THIS IS A CAPITAL CASE

No. 18-8820

IN THE

SUPREME COURT OF THE UNITED STATES

CARMAN DECK, Petitioner

v.

RICHARD JENNINGS and ERIC S. SCHMITT, Respondents

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Carlyle Parish LLC
Elizabeth Unger Carlyle*
6320 Brookside Plaza #516
Kansas City, Missouri 64113
*Counsel of Record

Kevin Louis Schriener
Law & Schriener, LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Petitioner Carman Deck presents his reply in support of his petition, responding to the state's brief in opposition. He continues to rely on all argument and authorities presented in the petition.

REASONS FOR GRANTING THE WRIT

I. THE PETITION IN THIS MATTER SHOULD BE GRANTED UNDER THE COURT'S "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI."

At the outset, the respondents fault Mr. Deck's petition for not citing explicitly to this Court's Rule 10. Of course, that rule indicates that the factors listed are "neither controlling nor fully measuring the Court's discretion." Nonetheless, for the benefit of the Court and respondents, Mr. Deck points out that his arguments address each of the three considerations listed in Rule 10. They are specifically cited below.

II. THIS COURT SHOULD GRANT CERTIORARI TO DIRECT THE COURT OF APPEALS TO ISSUE A COA AND REVIEW MR. DECK'S GROUNDS FOR RELIEF.

A. DENIAL OF EVIDENTIARY HEARING

The state's argument that the denial of an evidentiary hearing is reasonable is fallacious. First, the state indicates, and Mr. Deck concedes, that the grounds as to which he seeks an evidentiary hearing were procedurally defaulted. Thus, they were not considered in state court. Then, the state argues that an evidentiary hearing is not needed in federal court because Mr. Deck had a post-conviction

hearing in state court. Of course, that hearing did not address claims that were not before the state court. Thus, the fact that Mr. Deck raised *other* grounds in state court is irrelevant to whether he was entitled to a hearing on previously defaulted grounds.

The state's attempt to distinguish the decision in *Barnett v. Roper*, 904 F.3d 623 (8th Cir. 2018), deserves mention. In that case, the district court correctly held that where the state court had denied a hearing on a claim based on a finding of procedural default in the post-conviction motion, a hearing was necessary to determine 1) whether Mr. Barnett's post-conviction counsel were ineffective and 2) whether he was entitled to relief. Here, the district court did not analyze the facts underlying each claim, so it is impossible to know why the court believed the facts were fully developed. As to the three grounds for which an evidentiary hearing was requested, it is clear that Mr. Deck alleged facts which were not self-proving and which had never been presented in state court. Under this Court's precedents, specifically *Townsend v. Sain*, 372 U.S. 293 (1963), Mr. Deck is entitled to a hearing because he has stated facts which, if proven, would entitle him to relief.

B. DENIAL OF INVESTIGATIVE FUNDS FOR HABEAS PROCEEDINGS

Initially, the state argues that this issue is not currently before the Court because it was raised and rejected in *In Re Deck*, (8th Cir. Judgment entered on Sept. 19, 2014). This contention should be rejected out of hand. While Mr. Deck did attempt, during the pendency of the proceedings, to obtain a writ of mandamus

from the Eighth Circuit to obtain needed funding, the Eighth Circuit denied the petition without opinion. There was never a finding by that court that the funding was unnecessary. After that decision, Mr. Deck continued, *in the district court*, to seek funding. Specifically, on November 29, 2018, Mr. Deck again sought funding from the district court. The request was not ruled until the order denying relief. In its order denying relief under Rule 59(e), the district court explicitly denied the funding request. Dist. Court. Doc. 106, p. 19. The fact that the Eighth Circuit did not grant mandamus over four years earlier does not insulate that decision from appellate review.

The state suggests that *In re Carlyle*, 644 F.3d 694, 699 (8th Cir. 2011)[1] had held that the Criminal Justice Act confers no appellate jurisdiction. First, *In Re Carlyle* is an opinion by a single judge, not a ruling on a case before the Eighth Circuit. It has no precedential weight. Second, that case concerned not the failure of a court to provide investigative and expert funding, but rather to provide compensation for counsel. Under this Court's ruling in *Ayestas v. Davis*, 138. S.Ct. 1080 (2018), the decision of the court below not to provide expert and investigative services may be reviewed on appeal. Of course, that decision was made long after Mr. Deck attempted to obtain Eighth Circuit review of the denial through mandamus.

Finally, the state attempts to analyze facts presented in the petition, which Mr. Deck concedes were not fully investigated due to lack of funding, to determine

[1] The state incorrectly cited the name of this case as "*In Re Unger.*"

whether he was prejudiced by the lack of funding. But Mr. Deck cannot now present evidence he was never able to develop to refute these claims.

C. GROUND 1: IMPROPER ADMISSION OF CONFESSION

Mr. Deck relies on the arguments in his petition in connection with this ground. He notes that, by citing cases holding that *Stone v. Powell*, 428 U.S. 465 (1976), should not apply post-AEDPA, he has addressed the "conflict" consideration in Supreme Court Rule 10.

D. GROUND 2: CHANGE OF VENUE.

The state suggests that Mr. Deck is arguing that the district court did not "evaluate whether pretrial publicity was indicative of the "current community pattern of thought" under *Irvin v. Dowd*, 366 U.S. 717 (1961)." Brief in Opposition, p. 25. But it was the *Missouri Supreme Court* that failed to use the proper standard. The fact that the district court cited *Irvin* is thus irrelevant.

Mr. Deck would also note that he has cited cases from other circuits granting a COA on change of venue issues. Thus, review is proper under the "conflict" consideration in Rule 10. Other federal courts have granted certificates of appealability in cases in which the trial court has denied a change of venue based on pretrial publicity. *See e.g. Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012); *Hetzel v. Lamas*, 630 F. Supp. 2d 563 (E.D. Pa. 2009).

E. GROUND 5, INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CONSULT A FALSE CONFESSION EXPERT

With respect to this ground, the district court's statement that the relevant fact had been fully developed through the records submitted to the court and therefore no evidentiary hearing was necessary is a clear misstatement of the record which, in a death penalty case, should be corrected by this Court. The court stated that Mr. Deck "speculated" about what a confession expert could have done to assist trial counsel. But the court had before it a declaration from the expert, not simply habeas counsel's opinions about what the expert could have done. This evidence was clearly sufficient to require an evidentiary hearing before the court could conclude that it lacked "some merit."

The state contends that Mr. Deck's trial counsel "litigated the issue of Deck's confession competently and thoroughly." Brief in opposition, p. 19. But without hearing the evidence that trial counsel could have presented, but did not, and without hearing from trial counsel that this evidence would not have helped them, the district court clearly had an insufficient record before it to come to this conclusion.

The state also argues that Mr. Deck's pleading was inadequate because he did not name the expert in his petition, but did so in its traverse. The state cites no authority requiring a petitioner to name his expert in the petition. Rather, as required by the habeas rules, he explained in his petition the body of knowledge that an expert would have provided. *See* Petition, pp. 37-38. The district court's

rejection of this ground was not based on Mr. Deck's failure to name his false confession expert in the pleadings.

F. GROUND 6: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE INNOCENCE

The difficulty with the state's argument that the district court properly analyzed the claim is that the district court used the wrong standard, an issue not discussed by the state. The district is not permitted, when a procedurally defaulted claim is presented, to deny relief based on a full merits review. Rather, if the claim has "some merit" and can withstand the claim of procedural default because it was omitted as a result of ineffective assistance of post-conviction counsel, the claim is considered *de novo* based on **evidence** supporting it.

Mr. Deck's pleadings raise an issue that simply cannot be determined based on the district court's speculation about what the omitted witnesses would have said. He is entitled to a COA on this ground.

G. GROUNDS 8 AND 9: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO HEARSAY TESTIMONY ABOUT JIM BOLIEK'S ALIBI.

The state attempts to argue that the district court's decision is correct based on rulings the district court did not make. The district court's ruling relied on a prejudice analysis, rather than a finding that a hearsay objection would have been meritless. Mr. Deck cited *Jones v. Bassinger*, 635 F.3d 1030, 1046 (7th Cir. 2011), to explain why reasonable jurists could disagree that the hearsay objection would have

been unavailing. With respect to the prejudice analysis, Mr. Deck would note that because there was no objection, the jury was never instructed that the testimony regarding Jim Boliek's alibi was not to be considered for its truth. Under the *Martinez* standard, Mr. Deck has pled a ground with "some merit" and is entitled to review.

H. GROUND 14: IMPROPER PERSONALIZATION IN FINAL ARGUMENT

Mr. Deck relies on the briefing in his petition for writ of certiorari in connection with this ground.

I. GROUND 16: REFUSAL OF DEFENSE INSTRUCTIONS ON BURDEN OF PROOF ON MITIGATING EVIDENCE

Mr. Deck would note that, in opposition to this ground, the state cites Missouri state court cases holding that Missouri's instructions comport with *Kansas v. Marsh*, 548 U.S. 163 (2006). Of course, that does not resolve the federal question. This ground presents an important question of federal law on which this Court should rule. *See* Supreme Court Rule 10.

J. GROUNDS 18 AND 25: INEFFECTIVE ASSISTANCE AT JURY SELECTION.

The state wonders what standard Mr. Deck contends should be applied when a jury panel has not been properly questioned about critical issues. Mr. Deck points out to the court that on p. 22 of his petition, he argues that when a court finds that

prospective jurors should have been questioned but were not, no further showing of prejudice is necessary.

K. GROUNDS 19 AND 20: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE AND CALL MITIGATION WITNESSES.

Mr. Deck relies on the briefing in his petition for writ of certiorari in connection with this ground.

III. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE COURTS OF APPEALS TO EXPLAIN DENIALS OF CERTIFICATES OF APPEALABILITY.

The state suggests that the parties' ability to set forth arguments has not been affected by the Eighth Circuit's failure to provide this Court with a reasoned decision. The state failed to address Mr. Deck's argument that this failure likely contributes to the inequity between circuits in applying the COA standard. This Court should grant certiorari and address this issue.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

Carlyle Parish LLC
Elizabeth Unger Carlyle*
6320 Brookside Plaza #516
Kansas City, Missouri 64113
*Counsel of Record

Kevin Louis Schriener
Law & Schriener, LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105

ATTORNEYS FOR PETITIONER