

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

**ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT**

Before the Court, in this habeas action brought under 28 U.S.C. § 2254 seeking relief from a state conviction and sentence of death, is Petitioner Brian J. Dorsey’s motion to alter or amend judgment. (Doc. 105.) The Court previously denied Petitioner’s motion for expansion of the record or for an evidentiary hearing; denied all 28 claims in the Petition and a certificate of appealability; and dismissed the case. (Doc. 104.) The present motion seeks reconsideration of Claims 4, 16, and 26, as well as the Court’s denial of certificates of appealability on these claims and the denial of an evidentiary hearing on Claim 16. The motion is opposed and fully briefed. (Docs. 105, 106, 107.) For the reasons below, the motion is **DENIED**.

## Legal Standard

The parties do not dispute that the Court’s decision is governed by Rule 59(e) of the Federal Rules of Civil Procedure. The Court “has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e) . . . .” *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). “Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence.” *Id.* (cleaned up). “Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.” *Id.* (cleaned up).

## Discussion

## I. **Claim 4**

In Claim 4, Petitioner argued that his trial counsel was ineffective for advising him to plead guilty without investigating a potential diminished capacity defense. The Court denied this claim under § 2254's deferential standard for reviewing state court decisions. Specifically, the Court

found that the Supreme Court of Missouri (“state court”) reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) in deciding that trial counsel was not deficient for rejecting this defense because there was overwhelming evidence of deliberation.

Petitioner now argues that the Court’s decision was manifestly erroneous, citing *Jacobs v. Horn*, 395 F.3d 92 (3d Cir. 2005). This is improper reargument. *Jacobs* was cited in the Petition. (Doc. 25 at 192.) A Rule 59(e) motion “is not a vehicle for simple reargument on the merits.” *Action Mailing Corp. v. Hewlett-Packard Co.*, No. 08-0671-CV-W-GAF, 2009 WL 4825189, at \*1 (W.D. Mo. Dec. 15, 2009) (quotation marks and citation omitted).

Petitioner also suggests that the Court overlooked his argument that the state court unreasonably determined the facts on this claim. In his Traverse, Petitioner purported to raise a factual challenge but then proceeded to make various legal arguments that failed to identify any of the facts on which the state court based its decision. (Doc. 104 at 11 n.6.) Petitioner now directs the Court to a specific portion of his Traverse that can arguably be construed as raising a factual challenge—but the argument plainly lacks merit. Petitioner argued in his Traverse that the state court erred in finding that trial counsel considered a diminished capacity defense. (Doc. 86, Traverse at 17-18.) The state court specifically found as follows: “Mr. Slusher testified that he did not ‘remember really seriously considering doing the guilt-phase diminished capacity defense’ but later testified that he thought he did consider such a defense prior to Mr. Dorsey pleading guilty.” *Dorsey v. State*, 448 S.W.3d 276, 290 (Mo. banc 2014). This was not an unreasonable determination of the facts. The state court’s findings were supported by trial counsel’s testimony at the state postconviction hearing that he thought he considered asserting diminished capacity but ultimately concluded that the facts were not favorable to such a defense. (See Doc. 29-11, PCR Tr. at 599, 662, 673.)

The remainder of Petitioner’s arguments about Claim 4 are a rehashing of the same assertions already raised and rejected. Petitioner has not shown that the Court manifestly erred in deciding this claim or in denying a certificate of appealability.

## II. Claim 16

In Claim 16, Petitioner argued that trial counsel was ineffective for not investigating and presenting mitigation evidence of Petitioner’s good behavior and adjustment to life in custody. The Court denied this claim as procedurally defaulted. The Court concluded that that the default was not excused under *Martinez v. Ryan*, 566 U.S. 1 (2012) because the underlying claim of

ineffective assistance of trial counsel was meritless and thus not a “substantial” claim that should have been pressed in the state postconviction proceedings. (Doc. 104 at 26-27.)

Petitioner argues that the Court employed the wrong standard in assessing “substantiality” under *Martinez* because the Court should have used “the same standard for a certificate of appealability.” (Doc. 105 at 6.) The Court disagrees. These are two different standards. To obtain a certificate of appealability, the petitioner must make a “substantial showing of the denial of a constitutional right”—i.e., that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (cleaned up). To excuse a procedural default under *Martinez*, a petitioner must show that (1) postconviction counsel “was ineffective under the standards of *Strickland*” and (2) “the underlying claim is a substantial one, which is to say that the claim has some merit.” *Buck v. Davis*, 137 S. Ct. 759, 771 (2017) (cleaned up). This substantiality test plainly requires an assessment of the underlying merits. The Eighth Circuit has held, without referencing the *Miller-El* standard, that a claim may be found insubstantial under *Martinez* if the record reveals that it lacks merit. *See Kemp v. Kelley*, 924 F.3d 489, 499 (8th Cir. 2019). Regardless, even if Petitioner were correct, the Court has already found that a certificate of appealability is not warranted.

Petitioner also takes issue with the Court’s denial of his motion to expand the record, which sought to supplement the record with additional affidavits to support Claim 16. Petitioner argues that the Court misconstrued the motion as one to admit evidence and improperly denied it on hearsay grounds instead of considering it as a proffer to show the need for an evidentiary hearing. Hearsay was not the Court’s only basis for denying the motion to supplement the record. The Court also reviewed the proffered affidavits, found them to be largely cumulative of the evidence already proffered, and concluded that they would not alter the Court’s decision to deny Claim 16 as insubstantial under *Martinez*. (Doc. 104 at 49 n.20.)

Finally, Petitioner points to *Wharton v. Vaughn*, 722 F. App’x 268 (3d Cir. 2018), and *Davis v. State*, 87 So.3d 465 (Miss. 2012). These cases could have been cited in the Traverse and will not be considered for the first time on a motion to alter or amend judgment.

The remainder of Petitioner's arguments about Claim 16 are a rehashing of the merits and do not show the Court manifestly erred in deciding this claim or in denying a certificate of appealability.

### **III. Claim 26**

In Claim 26, Petitioner argued that the jury instructions were erroneous because they did not require the jury to apply the beyond-a-reasonable-doubt standard in weighing the aggravating circumstances against the mitigating circumstances. The Court denied this claim as procedurally defaulted because it was not raised at trial, the state court reviewed it only for plain error, and Petitioner failed to show that the default was cured by subsequent proceedings in state court. (Doc. 104 at 44-46.) The Court then concluded that, even if the claim were not procedurally defaulted, the state court's decision on direct appeal was a reasonable application of federal law. (*Id.*)

Because the state court did not explain the basis for its denial of Petitioner's motion to recall the mandate and state habeas petition, the Court must presume that the state court denied them on the same grounds as on direct appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). And because the state court reviewed only for plain error on direct appeal, that means the Court must presume the claim remained procedurally defaulted through the state court's subsequent proceedings. *See id.*; *Clark v. Bertsch*, 780 F.3d 873, 874 (8th Cir. 2015). Petitioner argues that the Court erred in finding this claim procedurally defaulted because, in two of the Eighth Circuit cases previously relied on by this Court, the state court explicitly stated that it was denying relief on procedural grounds. *See Byrd v. Delo*, 942 F.2d 1226, 1229 (8th Cir. 1991); *Oxford v. Delo*, 59 F.3d 741, 745 (8th Cir. 1995). This does not show a manifest error. Petitioner has still failed to show through "strong evidence" that the state court reached the merits of this claim in the subsequent proceedings. *Ylst*, 501 U.S. at 804.

The rest of Petitioner's arguments about Claim 26 are rearguments and do not show that the Court manifestly erred in deciding this claim or in denying a certificate of appealability.

### **Conclusion**

Accordingly, Petitioner's motion to alter or amend judgment is **DENIED**. (Doc. 105.)

**IT IS SO ORDERED.**

s/ Roseann A. Ketchmark  
ROSEANN A. KETCHMARK, JUDGE  
UNITED STATES DISTRICT COURT

DATED: May 5, 2020