Capital Case

No. 21-_____

In The Supreme Court Of The United States

SCOTT MCLAUGHLIN,

Petitioner,

v.

PAUL BLAIR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this Missouri capital habeas case, Scott McLaughlin's trial counsel failed to investigate the background and credibility of Dr. Keith Caruso who was retained and designated as the key defense witness at the penalty phase of trial. After Dr. Caruso disclosed to trial counsel on the eve of the penalty phase, he had been disciplined for altering laboratory data, trial counsel elected not to call him at the penalty phase, despite promising to do so in his penalty phase opening statement. As a result, the sentencing jury, who ultimately could not unanimously agree on punishment, heard no evidence from a qualified psychiatrist that petitioner's mental illness would have supported two statutory mitigating factors.

In the courts below, petitioner raised a defaulted ineffective assistance of counsel claim he labeled as the "Dr. Caruso fiasco." After holding an evidentiary hearing on the issue of cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), the District Court granted penalty phase relief on this claim. The Eighth Circuit reversed the District Court's judgment and reinstated petitioner's death sentence, finding the District Court erred in finding that petitioner's trial counsel's performance was objectively deficient, and that prejudice ensued. In reaching this conclusion, the Court of Appeals found that the District Court could not consider the "broken promise" by counsel during opening statement in assessing whether counsel was ineffective. On the issue of prejudice, the Eighth Circuit found that petitioner could not of establish that counsel's failure to investigate created a "substantial likelihood of a different result."

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

1. Whether a reviewing court, in assessing trial counsel's overall performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), should consider the cumulative effect of multiple errors of counsel in determining whether a Sixth Amendment violation occurred.

2. Whether a reviewing court's determination that a prisoner must show a substantial likelihood of a different result imposes a preponderance of the evidence test for prejudice that was explicitly rejected in *Strickland*.

3. Whether the Court of Appeals' finding that counsel in this case performed effectively, despite failing to investigate the background and credentials of an expert witness beyond the review of his CV, conflicts with this Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003) and decisions from other circuits.

4. Whether the Court of Appeals' review of a distinct ineffectiveness claim [under 28 U.S.C. § 2254(d)] in assessing prejudice from the Dr. Caruso fiasco conflicts with this statute and decisions from this Court.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

McLaughlin v. Precythe, 9 F.4th 819 (8th Cir. 2021). Case No. 18-3510. Judgment entered August 18, 2021.

McLaughlin v. Steele, 173 F.Supp.3d 855 (E.D. Mo. 2016). Case No. 4:12-cv-1464. Judgment entered March 22, 2016.

McLaughlin v. State, 265 S.W.3d 257 (Mo. banc 2008). Case No. SC88181. Judgment entered August 26, 2008.

McLaughlin v. Missouri, 556 U.S. 1165 (2009). Case No. 08-822. Judgement entered April 6, 2009.

McLaughlin v. State, 378 S.W.3d 328 (Mo. banc 2012). Case No. SC91255. Judgment entered July 3, 2012.

State v. McLaughlin, Case No. SC08-sl-cc05311 (St. Louis County), Judgment entered August 27, 2010

RULE 29.6 STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott McLaughlin respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit that reversed the District Court's judgment granting penalty phase relief to petitioner pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The August 18, 2021, opinion of the Eighth Circuit Court of Appeals reversing the district court's grant of habeas corpus relief is published as *McLaughlin v. Precythe*, 9 F.4th 819 (8th Cir. 2021), and appears in the Appendix at App. 1a through App. 18a. The district court's decision granting habeas relief is published as *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D. Mo. 2016), and appears in the Appendix at App. 20a through App. 79a. The Eighth Circuit's November 19, 2021 order denying rehearing and rehearing en banc is unpublished and appears in the Appendix as App. 19a.

JURISDICTIONAL STATEMENT

The Eighth Circuit issued its judgment on August 18, 2021, and subsequently denied rehearing en banc on November 19, 2021. Under 28 U.S.C. § 2201(c) and Rule 13.1, the present petition was required to be filed within ninety (90) days. Upon application of Petitioner under Rule 13 in Case No. 21A387, Associate Justice and Eighth Circuit Justice Brett M. Kavanaugh extended the time for filing a petition for writ of certiorari in this cause up to and including April 18, 2022. App. 80a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, … and to have the Assistance of Counsel for his defence." U.S. CONST. Amend. XI.

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." U.S. CONST. amend. XIV.

This case also involves 28 U.S.C. § 2254, which provides, in pertinent part:

> (a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.
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> . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

I.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

A St. Louis County jury convicted Scott McLaughlin in 2006 of first-degree murder involving the death of his former girlfriend, Beverly Guenther. The jury found Petitioner guilty of the offenses of first-degree murder, armed criminal action, and forcible rape. (Tr. 1470-1472).[1] The jury found Petitioner not guilty of one count of armed criminal action pertaining to the forcible rape conviction. (*Id.*).

On October 2, 2006, at the conclusion of the penalty phase, the jury rejected three statutory aggravating circumstances, and found the existence of only one of the four submitted statutory aggravators, depravity of mind. (L.F. 856-857; 865-866; Tr. 1999-2000). The jury's verdict form indicted they could not unanimously agree upon punishment. (Tr. 1999-2001; L.F. 865-866). Pursuant to Missouri law, the trial court, thereafter, sentenced Petitioner to death.

On direct appeal, the Missouri Supreme Court affirmed Petitioner's convictions and sentences. *State v. McLaughlin*, 265 S.W.3d 257 (Mo. banc 2008), *cert denied McLaughlin v. Missouri*, 556 U.S. 1165 (2009). Petitioner, thereafter, sought post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. The St. Louis County Circuit Court, after holding a hearing, denied the motion. (29.15

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[1] Petitioner's citations to the trial transcript are "Tr. #." Petitioner's citation to the trial record is "L.F. #." State post-conviction record cites are "29.15 Tr. #" and "29.15 L.F. #." "8th Cir. App. ##" refers to the appendix filed with the Eighth Circuit. "Hrg. Tr. ##" refers to the evidentiary hearing transcript from the district court proceedings.

L.F. 179-192). The Missouri Supreme Court subsequently affirmed the denial of post-conviction relief in *McLaughlin v. State*, 378 S.W.3d 328 (Mo. banc 2012).

Petitioner commenced the present federal habeas corpus proceeding by filing a timely habeas petition in the United States District Court for the Eastern District of Missouri, raising twelve claims for relief. *See McLaughlin v. Steele*, 173 F. Supp.3d 855 (E.D. Mo. 2016). The case was assigned to Judge Catherine Perry. After holding an evidentiary hearing, the District Court issued a memorandum, order and judgment granting penalty phase relief as to Petitioner's Habeas Claim 1A and 3, and denied habeas relief on the remaining ten claims and a portion of an eleventh. *Id.* at 855.[2] The Eighth Circuit, after briefing and argument, reversed the District Court's decision and subsequently denied rehearing and rehearing en banc. *McLaughlin v. Precythe*, 9 F.4th 819 (8th Cir. 2021).

B. FACTS PERTAINING TO INEFFECTIVENESS CLAIM.

Because trial counsel knew well in advance of trial that Petitioner had a history of mental illness, Mr. Kenyon decided early in the case that a psychiatrist was necessary to evaluate Petitioner to discover and present relevant mitigating evidence at the penalty phase of the upcoming trial. (29.15 Tr. 582-584). Because trial counsel's mitigation specialist had seen Dr. Keith Caruso give a presentation at a death penalty seminar, trial counsel decided to hire Dr. Caruso as the defense team's

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[2] In that same order, the District Court denied a COA on Petitioner's remaining ten claims. Petitioner pursued a cross-appeal. The Eighth Circuit, as is its practice in capital cases, summarily denied a COA. *See McLaughlin v. Precythe*, No. 18-3628, 2019 WL 2448268 (8th Cir. 2019). This Court subsequently denied certiorari in *McLaughlin v. Precythe*, 140 S. Ct. 1139 (2020).

primary penalty phase mental health expert. (*Id.*). Although trial counsel reviewed Dr. Caruso's CV prior to hiring him, they did nothing more to investigate his credentials or background. (*Id.* 584-585). Trial counsel inexplicably did not contact or communicate with any other attorney who had worked with Dr. Caruso or retained him to conduct a mental evaluation of a client. (*Id.*).

Dr. Caruso conducted an extensive pretrial evaluation of Petitioner. His report diagnosed him as suffering from, among other things, a major depressive disorder with severe psychotic features and bipolar disorder. (8th Cir. App. 1660-1663, 2891-2896). Dr. Caruso's testimony would have supported the submission of two statutory mitigating circumstances: Petitioner suffered from extreme emotional disturbance at the time of the crime and his capacity to appreciate the criminality of his conduct was substantially impaired. (*Id.*, 29.15 Tr. 585); *See also* § 565.032.3(2)(7) RSMo (2000).

Trial counsel's penalty phase strategy clearly contemplated Dr. Caruso's expert testimony as the cornerstone of their efforts to convince the jury to spare Petitioner's life. In his penalty phase opening statement, trial counsel promised the jury:

> You will also hear from a psychiatrist named Dr. Keith Caruso. Dr. Caruso evaluated Scott after Scott was incarcerated for the charges which you have convicted him of. Dr. Caruso is a psychiatrist, and he will describe to you the voluminous records that he reviewed. He reviewed school records, psychiatric records, medical records. He reviewed police reports. He reviewed depositions. He conducted personal interviews with people, and he conducted ten interviews with Scott himself. Dr. Caruso will share with you the conclusions that he reached after he evaluated Scott.
>
> He will tell you that he diagnosed Scott with bipolar disorder, and diagnosed Scott also with depression. And it was Dr. Caruso's opinion

> that at the time these crimes were committed, that Scott McLaughlin was suffering from a depressive episode of bipolar disorder.
>
> Dr. Caruso will tell you that at the time these crimes were committed, that Scott was under the influence of extreme mental or emotional disturbance. Dr. Caruso will also tell you that based on the mental illnesses that Scott had, he does not have the ability to appreciate the criminality of his conduct or to conform to conducts [sic] of the requirements of law, which – that he was substantially impaired in this regard.

(Tr. 1487-1488).

The night before the penalty phase commenced, Mr. Kenyon learned in an email from Dr. Caruso that his "star witness" had been disciplined in medical school for altering, fabricating, and destroying primary laboratory data. (29.15 Tr. 586-589, 596). Trial counsel immediately conducted a Google search, confirmed this information, and feared it would seriously damage Dr. Caruso's credibility on cross-examination. (*Id.* 580-588). After discussing the issue with co-counsel and his supervisor, trial counsel decided not to call Dr. Caruso as a witness at the conclusion penalty phase of trial despite promising to do so in his opening statement. Mr. Kenyon was incorrectly told by his supervisor this impeachment evidence would have to be disclosed to the prosecutor before Dr. Caruso testified. (*Id.* 588-589).[3] In light of the foregoing facts, petitioner labeled this *Strickland*/*Wiggins* claim as the "Dr. Caruso fiasco" in the courts below.

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[3] Counsel purportedly based this decision on a mistaken belief that he would have had to disclose Dr. Caruso's academic dishonesty to the state prior to calling him as a witness. However, there is nothing in Missouri's discovery rules or any other caselaw requiring a defendant to disclose impeaching information about one of its witnesses to the prosecution in advance of trial. *See* Mo. S. Ct. Rule 25.05.

After electing not to present Dr. Caruso's testimony, trial counsel attempted to elicit similar testimony from the other defense expert, Dr. Mark Cunningham. (*Id.* 590-591). However, Dr. Cunningham could not provide similar testimony to Dr. Caruso because he had not discussed the circumstances of the offense with Petitioner and instead focused only his background and social history. (*Id.* 590).

Dr. Cunningham did not conduct a formal mental evaluation of Petitioner – and could offer no opinions within a reasonable degree of certainty. He did not conduct any psychological tests and did not even evaluate Petitioner in person. (Tr. 1830-1831). This fact is underscored by the prosecution's closing argument where he labeled Dr. Cunningham as "Dr. Excuse" and also argued his testimony was unworthy of belief because he had neither evaluated Petitioner nor administered any psychological tests to him. (Tr. 1989).

Thus, trial counsel presented no evidence to the jury from Dr. Caruso or a qualified psychiatrist, despite promising to do so in opening statements, regarding their client's mental illnesses that would have provided factual support for the two statutory mitigating factors, which directly implicate the crucial issue of petitioner's state of mind at the time of the crime. (Tr. 1536-1955). Given there was only one statutory aggravator found and the jury deadlocked on punishment, this mental health evidence supporting these mitigators could have reasonably tipped the balance in favor of a life sentence.

During the Rule 29.15 proceeding, petitioner was evaluated by psychiatrist Stephen Peterson, M.D. (29.15 Tr. 325-328). After conducting more than six hours

of interviews and testing, and after reviewing extensive background records, Dr. Peterson concluded, as did Dr. Caruso, that petitioner suffers from several debilitating mental illnesses. (*Id.* 325-460). Dr. Peterson found petitioner suffered from borderline intellectual functioning, specific learning disorder, physical or emotional abuse, attention deficit hyperactivity disorder ("ADHD"), alcohol abuse, intermittent explosive disorder, and borderline personality disorder with narcissistic features. (*Id.* 434-437). These mental illnesses affected petitioner's cognitive ability and impulse control. Petitioner's mental illnesses made it difficult for him to control his anger and the stress resulting from the break-up in the relationship with Ms. Guenther. (*Id.* 453-454).

In Dr. Peterson's opinion, petitioner suffered from an extreme emotional disturbance at the time of the murder. (*Id.* 451-452). Petitioner was mentally incapable of coping with Ms. Guenther's rejection of him and her decision to end their relationship. Petitioner's mental deficits also impaired his capacity to conform his conduct to the requirements of law. (*Id.* 454). His deteriorating mental conditions were exacerbated by the fact that he had not taken his medication for two months prior to the homicide. (*Id.* 455).

C. FACTS REGARDING POST-CONVICTION COUNSEL'S INEFFECTIVENESS UNDER *MARTINEZ*.

After his direct appeal concluded, Petitioner commenced a Rule 29.15 action by filing a timely *pro se* motion. The trial court appointed the state public defender. The team responsible for representing Petitioner before the Rule 29.15 motion court

primarily consisted of attorney Pete Carter, attorney Valerie Leftwitch, and mitigation specialist Cindy Malone.

Appointed post-conviction counsel failed to raise the Dr. Caruso claim in the amended 29.15 motion. The Missouri Supreme Court, as a result, found this claim to be procedurally barred: "[t]his specific claim regarding the requisite investigation into Dr. Caruso, however, is not preserved for appeal…at no point in his Rule 29.15 motion for post-conviction relief did he allege that his trial counsel were ineffective for failing to adequately investigate Dr. Caruso or otherwise allege error for failing to specifically call Dr. Caruso at trial." *McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. banc 2012).

After appointed counsel filed the habeas petition in this § 2254 action that included the Dr. Caruso claim, respondent asserted a procedural bar defense arising from post-conviction counsel's failure to raise this claim in the amended 29.15 motion. (8th Cir. App. 93-95). In reply, Petitioner asserted that he could overcome this procedural bar defense by establishing cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012). Petitioner requested a limited evidentiary hearing on the *Martinez* issue which the district court granted. (8th Cir. App. 3100-3101). This hearing was conducted before Judge Perry on May 11, 2015. At this hearing, Mr. Carter, Ms. Leftwich, and Ms. Malone testified. Petitioner also presented the testimony of trial counsel Robert Steele, and 29.15 appellate counsel, Melinda Pendergraph. Respondent presented no witnesses or evidence.

Mr. Carter, Ms. Leftwich and Ms. Malone all identified and spotted an obvious "Dr. Caruso claim" from the face of the trial transcript. (Hrg. Tr. 16, 28, 52-53) ("trial counsel delivered the claim on a "silver platter"), *Id.* 56, 62, 64. Mr. Carter noted that the trial transcript obviously raised a "red flag." (*Id.* 31-32). In 2009, prior to filing the amended 29.15 motion, Ms. Leftwich googled Dr. Caruso. Information of his misconduct as a medical student appeared as the second item she found. (*Id.* 61-62). Ms. Pendergraph also noted that it is not often you have a transcript where trial counsel "admit they screwed up at trial." (*Id.* 84).

This patently obvious "Dr. Caruso claim," involving Mr. Kenyon's failure to investigate Dr. Caruso's background and credentials was, by all accounts, to be included in the amended 29.15 motion. (*Id.* 18, 21, 53, 55, 64). However, Dr. Caruso's name is not mentioned in the amended Rule 29.15 motion and no specific claim of ineffectiveness for counsel's failure to investigate Dr. Caruso's credentials was raised. (*Id.* 22, 66). This omission occurred despite team discussions "over and over and over again about that was going to be in there" (*Id.* 55), and a recognition by the individual tasked with drafting the claim that this issue was "very strong." (*Id.* 76).[4]

Mr. Carter also identified the internal funding request for post-conviction expert, Dr. Stephen Peterson. (Pet.'s Hrg. Exh. A). Mr. Carter testified that the request for funds for Dr. Peterson was necessary to establish *Strickland* prejudice from trial counsel's failure to investigate Dr. Caruso's credentials. (Hrg. Tr. 21). Ms.

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[4] Ms. Malone was "upset" that the claim was not included. (*Id.* 55). Ms. Pendergraph was "shocked" that the claim was not included. (*Id.* 84).

Malone confirmed this connection. (*Id.* 54). Ms. Leftwich agreed that the "Caruso claim" was supposed to be a component of the Dr. Peterson claim that was raised in the amended motion. (*Id.* 64, 68, 69). Ms. Pendergraph confirmed that, in discussions with Mr. Carter before the amended motion was filed, that Mr. Carter described a very strong or great "Dr. Caruso claim," and she agreed after reading the transcript. (*Id.* 75-76, 84).

Mr. Carter and Ms. Leftwich also knew that the detailed pleading requirements under Missouri Rule 29.15 are strictly enforced. (*Id.* 13, 59). Mr. Carter noted that the pleadings prerequisites "require you to be very, very detailed…and [claims] must be pled with great specificity." (*Id.* 13). Ms. Leftwich described that every claim must be pled with specificity both as to allegations and the evidence to be presented. (*Id.* 59). They both agreed that once the omission of the "Dr. Caruso claim" occurred, there was nothing that could be done to fix it. (*Id.* 23, 67).

Ms. Pendergraph also noted that the time limits for an amended motion are jurisdictional. (*Id.* 74). Ms. Pendergraph also noted that in her thirty years as an attorney, she had never before seen a case with an issue similar to Petitioner's Dr. Caruso claim, where trial counsel essentially admitted his ineffectiveness before the trial court. (*Id.* 84).

Mr. Carter was responsible for drafting the "Dr. Caruso claim." (*Id.* 32, 56, 64). Mr. Carter noted it "truly" was an "oversight" that he failed to raise the "Dr. Caruso claim." (*Id.* 32).

The other witnesses corroborate Mr. Carter's candid admission of deficient performance. Ms. Leftwich noted that, while she put the final document together, she did not catch the omission of this claim. (*Id.* 65). She indicated that the claim was supposed to be included but was inadvertently omitted. (*Id.* 66). While indicating that she would have noticed the omission if she had read the claim fully (*Id.* 70), she "viewed it as a major omission by Pete…and then by me for not reading it." (*Id.* 72).

Mr. Kenyon's failure to investigate Dr. Caruso's background precluded the jury from hearing any psychiatric testimony in a case where they ultimately deadlocked. (*Id.* 62). In a case where the jury did not find three of the four submitted statutory aggravators, trial counsel Robert Steele testified that failing to call Dr. Caruso prevented the jury from considering the statutory mitigating factors of extreme emotional disturbance and substantial impairment. (*Id.* 40, 45). According to Mr. Steele, without the Dr. Caruso testimony, there was no causal connection between Petitioner's history of mental illness and culpability. (*Id.* 45). As Mr. Steele noted: "We had no one else. I mean it was him." (*Id.* 49).

The dilemma trial counsel confronted due to Mr. Kenyon's failure to investigate is aptly described by Mr. Steele: "And we'd been in trial for two weeks and were depending on him exclusively, and then he sends an email after he's been on the case for years saying, 'Oh, I forgot to tell you that I fabricated stuff in medical school.'" (*Id.* 47).

D. THE DISTRICT COURT OPINION

On March 22, 2016, Judge Perry issued a memorandum, order and judgment granting petitioner penalty phase relief on his Dr. Caruso claim. *McLaughlin*, 173 F. Supp. 3d 855 (E.D. Mo. 2016)-. Before addressing the merits of the underlying Sixth Amendment claim, Judge Perry had little difficulty in finding that petitioner could establish cause and prejudice under *Martinez,* (*Id.* at 869-873). In light of the uncontroverted facts regarding post-conviction counsels' negligence in failing to include the Dr. Caruso claim in the amended 29.15 motion, respondent did not seriously contest, and the District Court found that post-conviction counsel's performance was deficient. (*Id.* at 870-873). The District Court also found prejudice under *Martinez* because the underlying Sixth Amendment claim was undoubtedly substantial. (*Id.* at 873).

The district Court, thereafter, addressed the merits of the Dr. Caruso claim and determined that Petitioner received ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). (*Id.* at 873-876). The District Court found that trial counsel's failure to verify the credentials and investigate the background of Dr. Caruso before and after retaining him and designating him as the key penalty phase witness constituted deficient performance. (*Id.* at 873-883).

The district court found "competent representation would have included, at a minimum, some investigation of Dr. Caruso's background" and that "counsel compounded this mistake" by failing to present a similarly situated expert and "more importantly, *even after* Dr. Caruso informed counsel of the misconduct investigation,

counsel went on to make an opening statement wherein he described Dr. Caruso's anticipated testimony in detail, mentioning him by name six times." *Id.* at 879–82; App. 44a-47a. As the District Court observed:

> Counsel should never have been in the situation of deciding, at the last minute, between calling an expert with a serious truthfulness problem and calling no expert at all. *See Wiggins*, 539 U.S. at 533 ("'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'") (quoting *Strickland*, 466 U.S. at 690-91).

(*Id.* at 878; App. 43a).

The District Court also noted: "In this case, Petitioner's counsel did not discharge his duty to investigate by hearing secondhand that Dr. Caruso gave a presentation. Indeed, he failed to do much of anything, and under the circumstances of this case, his inaction was constitutionally inadequate. He had not done the groundwork reasonably necessary to make a strategic decision about whether to call Dr. Caruso." (*Id.* at 879; App. 44a).

In assessing counsels' overall performance and prejudice under *Strickland*, the District Court also considered trial counsel's broken promise to the jury where he promised in his opening statement he would call Dr. Caruso as a penalty phase witness and outlined his testimony but thereafter, inexplicably, did not put him on the witness stand. In this regard, the District Court held that counsel's broken promise during opening statement magnified and exacerbated counsel's initial failure to adequately investigate Dr. Caruso and also prejudiced petitioner's overall penalty phase defense in the eyes of the jury. (*Id.* at 881-883).

The district court credited trial counsel's testimony regarding the hole in their mitigation presentation without Dr. Caruso because Dr. Cunningham, could not fill this gap. (*Id.* at 880; App. 45a). As the District Court observed: "Caruso provided the only evidence that the risks described by Dr. Cunningham had come to bear." (*Id.* at 885, n.15; App. 50a). As a result of trial counsel's failures, "It left Petitioner with no mitigation evidence from a mental-health professional who had examined him clinically as an adult or who could testify about his mental state at the time of the murder." (*Id.* at 869; App. 34a).

The district court further found that petitioner's poor impulse control, impulsivity, and his inability to conform his conduct to the requirements of the law could have likely impacted the jury's assessment of the depravity of mind aggravator. (*Id.* at 869; App. 34a). By offering competent expert testimony regarding their client's state of mind at the time of the crime, this aggravating factor could have been either minimized or completely rejected by the jury, just as they rejected the three other statutory aggravating factors submitted by the state. *See Andrus v. Texas*, 140 S. Ct. 1875, 1884-1885 (2020).

E. The Eighth Circuit Opinion

On appeal, the Eighth Circuit reversed the District Court's judgment granting penalty phase relief to petitioner on his "Dr. Caruso fiasco" claim. *McLaughlin v. Precythe*, 9 F.4th 819 (8th Cir. 2001). The panel majority found that the District Court erred in finding both deficient performance and *Strickland* prejudice. (*Id.* at 827-833). In a concurring opinion, however, Judge Erickson disagreed with the

majority on the issue of *Strickland* performance but concurred with the majority that *Strickland* prejudice could not be established. *Id.* at 834-836.

On the issue of *Strickland* performance, the panel majority found that Mr. Kenyon, by blindly demurring to Dr. Caruso's recommendation by his mitigation specialist and in reviewing Dr. Caruso's CV, conducted a constitutionally adequate investigation of Dr. Caruso's background. *Id.* at 827-830. As a result, the panel majority held that petitioner could not show that "no competent lawyer could have made the choice to trust the legal community's appraisal of Dr. Caruso." *Id.* at 829.

In assessing prejudice, the Eighth Circuit majority found that the District Court erred in considering counsel's "broken promise" to the jury during opening statements in assessing counsel's overall performance and the resulting prejudice. *Id.* at 830-831. The panel based this view on prior Eighth Circuit precedent that held that it is improper for a reviewing court to consider the cumulative effect of multiple errors of counsel in assessing counsel's performance and *Strickland* prejudice. *Id.* at 830-831 (citing *Forrest v. Steele*, 764 F.3d 848, 861 (8th Cir. 2014)).

The panel majority found that the psychiatric testimony "would not result in a different verdict" because the aggravating evidence "substantially outweighed" any evidence in mitigation. *Id.* at 831. The court concluded that the psychiatric evidence that was not presented as a result of the Dr. Caruso fiasco did not create a "substantial likelihood of a different result." *Id.* at 832.

Finally, the panel majority, after reviewing the issue of *Strickland* prejudice de novo examined the issue of prejudice arising from the failure to call Dr. Peterson

under the lens of 28 U.S.C. § 2254(d). The panel concluded that the state habeas court's decision that petitioner was not prejudiced due to counsel's failure to call Dr. Peterson, was not unreasonable or contrary to clearly established federal law under § 2254(d)(1). *Id.* at 832-833.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT BETWEEN THE CIRCUITS REGARDING WHETHER A REVIEWING COURT'S *STRICKLAND* ANALYSIS SHOULD REQUIRE A CUMULATIVE ASSESSMENT OF MULTIPLE ERRORS BY TRIAL COUNSEL IN CONSIDERING WHETHER TRIAL COUNSEL'S OVERALL PERFORMANCE WAS DEFICIENT AND *STRICKLAND* PREJUDICE.

The Eighth Circuit, as noted earlier, rejected the District Court's view that counsel's "broken promise" during opening statements at the penalty phase that Dr. Caruso would be called as a witness should be viewed in tandem with trial counsel's failure to investigate his background and credentials in assessing the issue of *Strickland* prejudice and whether trial counsel's overall performance was objectively deficient under *Strickland*. The Court of Appeals took the approach consistent with that of the Fourth Circuit and previous decisions from the Eighth Circuit and the highest courts of some states[5], but departed from the rule applied in the First, Second, Fifth, Seventh, Ninth, and Tenth Circuit, and the highest courts of other states. *See, e.g., Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001); *White v. Thaler*, 610 F.3d 890, 912 (5th Cir. 2010); *Goodman*

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[5] *See e.g. Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); *Middleton v. Roper*, 455 F.3d 838, 852 (8th Cir. 2006), *Weatherford v. State*, 215 S.W.3d 642, 649-650 (Ark. 2005).

v. Bertrand, 467 F3d 1022, 1030 (7th Cir. 2006); *Harris by and through Ramseyer v. Wood*, 64 F.3d 1432, 1439 (9th Cir. 1995); *Welch v. Sirmons*, 451 F.3d 675, 710 (10th Cir. 2006*); State v. Gondor*, 860 N.E.2d 77, 90 (Ohio 2006). This Court should step in to resolve this deep split on an issue fundamental to the correct application of the test for ineffective assistance of counsel that is critical to ensuring a fair administration of justice in criminal trials.

On the question of *Strickland* prejudice, it is clear that this Court, as well as virtually every other court of appeals, apply a cumulative effect test in assessing the issue of *Strickland* prejudice. A cumulative effect analysis on the issue of *Strickland* performance is also mandated by *Strickland* itself and *Kimmelman v. Morrison*, 477 U.S. 365 (1986). The opinion in *Strickland* refers at least ten times to the "errors" of counsel. *Strickland v. Washington*, 466 U.S. 668, 694-696 (1984).

For instance, this Court noted that the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Id.* at 694. This was no accident. *Strickland* represents the promise that, through the assistance of counsel, an accused will receive a "fair trial, a trial whose result is reliable." *Id.* at 687. A standard intended to guarantee the ultimate reliability of the outcome cannot achieve its purpose unless a reviewing court is obliged to weigh the collective impact of all of counsel's errors. This interpretation of *Strickland* has been endorsed by virtually every federal and state court that has addressed this issue. *See, e.g., Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999); *State v. Gunsby*, 670 So.2d 920 (Fla. 1996).

In articulating the familiar two-prong standard for assessing claims of ineffective assistance of counsel, *Strickland* held that: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made *errors* so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. (emphasis added).

Strickland also held that "[e]ven if the defendant shows that particular errors of counsel were unreasonable, …the defendant must show that they actually had an adverse effect on the defense." *Id.* at 693. The court in *Strickland* also stated that, "The result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Thus, to meet the *Strickland* prejudice test, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Two years later, this Court, in elaborating upon the analysis required by *Strickland*, stated that "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel has rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365,

386 (1986). This Court in *Strickland* also stated that "in any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. In making the prejudice determination, *Strickland* requires that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695.

It is, therefore, clear from *Strickland's* repeated references to counsel's performance; to the breakdown of the adversarial process; to the totality of the circumstances; to the reliability of the trial's result; to trial counsel's representation; and to counsel's errors in the plural, that the *Strickland* decision intended that counsel's errors to be considered cumulatively when determining whether counsel's overall performance was deficient and whether this deficient performance prejudiced the defendant. *See, e.g.*, *Lindstadt v. Keane*, 239 F.3d 191, 194, 198-199 (2d Cir. 2001). By stating that the right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel, if that error is sufficiently egregious and prejudicial," *Murray v. Carrier*, 477 U.S. 478, 496 (1986), this Court has made it unmistakably clear that in most cases counsel's ineffectiveness will be based upon the cumulative effect of multiple errors. *See also Smith v. Murray*, 477 U.S. 527, 535 (1986); *United States v. Cronic*, 466 U.S. 648, 657, n.20 (1984). In fact, some courts have recognized that the case in which ineffective assistance arises from only a single error as opposed to multiple errors is the exception to the rule. *See, e.g.*, *Gordon v. United States*, 518 F.3d 1291, 1297-1298 (11th Cir. 2008).

In a case involving remarkably similar facts, the First Circuit rejected the position taken by the Eighth Circuit here and also rebuked the prior reviewing courts that overlooked the significance of counsel's broken promise to the jury in opening statement that he would call a psychiatrist to testify and later failed to follow through. *See Anderson v. Butler*, 858 F.2d 16, 17-19 (1st Cir. 1988). As a result, in assessing counsel's performance, the court in *Anderson* held that counsel's broken promise must be considered in tandem with counsel's failure to investigate and call the psychiatrist in assessing *Strickland* performance. *Id.*

The Sixth Circuit reached a similar conclusion in *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010). In finding that trial counsel rendered deficient performance in failing to adequately investigate a defense witness' story before deciding not to call her, the court upheld the district court's decision that the unreasonableness of counsel's failure to investigate and call this witness was "exacerbated" by counsel's promise that this witness would testify during his opening statement. (*Id.* at 724, 728-729). Mr. Kenyon's failures are undoubtedly even more egregious than the conduct of counsel in both *English* and *Anderson* because he learned of the impeachment evidence he failed to previously uncover before he delivered his opening statement. As the court in *Anderson* pointed out, if counsel wanted to keep his options open regarding whether to call a witness, this could be done by "keeping silent." 858 F.2d at 18.

A cumulative effect analysis, as the District Court's decision makes clear, made a real difference in the assessment of counsel's performance and the prejudice that

resulted from the "Dr. Caruso fiasco." Apart from the First Circuit's opinion in *Anderson*, there are numerous cases from other state and federal courts finding counsel ineffective based upon a "broken promise" during opening statement alone. *See Ouber v. Guarino*, 293 F.3d 19, 27-34 (1st Cir. 2002), *State v. Moorman*, 358 S.E.2d 502 (1987); *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Crim. App. 1991).

When counsel's "broken promise" to call Dr. Caruso is viewed in tandem with his failure to investigate Dr. Caruso's background and credentials, it is evident that the District Court was correct, and the Eighth Circuit committed a clear legal error in failing to consider both of these mistakes by counsel in considering the issues of deficient performance and prejudice under the *Strickland* analysis.

This cumulation question is not just of critical importance in this case; it is also important to the proper administration of justice in courts across the country. This question arises frequently, and it goes to the heart of the appropriate *Strickland* analysis. Because of the Eighth Circuit's nearly solitary position that a cumulative analysis is inappropriate, the federal courts of appeal have been unable to arrive at a consensus on this question and, as a result, criminal defendants in different parts of the country are subject to varying levels of Sixth Amendment protection.

In the Eighth Circuit and in other jurisdictions where *Strickland* prejudice continues to be viewed in isolation, the application of *Strickland* fundamentally conflicts not only with the language of *Strickland* itself but also with this Court's *Strickland* derived *Brady* jurisprudence, which commands the accumulation of prejudice arising from the prosecution's improper withholding of evidence. *See Kyles*

v. Whitley, 514 U.S. 419, 436 (1995); *see also United States v. Bagley*, 473 U.S. 667, 682-683 & n.13 (1985) (holding that the *Strickland* prejudice standard supplies the proper test for assessing whether suppressed evidence is sufficiently "material" under *Brady v. Maryland*, 373 U.S. 83 (1963)).

As the *Brady*-related cases recognize, any rule forbidding cumulation for purposes of assessing prejudice is extraordinarily unfair. There can be no question that in carrying out the appropriate prejudice analysis a court must consider all of the evidence of a defendant's guilt, not just some of the evidence. *Kyles*, 514 U.S. at 436. If the effect of all of counsel's errors is not considered in assessing whether the jury would be reasonably likely to reach a different outcome, then the scales are improperly weighted against a finding of a Sixth Amendment violation. Only a holistic analysis of the prejudice resulting from deficient representation can accurately determine whether a different outcome was reasonably probable.

The Eighth Circuit's departure from these principles in this case require this Court's discretionary intervention to clarify how *Strickland* should be applied in cases involving either multiple or multi-faceted errors by trial counsel. The Eighth Circuit's approach, like that of the Fourth Circuit and certain state courts, undermine *Strickland* and creates considerable tension with this Court's *Strickland* derived *Brady* jurisprudence

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' FINDING THAT PETITIONER COULD NOT ESTABLISH PREJUDICE BY A PREPONDERENCE OF THE EVIDENCE CONFLICTS WITH *STRICKLAND*.

In its analysis of petitioner's Sixth Amendment claim, it is evident that the Court of Appeals erected too high of a barrier to relief by, in essence, altering the settled *Strickland* prejudice test to require petitioner to prove by a preponderance of the evidence that the outcome at the penalty phase of his trial would have been different. Although they did not use the specific language "preponderance of the evidence", the Court of Appeals on two different occasions noted that prejudice could not be established because petitioner had not shown a "substantial likelihood of a different result." *McLaughlin*, 9 F.4th at 832. The term "substantial likelihood" is virtually synonymous with the language "more likely than not" that is often employed when reviewing courts apply a preponderance of the evidence test. *See e.g. Schlup v. Delo*, 513 U.S. 298, 327 (1995).

At a different point in its *Strickland* prejudice analysis, the Eighth Circuit also expressed its agreement with respondent that the expert testimony "would not result in a different verdict." *Id.* at 831. The use of this language also suggests that the court below believed that petitioner must prove that it is more likely than not that the presentation of the omitted mitigating evidence would have resulted in a different penalty phase verdict. The Eighth Circuit's prejudice analysis cannot be reconciled with the appropriate *Strickland* test which is much less onerous.

In formulating its now familiar prejudice test in *Strickland*, this Court held a defendant is required to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. "The result of the proceeding can be rendered unreliable…even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. To meet the *Strickland* prejudice test, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Because the jury deadlocked on punishment and found only one statutory aggravating factor (rejecting three), this mistake by the panel was outcome determinative. This approach overlooks one overriding and inescapable fact the district court emphasized, in light of the fact the jury found only one statutory aggravating circumstance and deadlocked on whether to impose the death penalty, this was an extremely close case where additional mitigating evidence regarding Petitioner's mental illnesses created a reasonable probability of a different outcome.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' FINDING THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT CONFLICTS WITH THIS COURT'S DECISION IN *WIGGINS* AND DECISIONS FROM OTHER CIRCUITS.

As Judge Erickson's concurring opinion makes clear, the undisputed record in this case indicates that trial counsel did nothing to vet the qualifications and credibility of its star witness at the penalty phase, Dr. Keith Caruso, other than reviewing his CV and blindly following a mitigation specialist's recommendation who

saw this expert make a presentation at a seminar. *McLaughlin*, 9 F.4th at 835 (Erickson J., concurring). Contrary to the views of the panel majority, that it would have been difficult and time consuming for counsel to vet this expert, Judge Erickson also made it clear that the impeachment evidence at issue that undermined Dr. Caruso's credibility was easily ascertainable through a simple Google search. *Id.*

Given the fact that Dr. Caruso was the defendant's star witness at the penalty phase, both the District Court and Judge Erickson's position that trial counsel's inactions constituted deficient performance under *Strickland* were undoubtedly correct and the panel majority's contrary position is indefensible given settled jurisprudence from this Court and other circuits who have considered ineffectiveness claims involving similar failures to investigate expert witnesses.

Rather than supporting a reasonable tactical decision, the undisputed facts here demonstrate a complete lack of competence in the selection, investigation, and presentation, of expert testimony in petitioner's trial for his life. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Based upon the aforementioned undisputed facts, the District Court noted that in light of the importance of Dr. Caruso to trial counsel's effort to convince the jury to reject the death penalty, a reasonably competent capital defense attorney would have sought out other attorneys who had used Dr. Caruso in order to gauge how his testimony played with other capital jurors and speak with the expert himself to determine what line of attack the prosecution used to undermine his credibility in other cases. In fact, the impeachment evidence at issue only came to

light at the eleventh hour because Dr. Caruso volunteered this information to trial counsel on the eve of the penalty phase.

In other similar situations, other Circuit Courts of Appeal have found trial counsel ineffective for conducting no investigation of the background, credentials, and credibility of expert witnesses they had retained to testify. *Combs v. Coyle*, 205 F.3d 269, 287-288 (6th Cir. 2000); *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007). The Seventh Circuit in *Stevens* found trial counsel ineffective in failing to adequately investigate its expert and the substance of his proposed testimony in advance of trial. *Id.* at 896-898. In *Combs v. Coyle*, trial counsel was found ineffective in failing to adequately investigate his own expert witness and, as a result of trial counsel's failure to investigate, the expert's trial testimony discredited petitioner's mental defense. 205 F.3d at 287-288. *See also State ex rel. Erickson v. Schomig*, 162 F. Supp.2d 1020, 1040-1049 (N.D. Ill. 2001) (finding counsel ineffective in calling expert witness who had fraudulent credentials that counsel failed to investigate before trial).

In *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000), the Sixth Circuit held that defense counsel's decision to present during the penalty phase, the testimony of an unqualified psychologist who had already provided damaging testimony in the guilt phase, was deficient because it "fell below an objective standard of reasonableness." *Id.* at 270-273. Much like trial counsel in *Stevens*, *Combs*, and *Skaggs*, Mr. Kenyon utterly failed in vetting the background of Dr. Caruso before deciding to hire him and thereafter elevating him to the centerpiece of Petitioner's penalty phase defense. Trial counsel's failure to investigate Dr. Caruso in any manner whatsoever prior to

trial, other than reviewing his CV, in light of Dr. Caruso's importance to petitioner's case for life, "is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Although these cases involving nearly identical facts where trial counsel was found ineffective for failing to investigate expert witnesses were prominently cited in petitioner's brief, the Eighth Circuit majority mentioned none of these authorities nor made any attempt to distinguish them from the facts of this case. Instead, the court based its finding that counsel's performance was adequate based upon an indefensible interpretation of the facts that the impeaching information would have been difficult for trial counsel to uncover. As both Judge Erickson and the District Court noted, this information would have been easily ascertainable by a simple Google search and by simply asking Dr. Caruso himself whether there were any issues in his background that could be used to attack his credibility. This fact was also corroborated by the testimony of post-conviction counsel who indicated that the problems with Dr. Caruso's credibility came up the second item listed when she conducted a Google search of his name.

Because the panel majority's decision on the issue of deficient performance cannot be reconciled with *Wiggins* or the views of other Circuits, this Court's discretionary intervention is warranted to prevent a clear injustice. A writ of certiorari should issue to address this important question.

IV.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ASPECT OF THE COURT OF APPEALS' DECISION, THAT EVALUATED *STRICKLAND* PREJUDICE ARISING FROM THE FAILURE TO CALL DR. PETERSON UNDER § 2254(d), CONFLICTS WITH THE STUTUTORY LANGUAGE OF THIS PROVISION AND IS CONTRARY TO PRIOR DECISIONS FROM THIS COURT.

After reviewing the Dr. Caruso claim *de novo*, and concluding that petitioner could meet neither prong of the two part *Strickland* test, the panel majority also found that no *Strickland* prejudice could be established on the Dr. Caruso claim because the state habeas court's finding that petitioner was not prejudiced by trial counsel's failure to call Dr. Steven Peterson as a penalty phase witness was not unreasonable or contrary to clearly established federal law under the standard of review provisions of 2254(d)(1). *McLaughlin*, 9 F.4th at 832-833.

The panel's analysis of the distinct claim involving Dr. Peterson constituted a clear error of law. The text of § 2254(d) makes clear that the standard of review provisions in subsections one and two only come into play for claims that are adjudicated by the state court. Since it is clear from the record and, as respondent conceded in the court below, the "Dr. Caruso fiasco" claim was not adjudicated in state court and must be reviewed *de novo*.

This view aligns with this Court's consistent interpretation of the AEDPA. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011) ("§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated."). Thus, the unit of this Court's analysis in *Harrington* was the *claim*, not its components. As this Court has noted, a claim is an asserted "basis for relief from a state court's judgment of conviction." *See Gonzalez v.*

Crosby, 545 U.S. 524, 530 (2005). This is distinct from a "component of [a claim]." *Harrington*, 562 U.S. at 98. This view is also historically consistent with previous iterations of §2254. *See Townsend v. Sain*, 372 U.S. 293, 314 (1963) (noting that under pre-AEDPA law no relevant state fact findings are made unless the court decided the underlying constitutional claim on the merits).

Although the exhausted claim involving failing to call Dr. Peterson has some overlap with and relevance to the issue of prejudice arising from the Dr. Caruso fiasco, it is a distinct claim from the unexhausted claim involving failing to investigate Dr. Caruso. Although the District Court considered the substance of Dr. Peterson's testimony at the 29.15 hearing in assessing prejudice, both Dr. Peterson's opinion and Dr. Caruso's report are consistent with each other regarding petitioner's mental illness and the mitigating factors that this evidence supported. Both doctor's views, individually and cumulatively, provided an adequate basis to support the District Court's findings that petitioner was prejudiced by counsel's failure to investigate Dr. Caruso and his "broken promise" to the jury to call him as a witness.

This Court has also consistently found that components of claims presented to but not addressed by a state court should receive *de novo* review. For instance, in ineffective assistance of counsel cases resolved by a state court on only one prong of *Strickland*, this Court has not accorded deference to the other prong. This Court took this approach in a series of decisions. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis");

Rompilla v. Beard, 545 U.S. 374, 390 (2005) ("[b]ecause the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*"); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("[b]ecause the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*").

Ironically, petitioner was denied a COA by both the District Court and the Eighth Circuit on the Dr. Peterson claim. This fact also clearly establishes that the state court's adjudication of the Dr. Peterson claim was not a relevant consideration to be considered by the courts below in conducting its *de novo* review of the "Dr. Caruso fiasco." Certiorari should be granted to rectify this clear error of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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