herrera's claim fell well short of meeting this substantial burden of proof. *Id*.

Justice Blackmun's dissent, joined by Justices Stevens and Souter, expressed the view that executing an innocent person would violate society's "evolving standards of decency" so as to constitute cruel and unusual punishment and that it would "shock the conscience" to allow an execution to take place where a prisoner has presented persuasive evidence of innocence. *Id*. at 430-437 (Blackmun, J., dissenting.). Justice Blackmun's dissenting opinion is also significant because it pointed out that most of Justice Rehnquist's opinion for the court is *dicta*. As Justice Blackmun pointed out: "I therefore disagree with the long and general discussion that precedes the court's disposition of this case…That discussion, of course, is *dictum* because the court assumes, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional." *Id*. at 430 (emphasis added). Justice Blackmun concluded that a prisoner should be entitled to federal habeas relief on a claim of actual innocence under the Eighth Amendment and due process clause if he can establish that he is probably innocent. *Id*. at 442.

Only Justices Scalia and Thomas, in their concurring opinion, explicitly rejected the view that actual innocence would render a condemned prisoner's

execution unconstitutional. *Id*. at 427-29. (Scalia, J., concurring). Justice Scalia's opinion is also significant because, like Justice Blackmun's dissent, he clearly expresses the view that Justice Rehnquist's discussion regarding whether innocence alone is a cognizable ground for federal habeas relief is *dicta*. As Justice Scalia stated: "I would have preferred to decide that question, particularly since, as the court's discussion shows, it is perfectly clear what the answer is." *Id.* at 427.

As the foregoing examination of the fragmented *Herrera* decision demonstrates, a majority of the court would clearly hold that a capital defendant who presents a convincing claim that he is innocent can establish a constitutional violation. Five justices clearly stated that executing the innocent is unconstitutional, two justices assumed so without deciding, and only two took a contrary position. The more difficult question that other courts have grappled with and that this Court must consider is "how innocent a prisoner must be" in order to be entitled to habeas relief from a conviction and death sentence on federal constitutional grounds. In this regard, this Court should seek guidance from the well-settled rule of United States Supreme Court jurisprudence that holds that when no single rationale commands a majority of the Court, the holding of the Court should be viewed as the position taken by those justices who concurred in the judgment on the narrowest grounds. *City of Lakewood v. Plain Dealer*

Publishing Co., 486 U.S. 750, 764-765, n.9 (1988). In *Herrera*, the opinion that occurred in the judgment on the narrowest grounds was the concurring opinion of Justice O'Connor, joined by Justice Kennedy.

Justice O'Connor's concurring opinion holds, under the Eighth Amendment and substantive due process, that executing an innocent is inconsistent with the Constitution. *Id*. at 419. However, Justice O'Connor found it unnecessary to articulate the burden of proof for reviewing courts to apply in evaluating innocence claims because she found Herrera's claim of innocence totally unconvincing. *Id*. at 420-427.

Intervening factual and legal developments in the twenty-two years since *Herrera* was decided provide even more impetus in support of the *Herrera* majority's position that the execution of an innocent man would violate the Eighth Amendment and substantive and procedural due process. *Herrera* was decided before the recent surge of exonerations of capital and noncapital inmates through DNA testing and other means. Although the justices acknowledged the "undeniable fact" that the criminal justice system is fallible, *Id*. at 415, Justice O'Connor nevertheless noted society's "high degree of confidence in its criminal trials" in light of the Constitution's "unparalleled protections against convicting the innocent." *Id*. at 420 (O'Connor, J., concurring). Recent experience has undermined this "high degree of confidence."

As noted earlier, the extraordinary number of DNA exonerations in both capital and non-capital cases in the last twenty-five years, removes any doubt that many more innocent persons are imprisoned and even condemned to die who are actually innocent than Justice O'Connor's opinion in *Herrera* contemplated. However, in the vast majority of cases, an innocent person cannot conclusively prove his innocence through DNA. This is such a case.

In the handful of innocence cases that have come before this Court since *Herrera*, this Court has yet to definitively answer whether the Constitution prohibits the execution of a condemned prisoner if newly discovered evidence comes to light demonstrating he is innocent. Further, petitioner would contend that these more recent innocence cases that have come before this Court would strongly suggest that such a right exists. For instance, this Court's decision in *In re Davis*, 130 S. Ct. 1 (2009), which remanded a Georgia capital prisoner's original habeas petition to the district court for an evidentiary hearing on his claim of innocence, clearly suggests that such claims are cognizable. In light of this Court's decision in *Davis* and other post-*Herrera* decisions, there can be little dispute that many innocent men are wrongly convicted and that the Eighth Amendment and due process would preclude the execution of an innocent person. To incarcerate someone for life who is actually innocent, even if he is not under a sentence of death, is no less cruel and unusual under the Eighth Amendment under any

definition of these terms. *See Robinson v. California*, 370 U.S. 660, 667 (1962). It is even more offensive to contemporary standards of fairness and decency to permit a death sentence to be carried out or require a citizen to serve life in prison who is likely innocent.

There can also be little doubt that the continued incarceration and potential execution of an innocent man would violate firmly established substantive due process principles. The touchstone of substantive due process as defined over the years in this Court's jurisprudence is to prevent the government from engaging in conduct that "shocks the conscience" or interferes with the rights "implicit in the concept of order liberty." *Rochin v. California*, 342 U.S. 165, 172 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). Justices O'Connor and Kennedy agreed that nothing could be more shocking to the conscience or offensive to basic concepts of fairness than the continued imprisonment and execution of an innocent man. *Herrera v. Collins*, 506 U.S. at 419.

Finally, to allow Mr. Middleton to remain in prison would also violate procedural due process. In several pre-*Herrera* cases, inferior federal courts have held that a state's failure to cure a conviction, after credible newly discovered evidence emerges, violates due process if the newly discovered evidence would probably produce acquittal upon retrial. *Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991); *Sanders v. Sullivan*, 863 F.2d 218, 224-225 (2nd Cir. 1988). More

recently, the Second Circuit held that the absence of a judicial remedy would likely violate due process in the case of a clearly innocent prisoner. *Triestman v. United States*, 124 F.3d 361, 379 (2nd Cir. 1997).

II.

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE QUESTION THAT THIS COURT LEFT UNANSWERED IN CASE V. NEBRASKA, REGARDING WHETHER THE FOURTEENTH AMENDMENT REQUIRES THE STATE TO AFFORD PRISONERS AN ADEQUATE CORRECTIVE PROCESS FOR HEARING AND DETERMINING CLAIMS THAT THEIR FEDERAL CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED

Given the fact that this Court has recognized the existence of a constitutional right for innocent people to obtain their release from prison, it stands to reason that state courts must provide a fair and adequate procedure by which to enforce that right. The due process clause of the Fourteenth Amendment requires that state prisoners must be "given some clearly defined method by which they may raise [in state court] claims of denial of federal rights." *Young v. Ragen*, 337 U.S. 235, 239 (1949). In *Williams v. Kaiser*, 323 U.S. 471 (1945) and *Tomkins v. Missouri*, 323 U.S. 485 (1945), the Missouri Supreme Court did not require the state to answer a petition for writ of habeas corpus and refused to allow the petitioner an opportunity to prove his allegations of constitutional error. 323 U.S. at 473; 323 U.S. at 486. Instead, the Missouri Supreme Court summarily disposed of the respective habeas petitions by declaring that they "failed to state a cause of action." 323 U.S. at 487;

Id. This Court ruled that because the state court failed to accord the state prisoners a full and fair hearing of their federal constitutional claims, the decisions denying those claims had to be reversed. 323 U.S. at 473-474; 323 U.S. at 487.

Under current Missouri law, innocent prisoners have no judicial forum in which to raise a freestanding claim of actual innocence unless they are under a sentence of death *See State ex rel. Lincoln v. Cassady*, 511 S.W.3d 11 (Mo. App. W.D. 2016). Respondent vigorously argued in the courts below that petitioner's innocence claim could not be considered under the *Lincoln* decision. As a result, innocent Missouri prisoners who are not on death row have no corrective process in the state judicial system to obtain release from prison, regardless of the strength of the new evidence of innocence.

In *Case v. Nebraska*, 381 U.S. 336 (1965), this Court granted certiorari to decide whether the Fourteenth Amendment requires that states afford state prisoners adequate corrective process for the hearing and determination of their claims that their convictions violated the federal Constitution. *Id.* at 337. The Court left this question unanswered because it was rendered moot after the Nebraska legislature enacted a post-conviction relief statute. This Court also declined to address the same question two decades later in *Superintendent v. Hill*, 472 U.S. 445, 450 (1985). As Justice Stevens noted, in the decades following the *Case* and *Hill* decisions, the scope of the states' obligation to provide review of federal

Constitutional claims remains "shrouded in much uncertainty." *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). This case presents the Court with an ideal opportunity to address this important constitutional question that it has repeatedly declined to address.

It is also a fundamental constitutional principle under the Fourteenth Amendments that a prisoner's access to the courts cannot be obstructed or denied. *Johnson v. Avery*, 393 U.S. 483 (1969). The unique circumstances surrounding litigation of petitioner's Rule 29.15 motion and the present state habeas action remove any doubt that petitioner did not receive full and fair access to the Missouri courts to litigate his claims of ineffective assistance of counsel and his claim of innocence.

As noted earlier, in *Middleton II*, the Court of Appeals reviewed Judge Messina's 2005 order and judgment granting petitioner's motion to reopen his 29.15 action due to the abandonment of post-conviction counsel *de novo* because, in its view, the question of abandonment of counsel under state law was a purely legal and jurisdictional question. However, in several contemporaneous cases coming before the court for review where a 29.15 motion court had <u>denied</u> a prisoner's motion to reopen his 29.15 motion, the same Court of Appeals reviewed the issue of abandonment under the clearly erroneous standard of appellate review set forth under Mo. S. Ct. Rule 29.15(k). *See, e.g.*, *Johnson v. State*, 189 S.W.3d

698, 700 (Mo. App. W.D. 2006); *Edgington v. State*, 189 S.W.3d 703, 705 (Mo. App. W.D. 2006); *Fenton v. State*, 200 S.W.3d 136 (Mo. App. W.D. 2006). In addition, two subsequent decisions from the Missouri Supreme Court clarified any ambiguity regarding the appropriate standard of review for Missouri appellate courts to employ in reviewing a motion court's decision whether to reopen a post-conviction action due to abandonment. In both of these decisions, the Missouri Supreme Court made it clear that issues of abandonment of counsel on appeal must be reviewed under the clearly erroneous standard set forth under Rule 29.15(k). *Crenshaw v. State*, 266 S.W.3d 257 (Mo. banc 2008); *Gehrke v. State*, 280 S.W.3d 54 (Mo. banc 2009). *Crenshaw* also rejected the reasoning employed in *Middleton II* that abandonment of counsel is a jurisdictional issue subject to *de novo* review. 266 S.W.3d at 259.

Furthermore, the Missouri Court of Appeals' actions violate due process because the clearly erroneous standard of review is clearly established by both Missouri Supreme Court Rule and the *Gehrke* and *Crenshaw* decisions for appeals involving abandonment of post-conviction counsel. Therefore, petitioner has a liberty interest in having that law enforced that is protected by the Fourteenth Amendment. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1989); *Board of Pardons v. Allen*, 482 U.S. 369, 377-381 (1987).

Had the Court of Appeals applied the correct and deferential clearly erroneous standard of review mandated in *Gehrke*, the outcome of the appeal in *Middleton II* would have been different because Judge Messina's findings and conclusions on the abandonment issue were fairly supported by the record. Judge Messina in *Middleton II* found: (1) that petitioner was personally without fault for filing the blank verification form; (2) neither Mr. Handley nor the public defender ever met with petitioner or spoke with him about the issues that he wanted to include in the amended petition before it was filed; (3) that neither the public defender nor Mr. Handley were given leave to withdraw or enter their appearance so close to the deadline for the amended motion which should have required the court to conduct an abandonment hearing in *Middleton I* which she failed to do and candidly admitted as much in her decision; and (4) the affidavit and verification attached to the motion was a faxed copy that did not comport with Missouri law's requirements that an original verification be attached to an amended motion. Under the correct clearly erroneous standard of review that the Court of Appeals should have applied in *Middleton II*, these findings of facts are presumed correct, supported by substantial evidence, and should have been affirmed.

The extraordinary facts here are similar to a South Dakota case that involved a similar procedural morass. *See Engesser v. Dooley*, 823 F.Supp.2d 910, 913-914 (D.S.D. 2011). In that case, Mr. Engesser ultimately received a new trial on a

successive federal habeas petition. *Id*. at 928-931. Unlike that case, however, any possible federal relief for Mr. Middleton has now been completely foreclosed. Like Mr. Engresser, petitioner deserves an opportunity to prove his innocence at a new and fair trial with the assistance of a competent attorney. This Court is now the only forum with the power to remedy this obvious injustice. This Court's intervention is necessary to ensure that Missouri's courts afford Missouri prisoners a full, fair, and consistent review of their claims of innocence, ineffective assistance of counsel, and governmental misconduct.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THIS COURT TO ADDRESS AN ISSUE IT LEFT UNANSWERED IN *MARTINEZ V. RYAN*, REGARDING WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE STATE COURTS TO PROVIDE EFFECTIVE COUNSEL DURING INITIAL POST-CONVICTION PROCEEDINGS WHERE THAT IS THE FORUM IN WHICH A PRISONER MAY RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

As noted earlier, petitioner raised a claim of ineffective assistance of trial counsel in his Missouri Supreme Court habeas corpus petition, alleging that trial counsel was ineffective in failing to investigate and present available evidence to establish that his wife's death was an accident. (A-67-100). Petitioner argued that he could show cause and prejudice to overcome any procedural bar due to the ineffective assistance of his state post-conviction counsel under this Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (A-9). However, the

Missouri Supreme Court implicitly declined to adopt the *Martinez* cause/prejudice test, likely because it has refused to do so in many other decisions where Missouri prisoners attempted to reopen their Rule 29.15 motions under *Martinez*.

In Missouri, claims of ineffective assistance of trial counsel cannot be raised on direct appeal. *See State v. Wheat*, 775 S.W.2d 155, 157-158 (Mo. banc 1989). Therefore, petitioner's Rule 29.15 proceeding before the trial court was the first available forum where he could advance his claims of ineffective assistance of trial counsel. Thus, if *Martinez* applied to the underlying Rule 91 petition in this case, petitioner can meet both prongs of the *Martinez* test.

The voluminous evidence attached to the state habeas petition removes any doubt that Mr. Handley's performance was deficient because he filed a clearly defective amended 29.15 motion at the eleventh hour without ever speaking with or meeting with petitioner as required under Rule 29.15. (See Exh. I). Mr. Handley also incompetently abandoned meritorious claims for relief and failed to call available witnesses at the 1992 evidentiary hearing. (See Exh's I-M). The only witness called by Mr. Handley at this hearing was trial counsel Robert Duncan. As a result, petitioner could not have possibly prevailed on any ineffective assistance of counsel claim because no evidence to support a finding of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) was presented, despite the fact that expert witness Charles Gay was present and available to testify consistently with

his subsequent testimony in 2004. (See Exh. J); *see also Gallow v. Cooper*, 133 S. Ct. 2730 (2013) (Breyer, J., concurring). Mr. Gay's testimony at the subsequent 2004 hearing was pivotal in convincing Judge Messina that petitioner's trial was unfair because Mr. Duncan was incompetent in failing to investigate and present available forensic evidence that petitioner is innocent because his wife's death was accidental. (A-144-155).

A side-by-side comparison of the 29.15 proceedings in 1992 with a subsequent 29.15 proceeding initiated in 2003 provides conclusive evidence that Mr. Handley's performance was deficient. Mr. Handley filed a three page amended 29.15 motion in 1992 (Exh. N). Petitioner's second 29.15 attorney filed an eighty-one page motion for relief in 2003. The evidentiary hearing transcript from the first hearing involving Mr. Handley, because he only called Mr. Duncan to testify and presented no evidence to establish *Strickland* prejudice, consisted of approximately fifty pages. In contrast, 29.15 counsel in 2004 conducted a hearing that consisted of over three hundred pages of transcript that was also bolstered by numerous affidavits and other documentary evidence to which the state stipulated. (See Exh's C-H). Viewed in conjunction with the decision rendered by Judge Messina granting a new trial after all of the relevant evidence was presented to the court by competent counsel, Handley's incompetence in the first 29.15 proceeding

is self-evident.[2] To borrow a term from tort law, under these circumstances, Handley was clearly ineffective under the doctrine of *res ipsa loquitur*.

The petitioner in *Martinez*, as well as many of the parties that filed amicus briefs, urged the court to find that both due process and the Sixth Amendment requires states to provide effective assistance of counsel in the first state post-conviction action regarding claims that can only be raised for the first time during that proceeding. This Court in *Martinez* declined to hold that a right to effective post-conviction counsel is required by the Constitution. Instead, the court elected to hold, as a matter of equity, that cause and prejudice can be established in these circumstances only in federal habeas corpus proceedings. Because it declined to find a constitutional right to counsel, prisoners attacking their convictions by attempting to raise defaulted ineffective assistance of trial counsel claims can only utilize *Martinez* to overcome a procedural default in 2254 proceedings in federal court. Although many states have elected to adopt *Martinez*, Missouri has refused to do so both in this case and in prior decisions. This case presents the court an ideal opportunity to determine whether the Sixth Amendment requires state courts to follow *Martinez* in state habeas actions because the Constitution requires

[2] In similar circumstances, state post-conviction counsel has been found ineffective in failing to present available evidence to support a claim for relief. *See, e.g.*, *Patton v. State*, 537 N.E.2d 513, 519 (Ind. App. 1989).

effective post-conviction counsel in limited circumstances noted in the original *Martinez* decision.

In our federalist system, both state and federal courts share equal responsibilities to protect and enforce federal constitutional rights. In the last twenty years, based upon the enactment of the AEDPA and decisions from this Court, the primary duty for enforcing constitutional challenges to state convictions has been delegated to the state courts. *See, e.g.*, *Woodford v. Viscotti*, 537 U.S. 19, 27 (2002); *Harrington v. Richter*, 131 S. Ct. 770, 778 (2011). In light of this new reality, as the procedural history of this case indicates, state courts have assumed the primary responsibility not only to be the first forum to vindicate the constitutional rights of a prisoner challenging his state convictions, but also forms the last line of defense to enforce such rights.

Under the facts presented here, petitioner could not have raised and succeeded on this claim in his prior federal habeas corpus proceeding because his federal habeas petition was litigated and denied in the district court in 1998, fourteen years before *Martinez* permitted defaulted ineffective assistance of counsel claims to be heard if the claim was defaulted due to the incompetence of state post-conviction counsel. Prior to that time, such claims were completely foreclosed by *Coleman v. Thompson*, 501 U.S. 722 (1991). Under these circumstances, this unfortunate sequence of events here present an ideal scenario

for this Court to address whether *Martinez* should be extended to state habeas corpus proceedings under the Sixth and Fourteenth Amendments.

Because of the increasing importance of state post-conviction proceedings in light of the AEDPA, this Court's previous decisions in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005) should logically be extended to provide state post-conviction petitioners a constitutional right to effective assistance of counsel at their first post-conviction proceeding with respect to any federal constitutional claims that can only be raised for the first time during that proceeding. Because of the timing of petitioner's initial federal habeas litigation, his claim of ineffective assistance of trial counsel should not be forever precluded from being heard. Unless this Court extends *Martinez* and finds that a constitutional right to effective post-conviction counsel exists under these circumstances, it would create a fundamentally unfair situation where petitioner will die in prison without having a substantial claim of ineffective assistance of trial counsel heard in any state or federal forum due to the incompetence of his Rule 29.15 motion court counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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