No. 18-8820

THIS IS A CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

CARMAN DECK,

Petitioner,

v.

RICHARD JENNINGS, **Warden, and ERIC S. SCHMITT, Attorney General,**

Respondents.

Brief in Opposition to Petition for a
Writ of Certiorari to the Eighth Circuit Court of Appeals

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QUESTIONS PRESENTED

1. Did the Eighth Circuit err in denying Deck a certificate of appealability on grounds that had been considered and reasonably denied by state courts, were procedurally defaulted, or were meritless?
2. Is the Eighth Circuit required to explain every denial of certificate of appealability in the absence of any statute, rule, or mandate from this Court to do so?

LIST OF ALL PARTIES TO THE PROCEEDING

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

Richard Jennings, Warden of the Potosi Correctional Center, is Deck's custodian and therefore a named respondent in this case. 28 U.S.C. § 2254 Rule 2(a). He and his predecessors in that position, Troy Steele and Cindy Griffith, were represented in the courts below by Katharine Dolin, Assistant Missouri Attorney General.

Eric S. Schmitt, Missouri Attorney General, should also be a named respondent in this case, as Deck challenged a future consecutive sentence in his federal habeas petition. 28 U.S.C. § 2254 Rule 2(b). He and his predecessors in that position, Chris Koster and Joshua Hawley, were represented in the courts below by Katharine Dolin, Assistant Missouri Attorney General.

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STATUTES INVOLVED

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in 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.

(b) (1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable

written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

In July 1996, Carman Deck and his sister, Tonia Cummings, knocked on the door of an elderly couple, James and Zelma Long, asking for directions. *State v. Deck*, 994 S.W.2d 527, 531 (Mo. 1999). When the couple invited them in, Deck ordered the Longs to turn over their valuables and lie face down on their bed. *Id.* at 531–32. They complied. For ten minutes the Longs begged for their lives while Deck stood at the foot of their bed contemplating his next move. *Id.* at 532. When Cummings entered and told him time was running out, Deck shot each of the Longs twice in the back of the head. *Id.* Deck was convicted of the murders and related crimes and received two death sentences. *Id.* at 531. Deck's case has included one guilt-phase trial[1] and three

[1] *Id.* at 527.

penalty-phase trials, in each of which a jury has unanimously recommended the imposition of two death sentences. [2]

Deck filed a counseled federal habeas corpus petition in 2013, raising 32 grounds of error. App'x 6a–11a. The district court granted that petition in part and denied that petition in part on April 13, 2017. App'x 2a–172a. It vacated Deck's death sentence based on two grounds for relief related to the delay between Deck's guilt-phase trial and last sentencing-phase trial. App'x 3a. It denied relief on 30 other grounds and denied Deck a certificate of appealability twice. App'x 3a, 170a, 171a; Doc. 106. [3]

Respondents appealed the district court's grant of the writ of habeas corpus. *Deck v. Jennings,* No. 17-2055 (8th Cir.). Deck attempted to file a cross-appeal on the denial of the writ of habeas corpus. *Deck v. Steele,* No. 18-1617 (8th Cir.). The Eighth Circuit denied a certificate of appealability after a careful review of the file. App'x 1a.

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[2] *Id.*; *State v. Deck*, 136 S.W.3d 481 (Mo. 2004); *State v. Deck*, 303 S.W.3d 527 (Mo. 2010). Deck's first sentencing was reversed by the Missouri Supreme Court on an ineffective assistance of counsel issue. *Deck v. State*, 68 S.W.3d 418 (2002). Deck's second sentencing was reversed by this Court on a visible shackling issue. *Deck v. Missouri*, 544 U.S. 622 (2005).

[3] Respondents cite to documents filed in the district court but not included in Petitioner's Appendix by their district court document number.

SUMMARY OF THE ARGUMENT

Certiorari is unwarranted because Deck has not alleged a conflict between courts nor a profoundly important issue. He asserts only a misapplication of the well-settled standard for granting a certificate of appealability.

But this Court need not exercise its rarely-invoked power of error-correction because the court below appropriately applied the standard for granting a certificate of appealability and came to the correct conclusion.

Deck also asks this Court to grant certiorari to create a new requirement that Court of Appeals' denials of certificates of appealability be more detailed. As the way the Courts of Appeals currently decides certificates of appealability does not impair the ability of this Court to review them, Deck requests a remedy for a non-existent problem.

REASONS FOR DENYING THE WRIT

I. Deck merely asks this Court to review his request for a certificate of appealability *de novo*, rather than referencing any of the considerations governing review on certiorari.

Deck challenges the Eighth Circuit's denial of his request for a certificate of appealability. Pet. i. However, he does not argue that the Eighth Circuit entered a decision in conflict with the decision of another court of appeals; decided an important federal question in a way that conflicts with a decision of a state court of last resort; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory

power; decided an important question of federal law that has not been, but should be, settled by this Court; or decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10.

Deck only argues that the standard for a certificate of appealability set forth in 28 U.S.C. § 2253, and interpreted by *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773–74 (2017), "requires a COA in Mr. Deck's case." Pet. 7. This Court rarely grants petitions for writs of certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly-stated rule of law. Sup. Ct. R. 10. As Deck only argues that the district court misapplied the law and asks this Court to "intervene and provide him with the opportunity for appellate review," Pet. 7, this Court should deny his petition.

II. Deck did not meet the standard for a certificate of appealability.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 326 . This standard is not whether reasonable jurists could disagree on the merits of a petitioner's claims when reviewing the claims *de novo*, but whether reasonable jurists could disagree with the district court's denial of the writ under AEDPA's highly-deferential standard. *Id.* at 336.

To obtain a certificate of appealability on a claim that the district court denied on procedural grounds, the petitioner must demonstrate both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Each of the grounds Deck discusses here was previously denied in a reasonable state court decision or is procedurally defaulted. Reasonable jurists would not disagree with the district court's application of the highly deferential standard of 28 U.S.C. § 2254(d) to the former or its application of 28 U.S.C. § 2254(b) to the latter.

A. Evidentiary Hearing

With regards to Grounds 5, 6, and 20, the district court found that each ground was procedurally defaulted and that Deck did not meet the requirements of *Martinez* to overcome the default. App'x 30a, 45a, 67a. Regarding Deck's request for an evidentiary hearing, the district court found that "the facts underlying Deck's grounds have been fully developed through the records submitted to the Court and no further development was necessary." App'x 3a. Following the Eighth Circuit's decision in *Sweet v. Delo,* 125 F.3d. 1144, 1160 (8th Cir. 1997) (*citing Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992)), it denied an evidentiary hearing. App'x 3a.

Deck argues *Sweet* is inapposite for two reasons: 1) it was decided before *Martinez,* and 2) petitioner Sweet had a hearing on his claims. Pet. 8. First, it is true that Deck, unlike petitioner Sweet, did not have five days of evidentiary hearing in

federal court to explore his post-conviction claims. But Deck did have three days of evidentiary hearings in his state court post-conviction case to explore his claims. Resp. Ex. TT,[4] p. 3, Resp. Ex. UU, pp. 3–4. During that hearing, Deck discussed some of the facts he later used to support Grounds 6 and 20, as the district court noted in its judgment. App'x 36a–42a, 57a, 59a, 60a. But as to the rest of his habeas grounds, for most of which the factual support would have been known to Deck prior to the hearing, he declined the opportunity to adduce any evidence. Second, the word "Martinez" does not automatically entitle a petitioner to a hearing. Whether *Martinez* serves to excuse procedural default is evaluated just like any other claim; if it is clear from the petitioner's pleading that he cannot meet the requirements to excuse his procedural default, there is no need for a hearing. *See Sweet,* 125 F.3d. at 1160 (a petitioner is entitled to an evidentiary hearing in federal court *only* if he *can show* cause and prejudice for his failure to develop the facts fully in state court) (emphasis added) (*citing Keeney*, 504 U.S. at 11). Deck's suggestion that a district court is *required* to hold a hearing on a *Martinez* claim is unsupported by law.

On page 8 of his Petition, Deck cites two cases for the proposition that "an evidentiary hearing is appropriate when a petition alleges that otherwise defaulted grounds for relief are available under *Martinez*": *Dickens v. Ryan*, 740 F.3d 1302,

[4] Respondents cite to the exhibits that accompanied Respondents' response to the district court's order to show cause as "Resp. Ex." It should be noted that due to the volume of these documents, they were not electronically filed but are rather stored on a compact disc maintained by the district court clerk.

1321–22 (9th Cir. 2014) and *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007). Neither case advances Deck's argument.

Dickens merely states that "a district court *may* take evidence *to the extent necessary* to determine whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez." Dickens*, 740 F.3d at 1321 (emphasis added). Here, Respondents argued, and the district court correctly determined, that an evidentiary hearing was not needed to determine that Deck's claims are not substantial. Doc. 35, pp. 27–28, 29–30, 95–100; App'x 26a–45a, 57a–68a.

Deck alleges that he, like the petitioner in *Simpson*, is entitled to a hearing because he raised a claim that was "previously unavailable." Pet. 8. Deck is mistaken for two reasons. First, *Simpson* involved a substantive claim for relief, not a method to excuse procedural default. *Simpson*, 490 F.3d at 1034. Second, the claim in *Simpson* was "previously unavailable" because it was based on precedent that did not exist yet. *Id.* at 1035. None of Deck's underlying claims were "unavailable;" he just chose not to raise them. Nor does *Martinez* serve as a "previously unavailable" claim. These two cases[5] do not make the district court's decision to deny a hearing in this case "clearly debatable among jurists of reason." Pet. 9.

[5] Deck also mentions *Barnett v. Roper*, 904 F.3d 623 (8th Cir. 2018). In that case, the district court denied an evidentiary hearing on a defaulted habeas claim of ineffective assistance of trial counsel, but after the *Martinez* decision, the district court granted Barnett an evidentiary hearing so that he could attempt to 1) excuse the procedural default by showing he received ineffective assistance of post-conviction counsel and 2) prove his underlying habeas claim. *Id.* at 628–29. It is unclear why

Respondents below specifically address each of the three grounds on which Deck alleges he was entitled to an evidentiary hearing.

Ground 5

As to Ground 5, Deck waited until his traverse to name the "false confession expert" he would have like to have used at trial and still did not allege that 1) such a person would have been ready, willing, and able to testify, and 2) that counsel was ineffective for failing to call this specific person. Doc. 67, pp. 28–38. Unlike general federal civil practice, which only requires "notice pleading," federal habeas practice requires "fact pleading." 28 U.S.C. § 2254 Rule 2(c). Rule 2(c) specifically requires a federal habeas petitioner to specify the facts supporting each of his grounds for relief in the *petition*. *See Mayle v. Felix*, 545 U.S. 644, 654–55 (2005); *Hill v. Lockhart,* 474 U.S. 52, 60 (1985). An evidentiary hearing could do nothing to support facts that Deck did not plead in his petition, as he was required to do.

Additionally, the proposed testimony of such an expert likely would be inadmissible at the *guilt-phase* trial, given the state of Missouri law on the subject. App'x 28a. The testimony would also be inadmissible at the *penalty-phase* trial

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Deck believes that this case is useful to him. In *Barnett*, there was a finding by the Missouri Supreme Court that the work of post-conviction counsel undoubtedly contributed to the procedural default. *Id.* at 627. This is not the case here. Further, the district court in *Barnett* apparently determined that a hearing was necessary to determine the underlying habeas claim of ineffective assistance of trial counsel. *Id.* at 629. The same is not true here; even taking as true Deck's allegations, the claims can be decided based on the existing state court record.

because it would become irrelevant after a finding of guilt. App'x 29a. Further still, as the district court determined after a thorough review of and citation to the record, Deck's *pretrial* defense was not prejudiced by the lack of consultation with such an expert, because trial counsel litigated the issue of Deck's confession competently and thoroughly. App'x 28a–29a. These are legal questions that could not have been resolved any more accurately through a hearing. Reasonable jurists could not disagree as to the district court's decision to decline to hold a hearing.

Ground 6

As to Ground 6, the proposed testimony of each witness to Deck's "innocence" was outlined on pages 40 and 41 of Deck's amended petition. Doc. 30, pp. 40–41. The district court reviewed the amended petition and found that, for each witness, Deck either failed to sufficiently plead the proposed testimony, made allegations belied by the record, or pled testimony that would have been unhelpful to his defense. App'x 31a–45a. These are legal conclusions, and as such, an evidentiary hearing would not have been useful to develop these claims. Accordingly, reasonable jurists could not disagree as to the district court's decision to not hold a hearing.

Ground 20

As to Ground 20, Deck identified the names of mitigation witnesses and pled some specific facts to which they could testify. Doc. 30, pp. 79–86. The district court cited the record extensively to compare the proposed testimony to the testimony that was admitted at trial and to discuss counsel's trial strategy as described in Deck's post-conviction hearings. App'x 60a–68a. The district court thereafter determined

that the proposed testimony would have been either cumulative to the mitigation witnesses that did testify about Deck's positive attributes and troubled childhood, or unhelpful to Deck because they highlighted his life in prison. App'x 60a–68a.

Determinations regarding whether proposed evidence would be cumulative to presented evidence is a legal conclusion that can be made from the record; no evidentiary hearing is required. The same is true for determinations as to whether evidence would have been useful to Deck or, as was true for much of the proposed testimony, whether the evidence would have hurt Deck's defense. Reasonable jurists could not disagree as to the district court's decision to decline to hold a hearing.

B. Criminal Justice Act Funding

What Deck attempts to challenge here is the Eighth Circuit's decision in *In re Deck,* 14-3000 (8th Cir. Judgment entered on Sept. 19, 2014) denying Deck's writ of mandamus on the issue of funding. But that is not the decision at issue in this petition. This petition regards the judgment of the Eighth Circuit in *Deck v. Steele,* 18-1617 (8th Cir. Judgment entered on Aug. 20, 2018) denying a Certificate of Appealability and dismissing Deck's cross-appeal. Pet. 1. If Deck wished to file a petition for certiorari regarding the Eighth Circuit's decision on funding, he should have done so. He is now more than four years out of time. Sup. Ct. Rule 13.

Further, it is not clear that he could have done so. The Eighth Circuit held, in dismissing the appeal of Mr. Deck's habeas counsel in another case on the same issue, that the Criminal Justice Act (CJA) does not confer appellate jurisdiction. *In re Unger*, 644 F.3d 694, 699 (8th Cir. 2011). This is because the non-adversarial nature

of the voucher process, wholly *ex parte*, evidences an administrative act, not a judicial decision. *Id.* This Court has also held that the determination of counsel fees should not result in a "second major litigation." *Fox v. Vice*, 563 U.S. 826, 828 (2011).

Indeed, all of Deck's CJA funding requests in the district court, as well as his writ to the Eighth Circuit, were filed *ex parte* and are sealed. Accordingly, Respondents do not have the ability to fully address "whether a reasonable attorney would regard the services [requested] as sufficiently important." *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018). But, some facts can be pieced together based on the docket entries of the district court habeas case and the Eighth Circuit writ case.

Respondents note that Deck's counsel was appointed one year before they filed Deck's habeas petition. Docs. 3, 29. They had received at least six CJA payments by that time. Docs. 7, 8, 20, 22, 23, 28. At the time Deck filed his writ regarding funding to the Eighth Circuit on August 27, 2014, counsel had been working on the case for two years and the district court had authorized at least 17 CJA payments. Docs. 7, 8, 20, 22, 23, 28, 32, 37, 38, 39, 40, 41, 42, 43, 46, 54, 61. Even after two years and 17 payments, Deck still had not filed a traverse. Overall, Deck requested five extensions of time (and, finally, a motion to file out of time) totaling seven months to complete the traverse, citing "pressures of counsels' day-to-day work." Docs. 44, 49, 56, 58, 63, 65. Not one of those motions raised a concern about funding for investigation. Docs. 44, 49, 56, 58, 63, 65.

Deck argues that the district court improperly evaluated his request for funding, because it set forth its scope of review as "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." Pet. 9. Deck suggests the district court therefore failed to consider that it also had to review procedurally defaulted claims on which there was no state court decision *de novo* if *Martinez* served to excuse the default. Pet. 9. This is not true; the district court just did not find that *Martinez* served to excuse the default of any of Deck's procedurally defaulted claims except the one on which it granted relief. Doc. 86, pp. 24, 29, 44, 47, 80, 161.

Only three grounds, 19, 20, and 21, alleged that trial counsel failed to present mitigation evidence. Respondents therefore examine these three grounds to determine whether they could have been affected by the denial of further funding.

Ground 19

As to Ground 19, the ground, save for a failure-to-investigate claim regarding one witness, was not procedurally defaulted. App'x 119a–129a. The claim based on that witness, Ed Kemp, was defaulted on post-conviction appeal and therefore is not affected by *Martinez.* App'x 76a–78a. But even if it were subject to *Martinez,* the underlying claim was belied by the record.

Counsel could not have been ineffective for failing to "investigate" Kemp because Kemp testified for Deck at Deck's guilt-phase trial. Resp. Ex. G 792. And counsel was not ineffective for deciding not to call Kemp again at sentencing because his proposed testimony was that Deck "cried, [and] admitted the entire crime" Doc. 30, p. 77. Choosing not to adduce even more evidence that Deck confessed to a double

homicide is a reasonable trial strategy. Deck fails to explain how receiving further funding from the district court would have helped him with this claim in any way.

Ground 20

As to Ground 20, Deck cites 11 witnesses he indicates should have been called at sentencing. This ground was entirely procedurally defaulted. Indeed, the district court found that it might be excused by *Martinez*. However, it went on to determine that *even taking as true the substance of the proposed testimony as Deck articulated it*, the witnesses would not have been useful to Deck. App'x 57a–68a, *see also* Doc. 35 pp. 95–100. Again, no amount of funding would have changed that conclusion.

Ground 21

As to Ground 21, Deck did not even meet the threshold fact-pleading requirement of 28 U.S.C. § 2254 Rule 2. He did not provide the name of an expert; aver that expert would have been ready, willing, and able to testify; or describe what the substance of the testimony would have been.[6] Doc. 30, pp. 86–88. The fact that

[6] Deck mentioned that a Dr. Gelbort testified in his post-conviction hearing. Doc. 30, p. 87. However, Deck presented Dr. Gelbort at the hearing for the purpose of showing that he was prejudiced by the lack of neuropsychologist testimony at sentencing, not for the purpose of showing that trial counsel was ineffective for failing to call *Dr. Gelbort* at sentencing. Whether *Dr. Gelbort* would have been known to counsel, and ready, willing, and able to testify at sentencing was not explored. Resp. Ex. TT, pp. 14–21; App'x 356a. However, whether Dr. Gelbort would have provided Deck a defense *was* explored. And the answer was a resounding "no." See Resp. Ex. TT, pp. 14–21; *Deck v. State*, 381 S.W.3d 339, 353–54 (Mo. 2012) ("Dr. Gelbort's testimony shows that Movant was not intellectually impaired, and his 'borderline defective' score on the Category Test 'did not mean anything' by itself.").

Deck did not adequately plead his ground is not changed by any amount of funding. Reasonable jurists would not find the district court's decision denying further funding on the issue of trial counsel's presentation of the mitigation evidence debatable.

C. Habeas Petition Grounds for Relief

Ground 1

Deck merely argues that this Court has never applied *Stone v. Powell,* 428 U.S. 465 (1976) to a capital case. That may be, but this Court has never indicated that *Stone* does not apply to capital cases. The Third Circuit wrote that "there is nothing within the language of *Stone v. Powell* itself upon which to base a distinction between capital and non-capital collateral review. We have applied *Stone* without hesitancy to capital cases." *Marshall v. Hendricks*, 307 F.3d 36, 81 n.34 (3rd Cir. 2002). The Sixth Circuit agrees. *McQueen v. Scroggy*, 99 F.3d 1302, 1332 (6th Cir. 1996) (overruled on other grounds)("There is no precedent for McQueen's claim that a different rule should apply because this is a death penalty case. In fact, the Supreme Court has specifically rejected the idea that procedural bars that apply in other cases do not apply in capital cases." The Third and Sixth Circuits are joined by the Fourth Circuit, *Boggs v. Bair*, 892 F.2d 1193, 1199 (4th Cir. 1989), Fifth Circuit, *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002), Eighth Circuit, *Sweet*, 125 F.3d at 1149, Tenth Circuit, *Smallwood v. Gibson*, 191 F.3d 1257, 1265 (10th Cir. 1999), and Eleventh Circuit, *Lawhorn v. Allen*, 519 F.3d 1272, 1287 (11th Cir. 2008). The other circuits appear to not yet have considered the issue.

Under *Stone*, a petitioner is precluded from asserting a Fourth Amendment claim as a basis for federal habeas relief unless he can demonstrate that the state courts did not afford him a full and fair opportunity to litigate the claim. *Stone,* 428 U.S. at 494. Deck cites two cases to suggest that *Stone* no longer applies after AEDPA. It is true that one lone district court case, *Carlson v. Ferguson,* 9 F.Supp.2d 654, 657 (S.D. W. Va. 1998), has held that 28 U.S.C. § 2254(d) includes claims raised under the Fourth Amendment's exclusionary rule. However, Deck cites to no other authority that supports this proposition, and Respondents are not aware of any. In fact, the other case Deck cites, *Herrera v. Lemaster*, 225 F.3d 1176 (10th Cir. 2000), explicitly *rejected Carlson*'s holding. In *Lemaster,* the Tenth Circuit actually applied *Stone* and found that the petitioner was able to show that he did not receive a full and fair opportunity to litigate his claim, unlike Deck. *Id.* at 1178. *Lemaster* then directly considered the holding of *Carlson* that Deck now proffers—that *Stone* no longer applies after AEDPA—and found it unpersuasive. *Id.* at 1177 n.3.

The First, Seventh, and Ninth Circuits have explicitly stated that *Stone* survives AEDPA. *Sanna v. Dipaolo*, 265 F.3d 1, 8 (1st Cir. 2001); *Hampton v. Wyant*, 296 F.3d 560, 563 (7th Cir. 2002); *Newman v. Wengler*, 790 F.3d 876, 880 (9th Cir. 2015). *Hampton*'s reasoning is useful to explain why *Carlson* is an outlier: "…the Antiterrorism and Effective Death Penalty Act does not affect *Stone.* AEDPA's changes to § 2254(d) apply only to cases within the scope of § 2254(a), which was not amended in 1996, and *Stone* is based on an interpretation of § 2254(a) that treats

inaccurate administration of the exclusionary rule as outside the scope of that statute." *Hampton*, 296 F.3d at 563.

Deck raised this issue in his guilt-phase direct appeal and his sentencing-phase direct appeal, and the Missouri Supreme Court rendered two reasonable decisions. *Deck*, 994 S.W.2d at 534–36; *Deck,* 303 S.W.3d at 544–45. While the district court did not make an explicit finding as to the reasonableness of the state court decisions on Ground 1, it did find that the State provided Deck "full and fair litigation of his Fourth Amendment claim." App'x 17a. The state court decisions in this case are entitled to deference under 28 U.S.C. § 2254(d). Deck does not demonstrate both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484.

Ground 2

Deck next argues that the district court failed to evaluate whether pretrial publicity was indicative of the "current community pattern of thought" under *Irvin v. Dowd,* 366 U.S. 717 (1961), such that Deck was entitled to a change of venue. Pet. 12. But the district court did cite *Irvin* in its order. App'x 85a.

Deck repeats several times that, under *Irvin*, "a community pattern of thought" can be the cause of an unfair trial. Pet. 12. Yet, he ignores the rigid standard in *Irvin* that a trial court's change-of-venue decision may be overturned *only* for "manifest error." *Irvin,* 366 U.S. at 724 . Deck also ignores that *Patton v. Yount,* 467 U.S. 1025, 1035 (1984), decided after *Irvin* and cited by the district court, clarified *Irvin* by

indicating that "[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." There is no evidence that any juror who sat on Deck's jury was unable render a fair and impartial verdict.

The Missouri Supreme Court issued an opinion denying this ground, *Deck*, 994 S.W.2d at 532–33, one that the district court found was consistent with clearly established federal law. App'x 86a–88a. Deck does not demonstrate that jurists of reason would find it debatable whether he states a valid claim of the denial of a fair trial under the district court's application of the highly deferential standard of 28 U.S.C. § 2254(d).

Martinez *Analysis: Grounds 5, 6, 8, 9, and 20*[7]

Deck alleges that the district court improperly determined that Grounds 5, 6, 8, 9, and 20 were not "substantial" claims of ineffective assistance. Pet. 14, 17, 25. Deck argues that the district court performed a full merits analysis of his claims and therefore held him to too high of a standard. Pet. 13, 14, 17, 25. But the district court repeatedly made reference throughout its evaluation of the *Martinez* issues that it was *not* performing a full merits analysis. App'x 22a–24a, 30a, 45a, 72a, 75a, 77a, 83a.

As for the standard for review, claims under *Martinez* must allege that initial-review collateral-proceeding counsel was so inadequate as to excuse the default of a

[7] Because Deck makes a similar argument about these five grounds, Respondents address them together.

claim of ineffective assistance of trial counsel. *Martinez v. Ryan,* 566 U.S. 1, 9 (2012). This Court directs district courts to consider whether the ineffective assistance of trial counsel claim is a "substantial" one that has "some merit." *Id.* at 14.

The district court determined that the ineffective assistance of trial counsel claims in Grounds 5, 6, and 20 were not "substantial" and did not have "some merit" based on the record and taking as true Deck's assertions. App'x 30a, 45a, 67a. As to Grounds 8 and 9, which challenge statements as inadmissible hearsay, the district court found that the statements were not hearsay at all. App'x 51a, 55a. Claims without any legal foundation can never be substantial or have some merit.

Deck does not explain how the district court could have evaluated the grounds less closely,[8] and in any event, the court used the appropriate standard in evaluating Deck's grounds. Deck does not demonstrate that jurists of reason would find it debatable whether the district court was correct in its procedural rulings regarding the *Martinez* standard. Respondents next address the merits of each of these grounds, to the extent Deck discusses them in his petition.

Ground 5

Respondents addressed above why a hearing was not needed to explore either the ground itself or *Martinez's* applicability to it. The district court found the

[8] Deck seems to argue that even discussing the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) means performing a "full merits review"; therefore, a *Martinez* review cannot include consideration of both prongs of *Strickland*. Pet. 14–15. Deck does not provide any legal support for this argument.

proffered evidence would have been inadmissible at trial. App'x 28a–29a. Deck concedes that the evidence would have been inadmissible, but faults counsel for not attempting to admit it anyway. Pet.13. Counsel cannot be ineffective for failing to elicit inadmissible evidence. The district court determined the lack of an expert did not prejudice Deck pretrial either. App'x 28a–29a. Even if the facts pled by Deck were true, the decision to not introduce expert testimony was not unreasonable or prejudicial to his Deck's defense. Jurists of reason would not disagree that Deck does not state a valid claim of the denial of a constitutional right.

Ground 6

Respondents addressed above why a hearing was not needed to explore either the ground itself or *Martinez's* applicability to it. The district court found that for each witness identified in this ground, Deck either failed to sufficiently plead the proposed testimony, made allegations belied by the record, or pled testimony that would have been unhelpful to his defense. App'x 33a–45a.

The proposed testimony of each witness to Deck's "innocence" was outlined on pages 40 and 41 of Deck's amended petition. Doc. 30. Deck identified some names of possible witnesses, but he only speculated generally as to what their testimony would entail and failed to allege that any of them would have been ready, willing, and able to testify at his trial. Doc. 30, pp. 49–50. Several other claims within Ground 6 were belied by the record, in that Deck alleged that counsel failed to investigate someone,

when in reality, counsel investigated them and declined to present them as a matter of trial strategy.[9] App'x 37a–41a, 44a.

And with respect to the witnesses for whom Deck *did* allege sufficient facts, even if those facts were true, he was not prejudiced by the absence of those witnesses.[10] With respect to the "Jefferson County Memorial staff" testimony, it would not have provided a defense because of timeline problems. Testimony at trial showed that the murders were committed around 9:15pm. Resp. Ex. F, pp. 155–56; Resp. Ex. M, 141. The testimony from the hospital staff, as he pled it in his post-conviction motion, would have been that Deck's sister was admitted to the hospital at 10:10pm. Resp. Ex. L, 172. As the distance could be traveled in 10 minutes, the testimony would not have been helpful to Deck. Resp. Ex. F, 162.[11] App'x 35a–36a. With respect to Tonia Cummings, she would have declined to testify on advice of her own counsel, but if she had, her testimony would have hurt Deck's defense. App'x 39a–41a. With respect to Deck's own testimony, he personally waived the issue by

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[9] Several of these witnesses were discussed in Deck's post-conviction hearings; therefore, the district court had a basis in the record to review the testimony of trial counsel regarding them.

[10] Setting aside the slim chance that trial counsel could have gotten Jim Boliek to confess to capital murder on the stand at Deck's trial.

[11] Deck argues, without acknowledging what the medical records introduced at trial actually say, that the staff's testimony would not have pinpointed a specific time Deck was at the hospital but rather "that Mr. Deck arrived at the hospital before the murders were committed and did not leave until afterwards." Pet. 15–16. It is unlikely that the state court would have allowed testimony to the effect of "we do not know what time he was here, but whenever the murder was, it was then."

telling the post-conviction court that he did not wish to pursue it. App'x 41a–43a. With respect to the DNA testing, given that the evidence at trial already showed no forensic link between the physical evidence seized and the Longs' belongings, DNA testing to further exclude such a link would have been cumulative. App'x 43a–44a.

Deck asserts that the reason he failed to sufficiently plead this ground is because he did not receive funding to obtain the affidavits the district court faulted him for not having. Pet. 15. But Deck admits "the *Martinez* determination focuses not on evidence but on pleadings." Pet. 15. He is correct. Here, his ground was so deficient that the district court was able to determine from its face that it was insubstantial. And the only reason that the district court commented on the lack of affidavits was that Deck's grounds were so speculative that an affidavit might have helped Deck plead sufficient facts for the court. App'x 35a. Jurists of reason would not disagree that Deck does not state a valid claim of the denial of a constitutional right.

Grounds 8 and 9

As to Ground 8, Deck claimed that he was denied effective assistance of counsel at his guilt-phase trial when trial counsel failed to object to testimony that officers corroborated Deck's confession by finding corpses at the location given by Deck. Doc. 30, p. 45. The district court found that this statement was offered for its effect on the listener, to wit, subsequent investigation of both Deck and Jim Boliek. App'x 50a.

Similarly, in Ground 9, Deck claimed that he was denied effective assistance when trial counsel failed to object to testimony that officers learned from multiple people that Jim Boliek had an alibi for the time of the murders. Doc. 30, p. 47. The

district court again found that testimony was not offered for the truth of the matter asserted but to explain why and how the questioning of Deck continued. App'x 53a–55a. Further, the questions about Jim Boliek's alibi came on redirect, in response to an extensive cross-examination about the investigation into Jim Boliek and a suggestion by counsel that it was incomplete or biased. App'x 53a–54a.

A statement offered for its effect on the listener rather than for the truth of the matter asserted is not hearsay. *United States v. Wright*, 739 F.3d 1160, 1170 (8th Cir. 2014). Such non-hearsay statements include those offered to explain the reasons for or propriety of a police investigation. *United States v. Malik*, 345 F.3d 999, 1001 (8th Cir. 2003). App'x 50a (citing *Malik*, 345 F.3d. at 1001).

Deck cites *Jones v. Bassinger*, 635 F.3d 1030, 1046 (7th Cir. 2011) for the proposition that jurists can disagree about whether the statements would have been admitted under a "course of investigation" hearsay exception. Pet. 17. However, in that case, two detectives were allowed to testify extensively, providing a detailed, double-hearsay account of the crimes and bolstering the credibility of a non-testifying tipster. *Jones*, 635 F.3d at 1036. This was not the case here, as the statements were brief and the facts contained therein were either independently admissible or already admitted without objection.

Even if this testimony was inadmissible hearsay, however, the error is harmless. As to Ground 8, Deck was not prejudiced because the jury eventually heard evidence both of Deck's confession and the location where the bodies were found. Resp. Ex. F, pp. 746–55; Resp. Ex. E, pp. 555–56; App'x 52a. As to Ground 9, Deck

was not prejudiced because information about Boliek's alibi had already been elicited without objection during the officer's direct examination. Resp. Ex. F, p. 790; App'x 56a. Further, the testimony was a proper rebuttal to Deck's injection of the issue of the propriety of the police investigation throughout the trial. App'x 51a, 53a–54a.

Respondents addressed the applicability of *Martinez* to grounds 8 and 9 above, but to the extent that Deck continues to advocate for a hearing either regarding *Martinez* or on the merits, the district court's decisions on grounds 8 and 9 are legal conclusions that could not be affected by an evidentiary hearing. Jurists of reason would not find it debatable whether the petition states a valid claim of the denial of a constitutional right or whether the district court was correct in its procedural ruling. *Slack,* 529 U.S. at 484.

Ground 14

Deck next argues that the district court erred in applying *James v. Bowersox*, 187 F.3d 866 (8th Cir. 1999) and *Sublett v. Dormire*, 217 F.3d 598 (8th Cir. 2000) to Ground 14 because Ground 14 was preserved for review whereas those cases regarded plain error. As a starting proposition, the district court found that the comments at issue in Ground 14 were not improper personalization. App'x 110a. The district court did not need to continue its analysis, but it nonetheless went on to evaluate whether the comments would have rendered Deck's trial unfair, assuming they had been improper. App'x 110a. For this reason alone, Deck was not entitled to a certificate of appealability.

While the petitioner's claim in *Sublett* was reviewed by the state courts for plain error, the Eighth Circuit evaluated it under the *Darden v. Wainwright,* 477 U.S. 168 (1986) standard for preserved error. *Sublett*, 217 F.3d at 600. And *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), one of the cases Deck cites[12] for the proper standard of review, cites with approval the very *James* quote with which Deck takes issue. *Id.* at 840.

Finally, the district court did not rely solely on *James* and *Sublett*; it also cited *Darden* and *Lisenba v. California*, 314 U.S. 219 (1941). App'x 111a. Neither *Darden* nor *Lisenba* were plain error cases. The district court ultimately found that it "cannot be said that these statements so infected the trial with unfairness that a reasonable probability exists that the verdict might have been different had the error not occurred." App'x 111a–112a. This comports with the standards in *Shurn v. Delo*, 177 F.3d 662, 666 (8th Cir. 1999), *Newlon v. Armontrout*, 885 F.2d 1328, 1336 (8th Cir. 1989), and *Weaver*, 438 F.3d at 840.

The Missouri Supreme Court issued an opinion denying this ground, *see Deck,* 303 S.W.3d at 540, one that the district court found was consistent with clearly established federal law. App'x 111a. Deck does not demonstrate that jurists of reason would find it debatable whether he states a valid claim of the denial of a fair trial under the district court's application of the highly deferential standard of 28 U.S.C. § 2254(d).

Ground 16

[12] Pet. 18.

Deck argues that the district court "implicitly" found that the Missouri Supreme Court properly applied *Kansas v. Marsh*, 548 U.S. 163 (2006) when it evaluated Ground 16. Pet. 19–20. He argues *Marsh* is inapposite because the Kansas and Missouri state statutes are different. This is incorrect.

Marsh reaffirmed that a state death penalty statute that places the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances does not violate the Eighth Amendment. *Marsh*, 548 U.S. at 171. So long as the State proves every element of the offense charged and the existence of aggravating circumstances, the burden may then be placed on the defendant to prove mitigating circumstances sufficiently substantial to call for leniency. *Id*. In other words, once the State has proved that the defendant committed the crime and that he is qualified for death, it is permissible to put the burden on the defendant to show that the jury should grant him mercy. Missouri's statutes and jury instructions comport with this rule. Indeed, the Missouri Supreme Court has several times found that Mo. Rev. Stat. § 565.030, and corresponding jury instructions, comply with *Marsh*. *Deck,* 303 S.W.3d at 548; *State v. Johnson,* 284 S.W.3d 561, 588–89 (Mo. 2009); *see also State v. Forrest,* 183 S.W.3d 218, 228–29 (Mo. 2006) and *State v. Zink,* 181 S.W.3d 66, 74 (Mo. 2005) (pre-*Marsh* findings that statute and jury instructions do not impermissibly shift burden of proof). Deck does not demonstrate that jurists of reason would find it debatable whether he states a valid claim of the denial of a fair trial under the district court's application of the highly deferential standard of 28 U.S.C. § 2254(d).

Grounds 18 and 25

Deck argues that the district court improperly required Deck to show that a biased juror was seated on his jury and that cases like *Sanders v. Norris*, 529 F.3d 787 (8th Cir. 2008) are inapposite because there is no state court finding in Deck's case that any particular juror was biased. Pet. 21. It is unclear what Deck's proposed standard would be in a situation in which a petitioner cannot point to any particular juror as being biased. Deck asserts that he is not able to show that a particular juror was biased because the right questions were not asked. Pet. 21. It is far too speculative to claim, without any evidence that partial jurors were seated, that had the "right" questions been asked, jurors might have given the "wrong" responses. And any argument that trial counsel completely failed to ask whether jurors would automatically vote for death, Pet. 22, is belied by the record. Resp. Ex. KK pp. 130, 339, 393, 430.

The Missouri Supreme Court evaluated Ground 18, finding that Deck's proposed questioning would have improperly called for commitment, *Deck,* 381 S.W.3d at 344–45, and that the panel was adequately questioned about childhood evidence. *Id.* at 345. The district court found that reasonable. App'x 117a–118a. As to Ground 25, Deck procedurally defaulted his claim as to R.E. Doc. 35, p. 114. The district court did not make a finding on that default, but did find that Deck provided no evidence of R.E.'s bias. App'x 155a. As to Juror G.H., if it was the same juror with which he took issue in his post-conviction motion, the Missouri Supreme Court found that Deck was not prejudiced by the lack of further questioning because G.H.'s juror

questionnaire did not indicate she was biased. *Deck*, 381 S.W.3d at 359. The district court did not address that finding as it regards G.H. but instead found independently that Deck both inaccurately stated the facts and provided no evidence of G.H.'s bias. App'x 142a–143a. Deck does not demonstrate that jurists of reason would find it debatable whether he states a valid claim of the denial of a fair trial under the district court's application of the highly deferential standard of 28 U.S.C. § 2254(d).

Investigation Budget: Grounds 19 and 20

Deck again complains about his budget, indicating that the denial of funding prevented him for investigating the witnesses he lists in these two grounds. Pet. 22–23. This argument fails for two reasons. First, the timeline of the case does not support Deck's argument. And second, the claims themselves needed no further investigation.

Deck's counsel had one year and at least six CJA payments to sufficiently plead these claims in the petition. Docs. 3, 30. But instead, they decided to hold off investigation until after the petition was filed and after the Respondents' response was filed. Deck indicates that on May 5, 2014, he requested funding to work on the reply or an amended habeas petition. Pet. 22. But the reply was due three months earlier on February 3, 2014. By the time he requested funding he was on his second extension. Deck eventually filed his reply under protest and again asked for funding, Doc. 67, this time after all briefing on the relevant issues was complete. Deck did not timely request funding and did not use the funding he did have available to conduct

the investigation he now complains should have been done. Moreover, the merits of both grounds fail.

Ground 19

The proposed testimony in Deck's Ground 19, much of which was investigated by his trial counsel (contrary to Deck's assertion),[13] would have been cumulative, unhelpful, or attributed to a witness that was not ready, willing, and able to testify at the trial. Deck seems to accuse the district court of imputing trial strategy to trial counsel on a silent record, Pet. 24, but the district court frequently referenced the transcript of trial counsel's testimony during Deck's post-conviction relief hearing. App'x 119a–129a. Deck alleges that "it cannot be said that trial counsel had a strategic reason for not calling the additional witnesses described in the petition." Pet. 24. This is also untrue, as trial counsel testified that he felt it was wiser to discuss Deck's childhood through experts rather than through biased, hostile witnesses. Resp. Ex. UU, pp. 113–46, 178–94, 241–43, 247–48.

The Missouri Supreme Court evaluated Ground 19, finding that that trial strategy was a reasonable one. *Deck*, 381 S.W.3d at 349–52. The district court found that reasonable. App'x 122a–123a, 126a, 129a. Deck does not demonstrate that jurists of reason would find it debatable whether he states a valid claim of the denial of a fair trial under the district court's application of the highly deferential standard of 28 U.S.C. § 2254(d).

[13] The district court discussed, at length, Deck's grounds regarding lack of investigation. App'x 120a–129a.

Ground 20

Respondents addressed above why neither a hearing nor more funding was needed to explore either the ground itself or *Martinez*'s applicability to it. The district court found that the testimony proposed in Deck's Ground 20, even if true, would have been cumulative or unhelpful. App'x 57a–68a. Deck has not shown that jurists of reason would find it debatable whether he states valid claims of the denial of effective assistance of counsel *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

III. There is no requirement that the United States Court of Appeals explain its denials of certificates of appealability.

Lastly, Deck complains that the Eighth Circuit's short denials of certificates of appealability "completely insulate its reasoning from Supreme Court review." Pet. 29. However, summary denials of certificates of appealability do not preclude meaningful review, as this case demonstrates.

When faced with a summary denial of a certificate of appealability, this Court naturally should assume that the court of appeals determined that, for each ground raised, the applicant failed to show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *See Miller–El,* 537 U.S. at 326. This Court then evaluates the propriety of that decision as it would any other legal conclusion by a lower court.

It does not appear from Deck's petition for certiorari, or from this brief in opposition, that the parties' ability to set forth their arguments have been affected by the Eighth Circuit's summary denial of Deck's request for a certificate of appealability. Nor does 28 U.S.C. § 2253, the statute governing the issuance of certificates of appealability, require a detailed opinion. Thus, this Court should decline Deck's invitation to implement a solution to a problem that does not exist.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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