No. 21-7660

CAPITAL CASE

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

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Brief in Opposition

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QUESTIONS PRESENTED

At the penalty phase of his case, McLaughlin presented mental health experts but no psychiatrist. He did not present a psychiatrist because the night before the penalty phase began the retained psychiatrist, who had testified in more than 90 cases, told counsel that seventeen years earlier, while in medical school, he had been found to have falsified data in a lab report, and that although no sanctions had been imposed the information was publicly available. Counsel initially planned to call the psychiatrist anyway, and in his opening said that he would, but after consultations, the defense team changed its mind and did not call the psychiatrist.

The Missouri post-conviction court, after an evidentiary hearing, rejected a claim that counsel was ineffective for not calling a psychiatrist, finding neither ineffectiveness nor prejudice. The Missouri Supreme Court agreed, and also found a new claim that counsel was ineffective for not better investigating the psychiatrist to be barred. The district court found the new claim was defaulted, but held an evidentiary hearing and granted relief based on *Martinez v. Ryan*. The Eighth Circuit reversed, finding counsel's actions were not ineffective and that no prejudice resulted. The questions presented are:

I. Whether the court below erred in reviewing prejudice from alleged acts of ineffectiveness by counsel individually as opposed to cumulatively, when the court below found counsel acted reasonably.

II. Whether the court below abandoned the prejudice standard in *Strickland v. Washington* by also using this Court's "substantial likelihood of a different result" language from *Harrington v. Richte*r.

III. Whether the court below erred in finding counsel's investigation of the retained penalty phase psychiatrist reasonable.

IV. Whether the court below erred in holding that the finding of the Missouri Supreme Court that that there was no prejudice from not calling a psychiatrist is entitled to deference.

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STATEMENT OF THE CASE

Scott McLaughlin ambushed his ex-girlfriend, Beverly Gunther, while she was leaving work on the night before a hearing on an adult abuse charge against McLaughlin for abusing her. Appendix 5a. McLaughlin stabbed her repeatedly with a steak knife. *Id*. Then he forced her to the ground, continued to stab her, raped her, and strangled her. *Id*. McLaughlin threw the body into the back seat of his car and took it to the Missouri River. *Id*. McLaughlin could not dump the body in the river as he had planned because of the thick brush. *Id*. So, he left the half-naked body in the brush and drove off. *Id*.

The next day McLaughlin was laughing and joking while talking with a friend. *Id*. McLaughlin bought bleach and other cleaning supplies and bleached the inside of his car. *Id*. The police brought McLaughlin in for questioning and found blood in his car and on his clothing. *Id*. After the police showed McLaughlin the evidence against him, he confessed and led the police to the victim's body. *Id*. A jury convicted McLaughlin of first-degree murder, rape, and armed criminal action. *Id*.

At the penalty phase, the state presented evidence of McLaughlin's history of stalking, aggression, and harassment against the victim. *Id*. at 6a. This included repeatedly calling the victim at work after they broke up, coming to her office uninvited, lurking outside her home, and burglarizing her home. *Id*. After charges were filed for the burglary, McLaughlin stopped the victim in the parking lot of her work, tried to talk to her about the burglary case, and tried to kiss her twice when she refused to talk to him. *Id*. On a different occasion, McLaughlin jumped from bushes and groped the victim's breast. *Id*. The victim reported that McLaughlin was

becoming more aggressive and violent as time went on. *Id.* The State also presented evidence of McLaughlin's convictions for first-degree tampering, first-degree sexual assault against a minor, forgery, felony nonsupport, and third-degree assault for attempting to cut the victim's neighbor with a knife. *Id.*

The penalty-phase defense included evidence that McLaughlin's biological father was an alcoholic who abused his mother, and that McLaughlin lived in several foster homes before being adopted by a couple in which the father physically and emotionally abused him. *Id.* The defense presented details of the abuse. *Id.*

McLaughlin also presented mental-health evidence from four professionals: Dr. Udziela; Dr. Accardo; Dr. Kulkamthorn; and Dr. Cunningham. *Id.* at 6a–7a. Dr. Udziela talked about McLaughlin's low I.Q., and issues related to anxiety, mistrust, and adjustment disorder with depressed features resulting from childhood abuse and neglect. *Id.* at 6a. Dr. Accardo testified about a neurodevelopmental assessment, which showed deficits in language skills, common sense monitoring, and cognitive abilities. *Id.* at 7a. Dr. Accardo also testified to neurologically based attention deficit disorder and impulsivity, and that his childhood had an impact on McLaughlin's ability to make good decisions, and that he appeared to be suffering from depression. *Id.* Dr. Kulkamthorn testified that McLaughlin struggled with depression and anxiety, but only received prescribed anti-depressants during office visits because he could not pay for a prescription. *Id.* Dr. Cunningham, a clinical and forensic psychologist, testified about his interviews with McLaughlin and his biological and adoptive families, and his review of academic, mental health, and prison records. *Id.*

He argued that McLaughlin's choice to kill was affected by factors that pervaded his life arising from his childhood, and other factors. *Id*.

The jury found the qualifying statutory aggravating factor that the crime involved depravity of mind based on the repeated and excessive acts of physical abuse that McLaughlin inflicted on the victim, but could not agree on punishment. *Id*. The trial judge imposed a sentence of death. *Id*.

In his state post-conviction relief motion, McLaughlin alleged that counsel was ineffective for not calling a psychiatrist who would have testified that McLaughlin was under extreme mental or emotional disturbance at the time of the crime that substantially impaired his ability to appreciate the criminality of his conduct. *Id*. McLaughlin called Dr. Peterson to present such testimony at the post-conviction hearing. *Id*. If the defense had called the retained psychiatrist at the penalty phase, Dr. Caruso, he would have given such testimony and testified that McLaughlin was suffering from a depressive episode of bipolar disorder at the time of the murder, but the defense chose not to put him on because of questions about his background of which the defense became aware only shortly before the penalty phase. *Id*. at 8a.

The defense had hired Dr. Caruso on the recommendation of a defense mitigation specialist who had seen Dr. Caruso give a presentation at a death penalty legal education program. *Id*. One of the defense lawyers reviewed Dr. Caruso's curriculum vitae and found that he was licensed in several states. *Id*.

During the guilt-phase deliberations, before the penalty phase, Dr. Caruso told defense counsel that seventeen years before, while he had been in medical school, he

had falsified data in an experiment. *Id.* Dr. Caruso said that the data was not published so there were no sanctions imposed, but the information was published in the Federal Register. *Id.* Dr. Caruso said that he had been impeached with this information three of the previous ninety times that he had testified, and offered rehabilitation questions. *Id.*

Defense counsel decided to call Dr. Caruso anyway, and mentioned him with the other experts in the penalty-phase opening statement. *Id.* But after consulting with other lawyers during the penalty phase, defense counsel changed his mind and decided not to call Dr. Caruso. *Id.* At the close of the penalty phase, counsel told the prosecutor that he did not believe it was ineffective to mention Dr. Caruso in the opening and then not call him, but warned the prosecutor not to mention Dr. Caruso in closing. *Id.* The prosecutor did not specifically discuss the failure to call Dr. Caruso in closing. *Id.*

The Missouri post-conviction court, after an evidentiary hearing, rejected a claim that defense counsel was ineffective for not calling a psychiatrist, finding that the decision not to call Dr. Caruso was reasonable and that there was no prejudice because of the similarity of the proposed testimony to that of other experts who did testify. *Id.* The Missouri Supreme Court affirmed. *Id.* In addition, the Missouri Supreme Court also rejected as procedurally barred a more specific variation of the claim not raised in the lower court, which argued that counsel was ineffective for not doing a more thorough background investigation of Dr. Caruso. *Id.* The Missouri Supreme Court explicitly found that counsel were not ineffective for not calling Dr.

Caruso or an alternative psychiatrist, and that there was no *Strickland* prejudice that resulted from the decision. *McLaughlin v. State*, 378 S.W.3d 328, 343–344 (Mo. banc 2012).

McLaughlin filed a habeas petition in the United States District Court for the Eastern District of Missouri raising the defaulted claim that counsel was ineffective for not adequately investigating Dr. Caruso. *Id.* The district court granted relief after an evidentiary hearing, finding on *de novo* review that testimony of a psychiatrist would have created a reasonable probability that the outcome of sentencing would change. *Id.* at 8a–9a.

The United States Court of Appeals for the Eighth Circuit reversed. *Id.* at 8a–13a. The Eighth Circuit explicitly reviewed the claim under the standard in S*trickland v. Washington*, 466 U.S. 668 (1984). Appendix 9a. The court noted that the claim involved failure to find impeachment evidence about Dr. Caruso as opposed to the substance or admissibility of his testimony. *Id.* at 10a. The Eighth Circuit found, after a review of the case law, that counsel acted reasonably in its investigation of Dr. Caruso, noting that he was recommended by a mitigation specialist, his curriculum vitae was checked, he was a presenter on mitigation topics at national seminars, and he had testified in other death-penalty cases. *Id.* at 11a. The court found that McLaughlin was really arguing that a general background search would have uncovered the falsified data, but McLaughlin did not explain why a reasonable attorney would have found such a search necessary, and McLaughlin failed to overcome the presumption that counsel acted reasonably. *Id.* at 11a–12a.

In evaluating *Strickland* prejudice, the Eighth Circuit cited this Court's holding in *Harrington v. Richter*, 566 U.S. 86, 111, 112 (2011), that "*Strickland* asks whether it is reasonably likely the result would be different… The likelihood of a different result must be substantial, not just conceivable." Appendix at 12a. The Eighth Circuit found that the district court erred in combining the alleged prejudice from counsel's statement in the penalty-phase opening statement that counsel would call Dr. Caruso, with the alleged prejudice from failure to investigate Dr. Caruso. *Id.* at 12a–13a. The Eighth Circuit held that not calling a psychiatrist did not result in *Strickland* prejudice, noting that evidence in aggravation was overwhelming, including that McLaughlin stalked and terrorized the victim, planned the attack, told others before the attack that he was going to "f**king kill that b**ch" and that he did not "want to be locked up" because of her. *Id.* at 13a. The Eighth Circuit further noted that he waited outside her work with a knife, stabbed her seven times, threw her to the ground, raped her, strangled her, then dragged the body to his car, tied the victim's legs with twine and dumped her body in brush by the Missouri river. *Id.* The court found that, rather than showing remorse, McLaughlin laughed and joked with friends the next day as if nothing had happened, and told one of the victim's friends "you're next." *Id.* The court found this evidence substantially outweighed any evidence in mitigation. *Id.* The court also found that the psychiatric testimony would have been substantially similar to the testimony of Dr. Cunningham that was presented. *Id.*

The Eighth Circuit found that McLaughlin's conduct in trying to conceal the body and bleach evidence from his car contradicted potential psychiatric testimony that he could not appreciate the criminality of his conduct. *Id*. Similarly, the Eighth Circuit found that McLaughlin's statement before the murder that he did not want to be locked up, in addition to being an aggravating factor, showed that he could appreciate the wrongfulness of criminal conduct. *Id*.

The Missouri Supreme Court explicitly found that counsel was not ineffective for not calling Dr. Caruso or an alternative psychiatrist, and that there was no *Strickland* prejudice that resulted from the decision. *McLaughlin v. State*, 378 S.W.3d 328, 343–344 (Mo. 2012). The Eighth Circuit found that the decision of the Missouri courts that there was no prejudice from not calling a psychiatrist was entitled to deference under 28 U.S.C. § 2254(d), and that the decision of the Missouri courts was not contrary to nor an unreasonable application of clearly established precedent from this Court. Appendix at 14a–15a. The Eighth Circuit held that the required deference provided an independent ground for reversing the district court. *Id*. The Eighth Circuit found that the defaulted failure-to-investigate claim was without legal merit, and so post-conviction counsel could not have been ineffective for failing to raise it, because counsel cannot be ineffective for not raising a meritless claim. *Id*. at 15a.

SUMMARY OF THE ARGUMENT

McLaughlin alleges that this Court should grant certiorari to address whether prejudice from an ineffective act by counsel, allegedly inadequately investigating a psychiatrist's background, should be considered in isolation or in combination with other ineffective acts by counsel. This is not an appropriate case to consider that issue

for three reasons: first, the court below found counsel acted reasonably in investigating the psychiatrist, so there is no ineffective action with which to combine prejudice; second, the claim is procedurally barred from review; and third, the court below gave deference to the decision of the Missouri Supreme Court that there was no *Strickland* prejudice resulting from not calling a psychiatrist, as the claim in state court was framed in that manner.

McLaughlin also argues this Court should grant certiorari because he alleges that the court below really used a "more likely than not" standard in evaluating prejudice, as opposed to a reasonable-probability standard, because the court below used the phrase "substantial likelihood," which McLaughlin equates with "more likely than not." But the court below quoted the "substantial likelihood" language from this Court's description of the reasonable-probability standard in *Harrington v. Richter*. There is no conflict with *Strickland* here.

McLaughlin disagrees with the finding of the Eighth Circuit that counsel acted reasonably in the investigation of the retained penalty-phase psychiatrist. The Eighth Circuit reviewed the relevant case law and correctly applied it to the facts of the case. McLaughlin argues that the court should have reached a different result. He is really asking for correction of a perceived error. That is not the typical role of this Court.

Finally, McLaughlin argues that the Eighth Circuit should not have given deference to the decision of the Missouri Supreme Court finding that no *Strickland* prejudice resulted from not calling a psychiatrist at the penalty phase. None of the

cases that McLaughlin cites stands for the proposition that the Eighth Circuit should not have given deference on the prejudice prong of the claim. And, in any event, the Eighth Circuit decided the effectiveness prong *de novo*. Thus, the question is not properly presented here.

REASONS FOR DENYING THE PETITION

I. This Court should not grant certiorari to decide whether the Eighth Circuit erred in reviewing prejudice from alleged acts of ineffectiveness by counsel individually as opposed to cumulatively, because the Eighth Circuit found counsel acted reasonably, and so this court would be issuing an advisory opinion on the prejudice issue.

McLaughlin alleges that this Court should grant certiorari to decide whether the prejudice from alleged errors by trial counsel should be analyzed individually or cumulatively with all other alleged errors by trial counsel. Petition at 13–24. Specifically, the Eighth Circuit declined to aggregate alleged prejudice from the claim that counsel acted ineffectively in not better investigating Dr. Caruso, with alleged prejudice from the decision to mention Dr. Caruso in the penalty-phase opening statement, and then after reflection and consultation with other attorneys not call him. Appendix at 12a–13a. But the Eighth Circuit found that the investigation of Dr. Caruso was reasonable. *Id*. at 12a. And the district court had found that counsel had acted reasonably during trial, but that counsel's unreasonable action occurred in not doing a more thorough investigation of Dr. Caruso before trial. *Id*. at 43a. The issue on which McLaughlin seeks certiorari is not properly presented for three reasons.

First, in order to prevail in on ineffectiveness claim, a petitioner must show both that counsel acted outside the wide range of professional competence *and* that this unprofessional error created a reasonable probability that the outcome of the trial was changed. *Strickland v. Washington*, 466 U.S. 668, 700 (1984). Here, there was no action by counsel outside the wide range of professional competence, as the Eighth Circuit found counsel acted reasonably. So, an evaluation of whether a court should cumulate prejudice from multiple acts of incompetence would be an advisory opinion that does not affect the outcome of the case.

Second, the Missouri Supreme Court found the failure to investigate the psychiatrist claim is procedurally barred. *McLaughlin v. State*, 378 S.W. 3d at 340. The Eighth Circuit agreed and found that there was no way around the bar because post-conviction counsel was not ineffective for declining to raise the claim. Appendix at 15a. That also cuts off analysis of the issue McLaughlin asks to have reviewed.

Third, the Missouri Supreme Court rejected the broader failure to call a psychiatrist claim on the merits, finding no ineffectiveness or prejudice. The Missouri Supreme Court explicitly found that counsel was not ineffective for not calling Dr. Caruso or an alternative psychiatrist, and that no *Strickland* prejudice resulted from the decision. *McLaughlin v. State*, 378 S.W.3d 328, 343–344 (Mo. banc 2012). The Eighth Circuit found that the decision of the Missouri courts that there was no prejudice from not calling a psychiatrist was entitled to deference under 28 U.S.C. § 2254(d), and that the decision of the Missouri courts was not contrary to or an unreasonable application of clearly established precedent from this Court. Appendix

at 14a–15a. The Eighth Circuit found that the required deference provided an independent ground for reversing the district court. *Id*. at 15a. The issue on which McLaughlin seeks review cannot be meaningfully reached for this reason as well.

In short, even if the cumulative-prejudice question advanced by McLaughlin were an issue worthy of this Court's review, this case would be a poor vehicle to address it, because the question is not properly presented and its resolution will not affect the outcome of the case.

II. This Court should not grant court certiorari to decide whether the Eighth Circuit abandoned the prejudice standard in *Strickland v. Washington* by also using this Court's "substantial likelihood of a different result" language from *Harrington v. Richte*r, because there is no real issue here, as the Eighth Circuit did nothing wrong by adopting language used by this Court in doing *Strickland* prejudice analysis.

McLaughlin alleges that, by using the phrase "substantial likelihood" in describing *Strickland* prejudice, the Eighth Circuit was really using a "more likely than not" test for *Strickland* prejudice as opposed to a reasonable-probability test, because in McLaughlin's view "substantial likelihood" means "more likely than not." Petition at 24–25. But the Eighth Circuit was quoting language this Court used in describing *Strickland* prejudice. The Eighth Circuit evaluated *Strickland* prejudice by citing this Court's holding in *Harrington v. Richter*, 566 U.S. 86, 111, 112 (2011), that "*Strickland* asks whether it is reasonably likely the result would be different… The likelihood of a different result must be substantial, not just conceivable." Appendix at 12a. The court below did not err by using the language to describe *Strickland* prejudice that this Court used to describe *Strickland* prejudice in

Harrington. *See Woodford v. Visciotti*, 537 U.S. 19 (2002) (rejecting the idea that a court had rejected the reasonable probability standard of review by using the word "probability" as opposed to the phrase "reasonable probability" at three places in the opinion in analyzing *Strickland* prejudice). There is no real issue to review here.

III. This Court should not grant certiorari to review the fact-bound question whether the Eighth Circuit erred in finding counsel's investigation of the penalty-phase psychiatrist was reasonable, because this is an invitation to correct an alleged error in the application of precedent to specific facts, not an issue that is appropriate for certiorari review.

The Eighth Circuit conducted analysis of the facts and the relevant case law, including this Court's decision in *Wiggins v. Smith*, 539 U.S. 23 (2003), in holding the defense investigation of Dr. Caruso was reasonable. Appendix at 9a–12a. McLaughlin disagrees with the result, and cites cases that he alleges have similar fact patterns in which counsel were found to be ineffective. Petition at 25–27. What McLaughlin really does here is ask this Court to become a court of error correction based on his view that the court below should have reached a different result in applying *Strickland* to the specific facts of this case. This Court is not a court of error correction, and McLaughlin presents no real issue that is appropriate for certiorari review here. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

IV. This Court should not grant certiorari to review whether the Eighth Circuit erred in holding that the finding of the Missouri Supreme Court that that there was no prejudice from not calling a psychiatrist is entitled to deference.

The Eighth Circuit held that the decision of the Missouri Supreme Court rejecting the broader claim that counsel was ineffective for not calling a psychiatrist due to lack of *Strickland* prejudice was entitled to deference under 28 U.S.C. § 2254(d)(1), and that this provided an independent reason for rejecting the narrower claim that counsel was ineffective not better investigating Dr. Caruso. Appendix at 14a–15a. McLaughlin alleges that applying deference here is contrary to this Court's decisions in *Harrington v. Richter*, 562 U.S. 86, 98 (2011), *Gonzalez v. Cosby*, 545 U.S. 524, 530 (2005), *Townsend v. Sain*, 372 U.S. 293, 314 (1963), *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), and *Porter v. McCollum*, 558 U.S. 30, 39 (2009). None of these cases supports McLaughlin's argument that applying deference here was incorrect.

The holding of *Harrington* is that a summary state-court decision without an opinion is entitled to deference and must be upheld if there is reasonable argument that supports the decision. *Harrington*, 562 U.S. at 105. *Harrington* does not support McLaughlin's proposition that the Eighth Circuit could not give deference to the Missouri Supreme Court's prejudice analysis on the broader "failure to call a psychiatrist" claim when analyzing prejudice on the narrower "failure to call a psychiatrist because of inadequate investigation" claim.

Gonzalez, 545 U.S. at 530–36, addressed the requirement that claims raised in a Rule 60(b) motion should be dismissed as a second or successive habeas petition. *Townsend*, 372 U.S. at 314–322, considered when the inadequacy of the record

requires an evidentiary hearing in a habeas case. Neither of those cases supports McLaughlin's allegation of a conflict of authority.

Rompilla, 539 U.S. at 534, held that, if a state court did not review the prejudice prong of *Strickland* claim, a federal habeas court should not give deference on that prong in its habeas review. Similarly, *Porter*, 558 U.S. at 39, held that where a state court did not review the performance prong of a *Strickland* claim, the federal habeas court should review that prong *de novo*. Here, the Eighth Circuit reviewed the prejudice prong deferentially because the Missouri Supreme Court had found there was no *Strickland* prejudice from not calling a psychiatrist, and the Eighth Circuit reviewed the ineffective assistance prong *de novo* and found counsel acted reasonably. That analysis is consistent with what *Porter* and *Rompilla* indicate should be done.

In short, the purported conflicts of authority that McLaughlin identifies are illusory. And even if not, the question is not properly presented, because the Eighth Circuit reviewed the performance prong *de novo*, and found counsel acted reasonably.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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