THIS IS A CAPITAL CASE

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CARMAN DECK, Petitioner

v.

RICHARD JENNINGS, Respondent

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

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

QUESTION PRESENTED FOR REVIEW

Mr. Deck filed a petition for habeas corpus relief from his convictions and death sentences. The district court granted relief as to two grounds, but denied both relief and a certificate of appealability (COA) as to all other grounds. Without explanation, the Eighth Circuit also denied a COA, and denied rehearing. The case thus presents the following questions:

1. Did Mr. Deck present grounds for relief as to which reasonable jurists could differ concerning the correctness of the district court's conclusion, thus requiring a COA?

2. Did the court of appeals' unexplained denial of a COA as to any grounds improperly insulate its decision from review by this Court?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Carman Deck is the Petitioner in this case and was represented in the Court below by Elizabeth Unger Carlyle and Kevin Louis Schriener.

Richard Jennings, Warden of Potosi Correctional Center, is the Respondent. He and his predecessors in that position, Cindy Griffith and Troy Steele, were represented in the court below by Assistant Missouri Attorney General Katharine Dolin.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

TABLE OF CONTENTS

Index To Appendix

Supplemental sealed appendix

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Petitioner Carman Deck prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on August 20, 2018.

.

OPINIONS BELOW

The order of the Eighth Circuit denying a Certificate of Appealability (COA) and dismissing Mr. Deck's cross-appeal is printed at Appendix (hereinafter "App.") p. 1a. No opinion accompanied the decision or was reported. The memorandum and order of the district court is printed beginning at App. 2a.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on August 20, 2018, denying a COA as to all grounds presented in Mr. Deck's petition for writ of habeas corpus as to which the district court denied relief, and dismissing Mr. Deck's cross-appeal *See* App. p. 1a. That court denied a timely petition to that court for rehearing or, in the alternative, for rehearing en banc, on October 10, 2018. App. p. 366a. On January 2, 2019, Justice Gorsuch granted Mr. Deck's motion for extension of time to file the petition for writ of certiorari and ordered that it be filed on or before March 9, 2019.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

[1] Because March 9 is a Saturday, this order had the effect of extending the time to March 11, 2019. U.S. Sup. Ct. R. 30.1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state 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.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Mr. Deck comes before this Court with two sentences of death for the 1996 murders of James and Zelda Long. After his conviction and first sentences of death were affirmed on direct appeal (*State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999)), the sentences of death were reversed by the Missouri Supreme Court on the grounds of ineffective assistance of counsel. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). He then received a second sentencing hearing before a second jury. His second sentences of death were reversed by the United States Supreme Court (*Deck v. Missouri*, 544 U.S. 622 (2005), because he was required to appear before the jurors in shackles for his second sentencing. Following a third sentencing hearing, his third sentences of death were affirmed by the Missouri Supreme Court. *State v. Deck*, 303 S.W.2d 527 (Mo. banc 2010). Mr. Deck then filed a post-conviction proceeding. The Missouri Supreme Court affirmed the denial of post-conviction relief. *Deck v. State*, 381 S.W.3d 339 (2012).

Mr. Deck then filed his habeas corpus petition. After briefing, the U.S. District Court, Eastern District of Missouri, denied relief as to all grounds relating to the convictions themselves, and as to most of the grounds relating to the sentences. A COA was denied as to all rejected grounds. However, the district judge

granted relief as to two sentencing grounds. That decision is now before the Court of Appeals on the respondent's appeal. (Deck v. Steele, Case No. 17-2055.)

Mr. Deck cross-appealed the denial of relief as to his additional grounds. In a motion for COA filed in the Eighth Circuit, he argued that he was entitled to a COA as to two procedural issues, the failure of the district court to grant an evidentiary hearing as to several grounds and the failure of the district court to provide adequate funding for appointed habeas counsel to perform a full investigation in support of the asserted grounds for relief. The motion also asserted that Mr. Deck was entitled to a COA as to the following substantive grounds:

1. The improper admission of Mr. Deck's confession.

2. The denial of a change of venue.

3. Ineffective assistance of trial counsel for failure to consult with a false confession expert.

4. Ineffective assistance of trial counsel for failure to investigate and call as witnesses two persons who would have cast doubt on his guilt.

5. Ineffective assistance of trial counsel for failure to object to hearsay testimony by two witnesses concerning the alibi of another suspect.

6. Violation of due process of law when the prosecutor improperly expressed his personal beliefs in final argument at the last sentencing hearing.

7. Violation of the Eighth Amendment when the trial court refused proffered defense instructions concerning the burden of proof as to mitigation.

8. Ineffective assistance of trial counsel for failure to conduct proper jury selection questioning to determine the prospective jurors' bias in favor of the death penalty.

9. Ineffective assistance of trial counsel for failure to investigate and call mitigation witnesses.

Without revealing its analysis, the court of appeals denied a COA. App. p. 1a.

REASONS FOR GRANTING THE WRIT

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

As noted above, the court of appeals denied Mr. Deck a COA as to all grounds rejected by the district court. Mr. Deck had specifically requested a COA as to nine of those grounds, as well as two procedural grounds. Each of them warranted a COA.

In *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017), this Court rejected the reasoning of the Fifth Circuit in denying a COA, holding that the court had improperly reviewed the merits of the claim:

> The court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief, 623 Fed. Appx., at 674—but it reached that conclusion only after essentially deciding the case on the merits. . . . We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable."

Of course, in Mr. Deck's case, this Court cannot determine the reasoning employed by the Eighth Circuit when it denied a COA as to any issue. However, the standard of 28 U.S.C. § 2253, as interpreted in *Buck* and this Court's other cases, notably *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003), requires a COA in Mr. Deck's case. Because Mr. Deck has been denied review of significant grounds for relief, and faces a sentence of death, this Court should intervene and provide him with the opportunity for appellate review. The individual grounds as to which review is required are discussed below.

A. DENIAL OF EVIDENTIARY HEARING

Mr. Deck's petition included a number of grounds of ineffective assistance of trial counsel which were not presented in state court. He asserted that the failure to present these grounds in state post-conviction proceedings was ineffective assistance of post-conviction counsel, and therefore the grounds could be reviewed by the district court under *Martinez v. Ryan*, 566 U.S. 1 (2012). He requested an evidentiary hearing as to three of these grounds, Grounds 5 (failure to investigate a false confession expert), 6 (failure to investigate evidence of innocence), and 20 (failure to investigate and present mitigating evidence not identified in state court).

The district court denied a hearing, saying, "Because the facts underlying Deck's claims have been fully developed through the records submitted to the Court and no further development was necessary, I did not hold an evidentiary hearing on

the claims." App. p. 3a. In support of this decision, the district court cited only one case, *Sweet v. Delo*, 125 F.3d 1144, 1160 (8th Cir. 1997).

That case certainly does not support the district court's decision. First, *Sweet* rested on the premise that the petitioner was not entitled to a hearing on grounds which were procedurally defaulted. But *Sweet* was decided long before *Martinez v. Ryan,* 566 U.S. 1 (2012), which provided for an exception to procedural default that Mr. Deck asserted as to each of the unpreserved grounds for which he sought a hearing. Second, Mr. Deck, unlike Mr. Sweet, did not have a five day hearing to enable him to develop the factual basis of these grounds. *See Sweet* at 1160. Rather, all three of the claims referenced here involve failure to present witnesses whose testimony has never been heard by any court.

Both the Eighth and Ninth circuits have held that an evidentiary hearing is appropriate when a petition alleges that otherwise defaulted grounds for relief are available under *Martinez.* In *Dickens v. Ryan*, 740 F.3d 1302, 1321, 1322 (9th Cir. 2014),, the court held that 28 U.S.C. § 2254(e)(2) does not bar a hearing on the issue of whether a petitioner has shown "cause" under *Martinez*, including a showing that the claim is substantial. Applying AEDPA, the court in *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007), also explained that 28 U.S.C. §2254(e)(2) did not apply because Mr. Simpson's claim, like those at issue here, was previously unavailable, and remanded for an evidentiary hearing. *See also Barnett v. Roper*, 904 F.3d 623 (8th Cir. 2018) (affirming grant of habeas relief after nine day hearing on ground previously held defaulted). The district court's decision to deny a hearing without

even considering the effect of *Martinez* is clearly debatable among jurists of reason, and the Eighth Circuit should consider it.

B. DENIAL OF INVESTIGATIVE FUNDS FOR HABEAS PROCEEDINGS

Mr. Deck was repeatedly denied funds by the district court to perform a full investigation in support of the grounds that he alleged were available under *Martinez*. The district court, in a sealed order rejecting the request, indicated that in habeas corpus proceedings, the court could consider only whether the Missouri Supreme Court's decision regarding trial counsel's presentation of the mitigation evidence was unreasonable or contrary to clearly established federal law. Supp. App. p. 368a. Of course, that standard applies only to grounds which have previously been reviewed in district court. Grounds as to which the petitioner has overcome a procedural default are reviewed *de novo. Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The district court's conclusion, which completely ignored the *Martinez* exception to the procedural default rule, was clearly wrong. *See Barnett v. Roper*, 904 F.3d 623 (8th Cir. 2018) (request to review ground for relief under *Martinez* was not a successive habeas petition).

After the district court's decision, this Court decided *Ayestas v. Davis*, 138. S.Ct. 1080 (2018). Under this holding the decision to deny funds was squarely before the Eighth Circuit, but there is no evidence that the Eighth Circuit considered it. This Court should direct the Eighth Circuit to do so.

C. GROUND 1: IMPROPER ADMISSION OF CONFESSION

The district court found that review of Ground 1 was barred by *Stone v. Powell,* 428 U.S. 465, 494 (1976), because the basis for exclusion of Mr. Deck's confession rested on an arrest which was improper under the Fourth Amendment. This decision is debatable among jurists of reason.

This Court has never applied *Stone v. Powell* to a capital case. 2 Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* §27.1 (6th Ed. 2011). In *Stone*, this Court balanced the societal costs of enforcing the exclusionary rule against the harm to the individual litigant, and concluded that habeas review should not be available for Fourth Amendment claims. Since its issuance over forty years ago, *Stone* remains the only Supreme Court case to have held that a particular constitutional claim is immune from habeas review. Jurists of reason could dispute whether, were the Court today to perform the same balancing, particularly when the harm to the individual litigant includes potential execution, the same result would occur.

Further, at least two courts have held that *Stone v. Powell* no longer applies after AEDPA. In *Carlson v. Ferguson*, 9 F.Supp.2d 654 (D.W.V. 1998), the court noted that the limitation on review prescribed in *Stone* "is neither jurisdictional nor statutorily based." *Id.* at 657, citing *Kuhlman v. Wilson*, 477 U.S. 436, 447 (1986), and *Withrow v. Williams*, 507 U.S. 680, 686 (1993). The court then concluded that AEDPA abrogated *Stone*.

> Respondents have provided this Court with no evidence that Congress intended to exclude Fourth Amendment claims from the statutory

> framework of 28 U.S.C. § 2254(d). In fact, the plain language of the statute reads: "An application for a writ of habeas corpus. . . shall not be granted with respect to any claim that was adjudicated on the merits in [state court]." 28 U.S.C. § 2254(d) (emphasis supplied). Following the well-established plain language rule of statutory interpretation, see *Brogan v. United States*, 522 U.S. 398, 118 S.Ct. 805, 807, 139 L.Ed.2d 830 (1998); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89–90, 5 L.Ed. 547 (1823), this Court concludes that the phrase "any claim that was adjudicated on the merits" as drafted in section 2254(d) includes claims premised under the Fourth Amendment's exclusionary rule.

In *Herrera v. McMaster*, 225 F.3d 1176 (10th Cir. 2000), the court held that Mr. Herrera had not received a full and fair hearing on his Fourth Amendment claim because the state court applied the wrong legal analysis. The same is true with respect to Mr. Deck's claim. Thus, review is not barred by *Stone v. Powell.* Certiorari should be granted to require the Eighth Circuit to review the district court's finding that review of Mr. Deck's confession claim was barred by *Stone v. Powell.*

D. GROUND 2: CHANGE OF VENUE.

In addressing Ground 2, the district court found that the Missouri Supreme Court set out the correct constitutional standard for determining whether a defendant could receive a fair trial from a jury exposed to pretrial publicity when it denied relief on Mr. Deck's change of venue claim. The district court further found that this determination was not "contrary to, or involved an unreasonable application of," clearly established federal law. Nor did the district court find this

determination to be an unreasonable determination of the facts. Reasonable jurists could disagree with these conclusions, and a COA is required.

Both the Missouri Supreme Court and the district court applied the wrong constitutional standard. The Missouri Supreme Court found that Mr. Deck had failed to demonstrate that a juror who sat on his case had such fixed opinions that they could not render a fair and impartial verdict in this case. But that court did not consider whether the publicity was indicative of "the then current community pattern of thought." *Irvin v. Dowd*, 366 U.S. 717, 725-27 (1961). The reason Mr. Deck could not show that any juror had a fixed opinion such that they could not render a fair and impartial verdict in this case is that pretrial publicity was indicative of the community pattern of thought and the jurors who served and were tainted by this publicity assured the court of their impartiality. *Irvin*, 366 U.S. at 725-27. Because the Missouri Supreme Court did not address whether the juror assurances were indicative of the community pattern of thought, reasonable jurists could conclude the decision was "contrary to, or involved an unreasonable application of," clearly established federal law. It was also an unreasonable determination of the facts.

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). This Court should grant certiorari and direct the Eighth Circuit to review Mr. Deck's change of venue claim.

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

Mr. Deck presented this ground for the first time in federal court, contending its omission from state court proceedings was the result of ineffective assistance of post-conviction counsel and that the ground was "substantial" within the meaning of *Martinez*.

In rejecting this ground, the district court conducted a full merits review rather than simply determining whether the ground was "substantial." Mr. Deck specifically requested a hearing on this ground, so that he could present evidence from confession expert Dr. Deborah Davis (who provided a report to the district court) concerning both her conclusions about Mr. Deck's confession and the assistance she could have given trial counsel.

In its merits review, the district court first concluded that it was unlikely that a false confession expert would have been permitted to testify. While many jurisdictions have now accepted the use of expert testimony in this area, Missouri courts have, admittedly, been slow to do so. But that does not mean that counsel should not have attempted to present this evidence.

The district court also rejected Mr. Deck's contention that a confession expert could have assisted trial counsel even if she did not testify, stating,

> Other than Deck's speculation that a confessions expert would have provided additional assistance to counsel, nothing before the Court shows a reasonable probability that such additional assistance would

> have affected the outcome of the case, especially in light of counsel's conduct in ably pursuing a false confessions defense.

App. p. 29a.

But Mr. Deck did not "speculate" about what a confession expert could have contributed to the defense. Rather, he presented a report from Dr. Deborah Davis (Traverse Ex. 3) that explained the various functions of a false confession expert and how they could have been used in Mr. Deck's case, including advising the attorney about useful discovery, about information that needed to be obtained from Mr. Deck, about jury selection, and about questioning of the witnesses.

Without hearing the testimony of Dr. Davis, the district court could not properly conclude that this ground has *NO* merit, as required to reject it as unsubstantial under the *Martinez* standard,. While the district court found that defense counsel "ably" pursued a false confession defense, it is clear that this strategy was unsuccessful. Use of expert assistance was fully consistent with the defense, and the failure to do so presents a "substantial" claim of ineffective assistance of trial counsel. This Court should grant certiorari to require the Eighth Circuit to review the district court's rejection of this ground for relief without a hearing.

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

Again, the district court used the wrong standard when it determined that the ground was not "substantial" within the meaning of *Martinez*. The district court

stated that it "declined to find prejudice" from the failure to investigate and call Jim Boliek as a witness. App. p. 34a. Later, the district court found that Mr. Deck "has failed to show he was prejudiced" by counsel's failure to investigate and call as witnesses Elaine Gunther and William Boliek. *Id.,* p. 345a.

The district court then faulted Mr. Deck for failing to provide affidavits in support of his allegation that trial counsel were ineffective for failing to investigate and call nurses at the hospital, characterizing his allegations as "speculation." The fact that an allegation is not supported by an affidavit does not make it speculative. It simply makes it unproven. But in order to show that this ground, which was never presented in state court, is "substantial," reasonable jurists could disagree that Mr. Deck was required to provide affidavits.

No case holds that affidavits are required to obtain a hearing on a claim made available by *Martinez.* Moreover, in this case, the failure to present affidavits is directly related to the lack of funding. *See* Section B, above. The *Martinez* determination focuses not on evidence but on pleadings.

Based on the pleadings, which indicated with specificity what the omitted witnesses would have said, the district court should have granted a hearing. In particular, the district court's finding that the nurses' testimony that Mr. Deck was at the hospital at 10:00 p.m. misstates Mr. Deck's claim. In his petition, Mr. Deck alleged that Ms. Shelia Francis and other nurses would testify that Mr. Deck arrived at the hospital before the murders were committed and did not leave until

10:00 p.m., which was after the victims died.. *That* testimony, of course, would have provided Mr. Deck with an alibi for the murders.

The allegations in this ground are sufficient for a finding that the ground was "substantial" and required a hearing. *See Dickens v. Ryan*, 740 F.3d 1302, 1321, 1322 (9th Cir. 2014). In light of *Dickens*, reasonable jurists could disagree with the district court's conclusion, and a COA should be issued.

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

In Mr. Deck's first statement to police, he denied committing the offense, but suggested that another person, Jim Boliek, had done so. According to this statement, Mr. Boliek gave Mr. Deck the items from the victims' home that were found in Mr. Deck's car. While Mr. Deck later confessed to the crime, he contended at trial that his confession was false and coerced. Two officers testified that the had investigated Mr. Boliek's alibi for the offense, and that several witnesses told officers that he was elsewhere when it was committed. None of these witnesses testified in court; the jury heard only the officers' accounts of their statements.

Trial counsel did not object to this hearsay evidence, and post-conviction counsel did not raise this failure as an instance of ineffective assistance of counsel. Mr. Deck raised this instance of ineffective assistance of trial counsel in his habeas corpus petition, and contended that the procedural default was excused under *Martinez*.

Rejecting this ground, the district court again conducted a full merits review of these grounds for relief before finding them insubstantial. Considering Ground 8, the district found that Mr. Deck could not show how the exclusion of Corporal Dolen's statement would have had any effect on the outcome of the trial and that he was not "prejudiced" by counsel's failure to object to it. Similarly, as to Ground 9, the district court found that Mr. Deck could not demonstrate how Detective Knoll's testimony that three people supported Mr. Boliek's alibi had any effect on the outcome of the trial of this case. However, particularly when considered in conjunction with Mr. Deck's ground concerning the failure to consult and call a false confession expert, this cursory evaluation of prejudice is insufficient to meet the *Martinez* standard.

Moreover, reasonable jurists could disagree whether these hearsay statements would have been admitted under a "course of investigation" exception if trial counsel had objected to them, as the district court suggested. App. p. 51a. *See Jones v. Bassinger*, 635 F.3d 1030, 1046 (7th Cir. 2011) (noting that "course of investigation evidence" has little or no probative value, but the dangers of prejudice and abuse posed by the "course of investigation" tactic are significant). Mr. Deck has made a strong enough showing of each *Martinez* element to require an evidentiary hearing in the district court regarding the lack of reasonable trial strategy in the failure to object. This Court should grant certiorari and instruct the Eighth Circuit to consider these grounds and remand for an evidentiary hearing.

H. GROUND 14: IMPROPER PERSONALIZATION IN FINAL ARGUMENT[2]

Denying relief on this ground, the district court used the wrong legal standard. The district court cited two Missouri ***plain error*** cases, *James v. Bowersox*, 187 F.3d 866 (8th Cir. 1999), and *Sublett v. Dormire*, 217 F.3d 598 (8th Cir. 2000). Under this standard, the court found that the questioned comments were not so inflammatory that a court should have granted a mistrial *sua sponte*..

But Mr. Deck fully preserved this ground for review, both at the trial court and appellate level. Therefore, the standard is that of *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999); *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989); and *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006). As the court of appeals explained in *Weaver,*

> Statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury. *Miller v. Lockhart*, 65 F.3d 676, 684-85 (8th Cir.1995). A prosecutor should not emphasize his or her position of authority in making death penalty determinations because it may encourage the jury to defer to the prosecutor's judgment. *Newlon*, 885 F.2d at 1335-37.

Id. at 840-841. The *Weaver* court held that the prosecutor's statements over objection regarding his personal beliefs resulted in a violation of due process, and that the state court's contrary conclusion was unreasonable under the AEDPA standard. *See also Copeland v. Washington,* 232 F.3d 969 (8th Cir.2000).

---

[2] This and the succeeding grounds, which concern the final penalty phase trial, were argued in the alternative in the Eighth Circuit. Mr. Deck certainly does not contest the order of the district court commuting his sentence to life without parole. Should the court of appeals reverse that finding, Mr. Deck contends he is entitled to a COA and a new penalty phase under this and the grounds which follow.

In light of *Shurn*, *Newlon*, *Weaver*, and *Copeland*, this Court should grant certiorari and direct the Eighth Circuit to review the merits of this ground.

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

The district court denied Ground 16, finding that the Missouri Supreme Court's determination that the trial court did not err in refusing requested defense instructions 8 and 13 regarding mitigating evidence was not contrary to nor an unreasonable application of federal law. The district court implicitly found that the Missouri Supreme Court identified and properly applied this Court's decision in *Kansas v. Marsh*, 548 U.S. 163 (2006). In *Marsh*, this Court upheld the constitutionality of the Kansas death penalty statute that permitted the death penalty when mitigating and aggravating factors are in equipoise.

The Missouri death penalty statute, however, differs from the Kansas statute upheld in *Marsh*. Unlike the Kansas statute, the Missouri statute creates a presumption in favor of the death penalty by requiring jurors to find unanimously that the mitigation factors outweigh the aggravating factors to eliminate the death penalty from consideration. See Mo. Rev. Stat. § 565.030.4. Under the Kansas statute, the court must impose a sentence of life without parole if the State does not prove beyond a reasonable doubt that the mitigating circumstances do not outweigh the aggravating circumstances. *Marsh*, 548 U.S. at 177-178. As this Court observed regarding the Kansas statute:

> Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.

Id. at 178 79.

The Missouri statute in effect at the time of Mr. Deck's trial permitted a death sentence, even if the jurors do not unanimously agree that the aggravating factors outweigh the mitigation factors, if: (1) the jurors find at least one aggravating circumstance; (2) the jurors find that the evidence in aggravation of punishment warrants the death penalty; and (3) the jurors decide under all of the circumstances to assess the death penalty. *See* Mo. Rev. Stat. § 565.030.4. Unlike the Kansas statute, the Missouri statute thus requires the defendant to prove unanimously that the mitigation outweighs the aggravation in order to avoid death. If the jurors split on that issue, the verdict is not life without parole; instead, the case keeps moving toward death.

The instructions requested by the defense would have restored the constitutional balance, requiring the jury to impose life unless they found the aggravating circumstances outweighed the mitigators. Because the Missouri statute is distinguishable from the Kansas statute, the Missouri Supreme Court's decision was contrary to and an unreasonable application of federal law. This Court should grant certiorari and direct the Eighth Circuit to rule on the merits of this ground.

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

The district held that in order to show prejudice from trial counsel's failure to properly conduct voir dire, Mr. Deck had to show that a biased juror was seated on his jury. This virtually insurmountable standard is not supported even by the cases cited by the district court. In *Sanders v. Norris*, 529 S.W.3d 787 (8th Cir. 2000), the court held that since the state court had made a factual finding that a juror was not biased, although he was shown to be unqualified and would have been eliminated had he been properly questioned, Mr. Sanders was not entitled to relief. The Missouri Supreme Court made no such finding here, holding only that there was no deficient performance by trial counsel. Similarly, in *Singleton v. Lockhart*, 871 F.2d 1395 (8th Cir. 1989), the court cited to record evidence that the single juror whom Mr. Singleton contended should have been challenged was not biased. No such evidence exists here. Thus, reasonable jurists could disagree with the district court's resolution of this ground.

Mr. Deck, unlike Mr. Singleton and Mr. Sanders, does not specify a particular juror who should not have been seated. Nor is he able to do so; because his trial counsel did not ask the jurors the questions that would have revealed their bias, Mr. Deck has no way of doing so now. Mr. Deck's right to due process of law was violated when trial counsel failed to explore the jurors' potential bias.

This Court has made clear that jurors' views on the death penalty are a proper and necessary subject for inquiry in jury selection when that punishment will be available to the jury. *See, e.g. Morgan v. Illinois*, 504 U.S. 719 (1992)

(defendant is entitled to know if jurors will automatically vote for death). This is based on the "requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment," *Id.* at 729. The failure of Mr. Deck's counsel to make proper inquiries deprived him of that right. No further showing of prejudice is necessary.

This Court should grant certiorari and direct the Eighth Circuit to review these grounds.

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

In two grounds of his petition, Mr. Deck raised as ineffective assistance of counsel the failure of penalty phase counsel to investigate and call specified witnesses.. Ground 19 addressed witnesses identified by post-conviction counsel whose testimony had been discussed in state court, and Ground 20 addressed additional witnesses and evidence first identified by habeas counsel; that evidence was not considered in state court.

Mr. Deck raised these claims with the anticipation that he would be able to investigate those mitigation witnesses that were not called by postconviction counsel. Before filing the reply, on May 5, 2014, counsel filed a proposed budget and budget narrative encompassing the filing of the reply, or if necessary an amended habeas petition.[3] This budget included a request for additional work to be

[3] The budget documents referenced here were filed under seal.

performed by a mitigation specialist. Attached to this budget were the declarations of Prof. Sean D. O'Brien concerning the prevailing standards for habeas counsel's investigation, and Jessica Sutton, the mitigation specialist, concerning the particular investigation needed. On May 13, 2014, U.S. District Judge Ross denied the request for further mitigation investigation funds and reduced the number of hours for which counsel could be compensated in preparing the traverse. Supp. App. 368a. Mr. Deck then sought a writ of mandamus, arguing that the May 13, 2014 order exceeded the court's jurisdiction as it sought to limit the scope of appointed counsel's representation. The Eighth Circuit denied the writ without opinion and Mr. Deck's counsel filed his reply to the State's response under protest.

After the reply was filed, Judge Ross recused himself, and the case was reassigned to U.S. District Judge Perry. The budget approved by Judge Ross ended, pursuant to his direction, with the filing of the reply to the state's response. Counsel submitted a new budget in which they explained their need for funding to investigate the procedurally defaulted claims and the grounds for cause (that state postconviction counsel was ineffective) pursuant to *Martinez.* The district court did not rule on the budget request. No additional mitigation work or investigation has been performed since the filing of Mr. Deck's reply.

In denying relief on Ground 19, the district court found that the Missouri Supreme Court's decision denying relief on Mr. Deck's claims that trial counsel was ineffective for failing to investigate and present testimony at trial from numerous

witnesses[4] was either not an unreasonable determination of the facts nor contrary to clearly established law. Reasonable jurists could disagree.

At Mr. Deck's most recent penalty phase trial, the only live witnesses that testified were experts (Dr. Eleatha Surratt and Dr. Wanda Draper). The remaining witness testimony consisted of the videotaped deposition testimony of Michael Deck (Mr. Deck's brother), Mary Banks (Mr. Deck's aunt), Beverly Dulinsky (Mr. Deck's aunt) and Major Puckett (Mr. Deck's former foster father.) It cannot be said that trial counsel had a strategic reason for not calling the additional witnesses described in the petition. *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999) ("Court is. . . not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."); *Griffin v. Warden*, 970 F.2d 1355, 1358-1359 (4th Cir. 1992) (court may not "conjure up tactical decisions an attorney could have made, but plainly did not. . . Tolerance of tactical miscalculations is one thing, fabrication of tactical excuses is quite another.").

Moreover, the Missouri Supreme Court ignored the fact that most of counsel's decisions regarding witnesses were based on inadequate investigation. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court emphasized the duty of trial counsel to make a proper investigation of the facts of the case, and reversed because counsel

[4], Specifically, Latisha Deck, Rita Deck, Elvina Deck, Michael Johnson, Stacy-Tesreau-Bryant, Wilma Laird, Carol Miserocchi, Arturo Miserocchi, Tonia Cummings, and David L. Hood.

made "strategic" decisions on the basis of inadequate investigation. Furthermore, the Missouri Supreme Court's decision ignored the fact that it is not reasonable trial strategy to present all evidence through expert witnesses. Finally, the fact that counsel "rested" on an eight-year-old investigation cannot be considered sound trial strategy.

The district court found that Ground 20 was procedurally barred because Mr. Deck's claim that third penalty phase counsel failed to investigate and call numerous witnesses and present extensive records not specified in the state post-conviction proceeding was not "substantial" for purposes of *Martinez.* Again, the district court applied the wrong standard. The court made a merits finding that trial counsel's failure to call the witnesses identified in Ground 20 did not prejudice Mr. Deck as there was no reasonable probability that their testimony would have changed the outcome of the trial. App., pp. 62a-66a. As set out above, Mr. Deck should have received an evidentiary hearing regarding this ground for relief. Moreover, Mr. Deck should not have been denied the funds to further investigate and develop these witnesses for habeas review.

Again, Mr. Deck has made a strong enough showing of each *Martinez* element to call for an evidentiary hearing in the district court. Reasonable jurists could disagree with the district court's complete rejection of this ground without a hearing. This Court should grant certiorari and require the Eighth Circuit to review these grounds for relief.

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

In both capital and non-capital cases, the Eighth Circuit routinely issues unexplained orders like that in this case, stating only "The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied." App. p. 1a. Mr. Deck filed an extensive motion in the court of appeals detailing the basis for a COA. The state responded, and Mr. Deck filed a reply in support of the motion. The court of appeals panel addressed none of these pleadings, and did not provide any basis for its decision to deny a COA.

This Court has previously been informed of the disparity between circuits in the granting of certificates of appealability in capital cases. *See Buck v. Davis*, brief of petitioner, Appendix A, showing that, between 2011 and 2016, "[A] COA was denied on all claims in 58.9% (76 out of 129) of the cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively." The data for the Eighth Circuit, where Mr. Deck's case arose, have been compiled for this court through 2016 in the case of *Greene v. Kelley*, No. 16-7425, 137 S.Ct. 2973 (2017). This data indicated that in the Eighth Circuit since 2011, 47.6% of capital cases as to which COA was sought in the Eighth Circuit had their COAs denied. Since that time, that court has denied at least one COA in a capital case with an unexplained order. *Barton v. Griffith,* No. 18-2241 (petition for rehearing pending).

The Eighth Circuit's COA practice is outside the norm for courts of appeals in three ways. First, its denial rate is substantially higher than at least two other circuits. For first-in-time capital habeas petitions within the Eighth Circuit, the COAs were denied in 47.6% of cases between 2011 and 2016. This is true despite the fact that the standard for a COA is not burdensome. As this Court held in *Miller-El v. Cockrell*, 537 U.S. 322, 337-338 (2003),

> [A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. . . . Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

By contrast, the denial rate cited in the *Buck* brief for the Eleventh Circuit is 6.3%, while that of the Fourth Circuit is 0%. Anecdotal evidence indicates that the Sixth Circuit's denial rate is also 0%.

Second, unlike most other circuits, the Eighth Circuit does not even attempt to explain to capital litigants (or to a reviewing court) why their claims are not debatable. When denying a COA motion, the Eighth Circuit always issues a uniform three-line summary order like that issued in Mr. Deck's case. The Eighth Circuit does not appear to have explained its reasons for denying a COA on a capital habeas petition since 1997. The Sixth Circuit, which issues reasoned decisions denying COA, explained the importance of reasoned opinions in *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). There, the court reversed a blanket denial of a COA, remanding to the district court for analysis of the individual issues presented in the petition. (The exact text of the district court's order is not available on PACER.) Citing its

earlier decision in *Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001), the court held that remand was required because "The district court here failed to consider each issue raised by Murphy under the standards set forth by the Supreme Court. . . ." *Murphy*, 263 F.3d at 467.

Like Mr. Murphy, Mr. Deck has never had the benefit of a reasoned analysis of whether his claims meet the standard for COA. The practice of issuing unreasoned blanket denials of COA departs from that of every other court of appeals, with the possible exception of the Seventh Circuit.[5] Under *Hohn v. United States*, 524 U.S. 236 (1998), this Court has jurisdiction to review the denial of a COA by a lower court. But when there is an unexplained denial, this Court is left with the responsibility of reviewing the lower court decisions on the COA issue *de novo.*

The great disparity between the rates at which COAs are granted in the various circuits makes the need for clarification by the courts of appeals even more important. The COA standard should be clear enough that any court reviewing a

[5] The certiorari petition in *Greene v. Kelley* identified the following reasoned orders denying COA in capital cases: *Swisher v. True*, 325 F.3d 225 4th Cir. 2003); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016); *Treesh v. Robinson*,No. 12-4539, 2013 U.S. App. Lexis 3878 (6th Cir. Feb. 13, 2013); *Woods v. Buss*, 234F. Appx 409 (7th Cir. 2007); *Dickens v. .Ryan*, 552 F.Appx 770 (9th Ctr. 2014); *Griffin v. Sec'y*,787 F.3d 1086 (11th Cir. 2015). The circuits which have not denied COA in capital cases have issued reasoned opinions when denying COAs in non-capital cases. *McGonagle v. United States,* 137 F. Appx 373 (1st Cir. 2005); *Middleton v. Attorneys General*, 396 F.3d 207 (2nd Cir. 2005); *Webster v. Adm'r N.J. State Prison*, No. 13-338I, 2013 U.S. App. Lexis 25719 (3d Cir. Oct.25, 2013); *Pickens v. Workman*,373 F. App'x 847 (10th Cir. 2010). It seems unlikely that these courts would change their practice of issuing reasoned decisions in a capital case.

habeas case will be able to apply it uniformly. That is obviously not happening. And permitting the Eighth Circuit to completely insulate its reasoning from Supreme Court review contributes heavily to that inequity.

CONCLUSION

For the foregoing reasons, 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