

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

No. 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 Missouri Supreme Court**

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**APPLICATION FOR STAY OF EXECUTION**

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COUNSEL FOR PETITIONER

*\*Counsel of Record*

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

The State of Missouri has scheduled the execution of Carman Deck for **May 3 2022, at 6:00 p.m., central time**. Mr. Deck respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari, filed on April 1, 2022.

### **PROCEDURAL BACKGROUND**

Mr. Deck respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23. On December 2, 2021, after his federal proceedings concluded on October 4, 2021, Mr. Deck presented his claim that the inordinate delay between the crime and his third capital resentencing rendered that proceeding fundamentally unfair to the Missouri Supreme Court in a Rule 91 state habeas corpus petition. Cert. Petition, App. p. 225a. In a related proceeding, Mr. Deck argued that an execution date should not be set until the Court had rendered a decision on this claim. On January 31, 2022, the Missouri Supreme Court issued an order denying his Rule 91 petition without a written opinion. Certiorari Petition, App. p. 1a. On that same day, they also issued a warrant of execution, setting an execution date of May 3, 2022. (Attachment A)

On April 1, 2022, approximately one month earlier than required by U.S. Sup. Ct. R. 13.1, Mr. Deck filed his petition for certiorari in this Court, raising the issues he raised in his Rule 91 petition. On April 4, 2022, Mr. Deck asked the Missouri Supreme Court for a stay of execution. (Attachment B) This stay request was denied on April 7, 2022. (Attachment C)

## REASONS FOR GRANTING THE STAY

To decide whether a stay of execution is warranted, this Court considers the petitioner's 1) likelihood of success on the merits, 2) the relative harm to the parties, and the 3) extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 US. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649- 50 (2004). Mr. Deck meets the relevant standards for this Court to grant a stay of execution.

### I. LIKELIHOOD OF SUCCESS ON THE MERITS

Mr. Deck raised a similar claim in federal district court, in his habeas proceedings, and the district court granted habeas relief, illustrating a likelihood of success on the merits. *See Deck v. Steele*, 249 F.Supp.3d 991, 1013 (E.D. Mo. 2017), *rev'd by Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020), Cert. petition App. p. 127a. The district court granted relief on Mr. Deck's claim that "he was denied a fundamentally fair penalty trial because of delay not attributable to him, and for counsel's ineffectiveness in failing to pursue this meritorious claim before the trial court." *Id.* Although the Eighth Circuit Court of Appeals overturned this decision, they did so on procedural grounds. *See Deck*, 978 F.3d at 584 (noting that Mr. Deck's claim failed because it was procedurally defaulted). Mr. Deck raised this claim in his Mo. Sup. Ct. Rule 91 state habeas corpus petition after the Eighth Circuit's denial on procedural grounds and obtained a silent denial from the Missouri Supreme Court. Cert. petition. App. p. 1a. Under this Court's jurisprudence, that denial was a denial on the merits and procedural default is no

longer a hurdle to federal court review. *See 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 that there is no absolute bar on successive capital state habeas corpus petitions, if the issue has not previously been litigated in state court. *State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 381 (Mo. banc 2021). Mr. Deck did not litigate this issue in state court prior to filing the Rule 91 in December 2021. Thus, there is no basis for this Court to infer that the silent denial issued by the Missouri Supreme Court was anything other than a decision on the merits.

The federal district court granted relief on the following basis:

I find that the 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 might have warranted mercy. And, as the Missouri Supreme Court found in *Deck II*, the mitigating evidence presented at the first trial was substantial. *Deck II*, 68 S.W.3d at 430–31. Because the last jury was not able to consider this substantial mitigating evidence, imposition of the death penalty violates Deck's right to be free from cruel and unusual punishment.

*Deck*, 249 F.Supp.3d at 1082. When adjudged on the merits, unconstrained by the AEDPA, it is clear that Mr. Deck presents a case of inordinate and prejudicial delay between his conviction, 1998, and his final resentencing in 2008.

Mr. Deck's case is unique. The only court to address the merits in a full manner ruled that the Constitution was violated. In such circumstances where success occurred, Mr. Deck satisfies the reasonable likelihood of success standard.

**A. THE INORDINATE AND PREJUDICIAL DELAY PREVENTED MR. DECK FROM PRESENTING A COMPELLING MITIGATION CASE**

Mr. Deck has undergone 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). However, on post-conviction review, the death sentences were reversed due to his appointed counsel's failure to request the proper jury instructions on mitigation. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). 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). However, this Court reversed the sentences, holding that the use of visible restraints upon Mr. Deck during trial was unconstitutional. *Deck v. Missouri*, 544 U.S. 622 (2005). By the time of the third capital sentencing, the lay witnesses who testified previously to the "substantial" mitigation 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.

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)<sup>1</sup>. 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.

When Mr. Deck's case returned to Missouri courts for a third capital sentencing after this Court reversed his second death sentence, the State requested a nine-month continuance to December 2006, to which Mr. Deck objected. *Deck*, 249 F.Supp.3d at 1076-77. 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

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<sup>1</sup> 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).

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.* At the behest of the Missouri Attorney General, the trial was reset, yet again, to September 15, 2008. *Id.* As this chronology makes clear, little if any of the three-year delay between this Court's ruling and Mr. Deck's third sentencing was attributable to him.

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. 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.

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." Pet for Cert. App. p. 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 presenting a compelling mitigation case at his third resentencing. What had been "substantial" and that several live witnesses

testified “regarding his horribly abusive childhood,” was unreasonably reduced to “inconsequential proportions.” *See Porter v. McCollum*, 558 U.S. 30, 43 (2009).

**B. *BARKER V. WINGO* AND *BETTERMAN V. MONTANA* LEFT OPEN THE QUESTION OF THE DUE PROCESS LIMITATION FOR INORDINATE DELAY IN SENTENCING PROCEEDINGS**

*Barker v. Wingo*, 407 U.S. 514 (1972) was this Court’s first case to “set out the criteria by which the speedy trial right is to be judged.” *Id.* at 516. In *Barker*, this Court laid out a balancing test that requires courts to approach the issue “on an ad hoc basis.” *Id.* at 530. The four factors to be assessed are “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Id.*

In *Betterman v. Montana*, 578 U.S. 437 (2016), a non-capital case, this Court noted in dicta that the Due Process Clause protects a defendant against inordinate delays 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.” *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 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, which given the sanction's severity and finality, is no less important . . . . Nor is accuracy in making that decision any less critical.”). *Betterman* also 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).”)

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 test of *United States v. Lovasco*, 431 U.S. 783 (1977), 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 a balancing test and does not require showing of bad faith on the state's part. *See United States v. James*, 712 Fed.Appx. 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*, 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, n. 168-170 (2019) (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 Fed.Appx. 21, 24 (2nd Cir. 2018) (relying on their own two-part Circuit test).

The confusion 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. A stay is required for full consideration of this important issue.

## II. HARM TO THE PARTIES

Irreparable harm will occur to Mr. Deck if the execution is not stayed until the petition for writ of certiorari is considered. If this Court does not stay Mr. Deck's execution, he will be executed without the opportunity to fully litigate his meritorious constitutional claim that his final resentencing was unconstitutionally and exorbitantly delayed, resulting in the complete absence of lay mitigating witnesses due to the passage of time. That is an "irremediable" harm because an "execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *See also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (recognizing that irreparable injury "is necessarily present in capital cases"). Allowing the government to execute Mr. Deck while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (Burger, C.J., in chambers). Because "the normal course of appellate review might otherwise cause the case to become moot, . . . issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course").

There is no tangible harm to the state. A simple delay to accurately determine whether Mr. Deck's resentencing was unconstitutionally delayed due

to actions attributable to the state, prevents the state from committing an illegality. The state cannot claim harm for having to follow the law. *See, e.g., In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (noting that “contrary to the State’s contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner’s execution to determine whether that execution would violate the Eighth Amendment.”)

### **III. THERE HAS BEEN NO UNNECESSARY DELAY IN THE PRESENTATION OF THIS CLAIM.**

Mr. Deck instituted state habeas corpus proceedings on December 2, 2021, after his federal proceedings concluded on October 4, 2021. The issue presented in state habeas was alleged to have been procedurally defaulted when it was presented in federal court. It would have been premature to present the issue in state court earlier, as federal proceedings were still ongoing, and Mr. Deck was actually granted relief on this issue in the district court. It was not until the Eighth Circuit Court of Appeals reversed the grant of relief, and this Court denied certiorari review, that it became clear that Mr. Deck would have to pursue relief in state court on the same issue. On January 31, 2022, the Missouri Supreme Court denied this request for state habeas corpus relief and set his execution date for May 3, 2022. Although the petition for certiorari was not due until May 2, 2002, 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.

## CONCLUSION

The State of Missouri is set to execute a man who was deprived of the opportunity to present a compelling mitigation case due to inordinate delay between the crime and the third capital sentencing proceeding. This Court should stay Mr. Deck's execution so that his petition for certiorari can be fully and fairly considered by this Court. The balance of equities weighs in Mr. Deck's favor.

/s/ Elizabeth Unger Carlyle

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COUNSEL FOR PETITIONER

*\*Counsel of Record*



**SUPREME COURT OF MISSOURI**  
**en banc**

January 31, 2022

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	NO. SC89830
	)	
	)	
CARMAN L. DECK,	)	
	)	
Appellant.	)	

**PER CURIAM**

BE IT REMEMBERED, on November 7, 2008, the Circuit Court of Jefferson County entered its judgment in accordance with the jury's verdicts finding Carman L. Deck guilty of two counts of murder in the first degree and fixing punishment at death on each count; and

Thereafter, on December 18, 2008, Carman L. Deck's notice of appeal from said sentence was filed in this Court; and

Thereafter, on January 26, 2010, this Court affirmed his sentence; and

Thereafter, on March 2, 2010, this Court overruled his motion for rehearing; and

Thereafter, on May 16, 2011, Carman L. Deck's notice of appeal from the judgment overruling his postconviction relief motion was filed in this Court; and

Thereafter, on July 3, 2012, the Court affirmed the overruling of his postconviction relief motion; and

Thereafter, on August 14, 2012, this Court overruled his motion for rehearing; and

Thereafter, Carman L. Deck sought relief in various federal courts; and

Thereafter, on October 4, 2021, the Supreme Court of the United States denied Carman L. Deck's petition for writ of certiorari;

Thereafter, on October 4, 2021, the state filed a motion to set execution date and, on December 2, 2021, Carman L. Deck filed a response thereto;

NOW, THEREFORE, it is ordered that Carman L. Deck's sentence be executed during the twenty-four hour period beginning at 6:00 p.m. on May 3, 2022.

A warrant of execution is directed to issue accordingly.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the order of said Supreme Court, entered of record at the January Session thereof, 2022, and on the 31<sup>st</sup> day of January, 2022, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 31<sup>st</sup> day of January, 2022.



Betsy AuBuchon  
Clerk

Alana F. [Signature]  
Deputy Clerk



Supreme Court of Missouri  
en banc

January 31, 2022

STATE OF MISSOURI,	)	
Respondent,	)	
	)	
vs.	)	No. SC89830
	)	
CARMAN L. DECK,	)	
Appellant.	)	

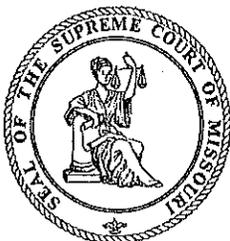
**WARRANT OF EXECUTION**

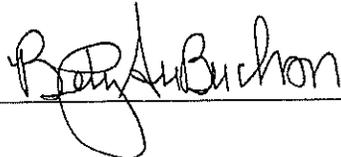
Now on this day, Appellant, Carman L. Deck, being in custody pursuant to a sentence of death heretofore rendered against him by the Circuit Court of Jefferson County, and affirmed by this Court, it is therefore considered, ordered and adjudged by this Court that Carman L. Deck be and remain in the custody of the Department of Corrections, and, thereafter, within the twenty-four hour period beginning at 6:00 p.m. on May 3, 2022, under the supervision and direction of the director of said department, shall suffer death. Said director is directed to make return of this warrant to this Court showing the time, mode and manner in which this warrant was executed.

STATE OF MISSOURI –Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the order of said Supreme Court, entered of record at the January Session thereof, 2022, and on the 31<sup>st</sup> day of January, 2022, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 31<sup>st</sup> day of January, 2022.



  
 \_\_\_\_\_  
 Clerk

  
 \_\_\_\_\_  
 Deputy Clerk

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

v.

CARMAN DECK

§  
§  
§  
§  
§  
§

No. SC89830

Execution set for  
May 3, 2022 at 6:00 p.m.

MOTION FOR STAY OF EXECUTION

Comes now Carman Deck, a Missouri prisoner under a sentence of death in Respondent's custody at Potosi Correctional Center, and moves this Court to stay his execution, currently scheduled for May 3, 2022, for the following reasons.

Mr. Deck filed a petition for writ of habeas corpus pursuant to Mo. Sup. Ct. R. 91 and this Court denied the petition on January 31, 2022 in Cause No. SC99412. Exh. A. In the Rule 91 petition, Mr. Deck raised a question of federal constitutional law regarding inordinate delays between conviction and sentencing that affected the fundamental fairness of his third capital sentencing proceeding. Exh. B at 22-30. Mr. Deck's claim was based upon a legal theory on which he was granted relief in the federal district court, although this relief was overturned by the Eighth Circuit Court of Appeals. *Deck v. Steele*, 249 F.Supp.3d 991, 1013 (E.D. Mo. 2017), *rev'd by Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020). The primary legal authority for this claim was the Supreme Court's dicta in *Betterman v. Montana*, 578 U.S. 437,

448 (2016), that there is a due process limitation upon inordinate delays between conviction and sentencing: “due process serves as a backstop against exorbitant delay.” *Id. Betterman* also specifically left open the question of whether the right to a Speedy Trial applies to capital sentencing proceedings. *Id.* at 451, n.2 (“We reserve the question whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage, facts could increase the prescribed sentencing range are determined (e.g., capital cases in which eligibility for the death penalty hinges on aggravating factor findings).” Aggravating factors in Missouri are not found until the penalty stage in a capital proceeding, leaving open the question of whether Mr. Deck’s speedy trial rights were violated, as well as his due process right against inordinate delay and his Eighth Amendment right to present mitigating evidence before being sentenced to death. *See* Mo. Rev. Stat. § 565.030(4) (noting that the second stage of a capital trial includes evidence in aggravation and mitigation of punishment).

After this Court denied Rule 91 relief, Mr. Deck has filed a a petition for writ of certiorari in the United States Supreme Court on April 1, 2022, well in advance of the due date of May 2, 2022, noting the dicta in *Betterman* and the question left open regarding the application of the Speedy Trial right to bifurcated capital sentencing proceedings. A copy of the petition is attached as Exh C.

In order to ensure that the petition is able to be fully and competently considered, without the rush of proceedings attendant to execution dates, Mr. Deck requests a stay of his execution so that the United States Supreme Court can properly consider the substantial federal question that his certiorari petition has presented. Under Supreme Court rules, Mr. Deck cannot ask the United States Supreme Court to stay his execution, so that they consider his petition for certiorari, until he first asks this Court to do so. S. Ct. Rule 23(3) (“Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.”).

Mr. Deck requests that the stay of execution remain in place until either 1) the United States Supreme Court grants certiorari and decides the issues, or 2) the United States Supreme Court denies certiorari.

## CONCLUSION

The execution of Mr. Deck should be stayed so that the serious constitutional issues presented in his petition for writ of certiorari can be fairly and adequately determined by the United States Supreme Court.

Respectfully submitted,

/S/ Elizabeth Unger Carlyle

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ATTORNEYS FOR PETITIONER

## Certificate of Service

I hereby certify that Katharine Dolin, Office of the Attorney General, were served a copy of this pleading on April 4, 2022, by electronic filing.

/s/ Elizabeth Unger Carlyle



Supreme Court of Missouri  
en banc

SC89830

State of Missouri, Respondent,  
vs.  
Carman L. Deck, Appellant.

- Sustained
- Overruled
- Denied
- Taken with Case
- Sustained Until
- Other

Order issued: Appellant's motion for stay of execution overruled.

By: Paul M. ...  
Chief Justice

April 7, 2022  
Date