

****THIS IS A CAPITAL CASE****

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

CHRISTOPHER COLLINGS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

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

**PETITIONER'S APPENDIX
TO THE PETITION FOR WRIT OF CERTIORARI**

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-1064

Christopher Collings

Petitioner - Appellant

v.

Cindy Griffith

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:18-cv-08000-MDH)

JUDGMENT

Before ERICKSON, GRASZ, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The motion for leave to file an overlength reply is granted.

June 28, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A001

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 23-1064

Christopher Collings

Appellant

v.

Cindy Griffith

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:18-cv-08000-MDH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 08, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A002

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

CHRISTOPHER COLLINGS,)	
)	
<i>Appellant,</i>)	
)	
v.)	No. 23-1064
)	
CINDY GRIFFITH)	Death Penalty Case
)	No Execution Date
<i>Appellee.</i>)	

APPELLANT CHRISTOPHER COLLINGS'S
APPLICATION FOR CERTIFICATE OF APPEALABILITY

Appellant Christopher Collings moves the Court for a Certificate of Appealability (“COA”) so that he may appeal the district court’s adverse rulings on Claims 1, 2, 4, 9, 11, 14, 16, and 17 of his Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. 2254. Appellant Collings also appeals the district court’s denial of his motion for a stay of the habeas proceedings to allow him, through appointed counsel, to exhaust his state court remedies in light of the Supreme Court’s decision in *Shinn v. Ramirez*, 142 S.Ct. 1718 (2022).¹

¹ Appellant Collings does not address the merits of this claim in his application for certificate of appealability because this issue is appealable under 28 U.S.C. § 1291 and does not require a certificate of appealability. *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (holding that a COA is required under 28 U.S.C. §2253(c)(1)(a) only if the district court’s order disposed of a habeas corpus proceeding’s merits); *Rhines v. Weber*, 346 F.3d 799, 800 (8th Cir. 2003), *vacated and remanded on non-jurisdictional grounds*, 544 U.S. 269 (2005) (“We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas petition in abeyance pending exhaustion of state court remedies.”); *see also*, *Edwards*

STATEMENT OF CASE AND FACTS

COA STANDARDS

A court should issue a COA when an appellant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A COA does not require a showing that an appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Instead, a COA should issue if the district court’s decision is “debatable among jurist of reason,” or “the issues presented are adequate to deserve encouragement to proceed further.” *Id.* at 336.

In determining whether an issue is debatable, courts may not conduct a merits review of the issue. *Id.* (“This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.”). Courts must not conflate the question of whether a case presents issues that are “debatable” with whether the issues are likely to succeed on appeal. Courts should resolve all doubts about debatability in favor of the petitioner, especially in a capital case where “the nature of the penalty is a proper consideration” weighing in favor of a COA. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (citing *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000); *see also, Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

v. Roper, 688 F.3d 449, 462 (8th Cir. 2012) (concluding that this Court may consider an order denying a motion to enlarge the authority of appointed counsel without a COA).

Collings presents eight debatable issues for appeal:

1) Whether reasonable jurists could disagree whether Collings's Fifth, Sixth, and Fourteenth Amendment rights were violated as a result of unconstitutional police tactics in obtaining a statement from him?

2) Whether reasonable jurists could disagree about the denial of Collings's right to due process of law when the state court failed to consider a law enforcement officers' "egregious and blatant violation of Collings' constitutional rights" in evaluating the officer's credibility?

3) Whether reasonable jurists could disagree whether the prosecution's failure to disclose their primary law enforcement officer's multiple criminal convictions and sentences of imprisonment resulted in a *Brady* violation?

4) Whether reasonable jurists could disagree that Missouri law considers evidence of voluntary intoxication relevant to a defendant's mental state and therefore find that the exclusion of such mental state evidence establishing Collings's defense to first-degree murder violated due process?

5) Whether reasonable jurists could disagree with the district court's determination that Collings's new evidence of previously uninvestigated and unrepresented brain abnormalities negating an element of first-degree murder does not satisfy the fundamental miscarriage of justice standard nor entitle Collings to relief?

6) Whether reasonable jurists could disagree that trial counsel's consultation with multiple experts in other fields of expertise automatically forecloses any other ineffective assistance of counsel claim asserting a failure to investigate and present to the sentencing jury medical evidence establishing two statutory mitigating circumstances that the jury otherwise did not consider?

7) Whether reasonable jurists could disagree that trial counsel's failure to present to the jury known evidence establishing Collings's prior disclosure of his sexual victimization when he was a child and teenager was reasonable, particularly when counsel wanted to present this information and the failure to do so allowed the State to

undermine the mitigation case by relying on the absence of evidence of Collings's pre-trial disclosure?

8) Whether reasonable jurists could disagree with the district court's determination that Collings's new evidence of previously uninvestigated and unrepresented evidence of Collings's "multiply injured brain" negating an element of first-degree murder does not satisfy the fundamental miscarriage of justice standard for actual innocence of the death penalty nor entitle Collings to relief?

Indeed, capital habeas petitioners in this Circuit have received COAs on similar – yet demonstrably weaker – claims than Collings's, even where there was reason to believe success on appeal was unlikely. *See, e.g., Dorsey v. Vandergriff*, 30 F.4th 752 (8th Cir. 2022) (COA was granted on counsel's ineffectiveness for failing to present evidence of capital defendant's good adjustment in prison).

In *Nelson v. United States*, a panel of the Eighth Circuit reversed their earlier denial of a COA and issued a COA. *See* 909 F.3d 964, 969 (8th Cir. 2018). The panel of this Court noted that after the district court denied a COA on all claims, the Eighth Circuit did as well, but reversed this decision on rehearing in light of the pending Supreme Court case of *Buck v. Davis*, 580 U.S. 100 (2017).

Buck also supports Mr. Collings's request for a COA. At issue in that case was whether the circuit court engaged in the proper inquiry in determining the petitioner's COA request. The Court began by articulating the nature of the COA inquiry under 28 U.S.C. § 2553:

The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This threshold questions should be decided without full consideration of the factual or legal bases adduced in support of the claims. When a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Buck, 580 U.S. at 115 (citations omitted). As the Court further noted: “The statute sets forth a two-step process; an initial determination whether a claim is reasonably debatable, and then – if it is – an appeal in the normal course.” *Id.* at 117.

The circuit court in *Buck*, however, improperly reversed the two-step process: it “phrased its determination in proper terms – that jurists of reason would not debate that *Buck* should be denied relief – but it reached that conclusion only after essentially deciding the case on the merits.” *Id.* at 115-16 (internal citation omitted). However, the Supreme Court flatly rejected this mode of COA inquiry: “That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.” *Id.* at 116.

As in *Buck*, the Supreme Court repeatedly has cautioned that “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.”

See, e.g., *Miller-El*, 537 U.S. at 338. In other words, a claim is “debatable” when it is “open to dispute on any logical basis. The focus is on the existence of a debatable issue, not on which party was correct.” *Adam v. Stonebridge Life Ins. Co.*, 612 F.3d 967, 974 (8th Cir. 2010).

The issuance of COAs are especially important in capital cases, where the Supreme Court has directed that “in a capital case, the nature of the penalty is a proper consideration.” *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); see also *Gomez v. Quarterman*, 529 F.3d 322, 326 (5th Cir. 2008) (“In death penalty cases, any doubts as to whether the COA should issue are resolved in favor of the petitioner.”). Mr. Collings urges the Court to grant the COA because many of the claims concern the appropriateness of the sentence of death and counsel’s ineffectiveness in the penalty phase.

ISSUES REQUIRING CERTIFICATE OF APPEALABILITY

I HABEAS CLAIM ONE

The State’s case against Collings depended on statements obtained from him on November 9, 2007, that were the were the product of unconstitutional police tactics that served to deny Mr. Collings his Fifth, Sixth, and Fourteenth Amendment rights. The Missouri Supreme Court denied relief but only after ignoring evidence presented in the trial court that substantiated the unconstitutional police interrogation tactics. Collings’s claim, as outlined below, is

one where reasonable jurists could disagree whether he is entitled to relief and this Court should grant him a COA.

The district court denied relief on Collings's claim by relying on the reasoning of the Missouri Supreme Court's opinion, but ignoring the challenges raised in the habeas petition. R. Doc. 58, at 13-14. Notably, Collings's habeas claim challenges the Missouri Supreme Court's decision on its application of established Supreme Court precedent as well as its decision not being supported by the record developed in the state court. These factors, when taken as a whole, demonstrate Collings's basis for relief and entitlement to a COA in this Court.

Collings made three statements to law enforcement. The first was an unrecorded statement made to Chief Clinton Clark at the Muncie Bridge outside of Wheaton, Missouri. The second was a recorded statement that occurred at the Wheaton Police Department. The third and final statement to law enforcement was recorded and took place at the Wheaton Police Department. The three statements implicate different constitutional issues and involve different police tactics designed to elicit incriminating statements and to prevent Mr. Collings from asserting his constitutional right to remain silent.

The initial statement made at the Muncie Bridge implicates two issues – whether Mr. Collings was in a custodial setting and whether law enforcement relied on the “false friend” technique to extract a statement from Mr. Collings. The trial

court held that the circumstances of the interrogation was not custodial in nature and, therefore, did not require Chief Clark to provide the *Miranda* warnings. R. Doc. 10-32, at 173. The trial court's analysis, though, ignored most of the factual considerations in determining the custodial nature of the interrogation. The trial court emphasized a single factor – that Chris Collings initiated the contact – while ignoring all of the other, relevant factual issues at play. R. Doc. 10-32, at 172-73. As a result, the trial court's analysis fails to support its finding, and the facts of the Muncie Bridge interrogation make clear, this was a custodial interrogation requiring a *Miranda* warning be provided to Mr. Collings.

The second and third statements raise three issues with respect to the police tactics involved in obtaining the statements. First, whether Chief Clark advised Mr. Collings of his *Miranda* rights prior to the Muncie Bridge interrogation is relevant to the subsequent interrogations. The trial court found that he did and credited Chief Clark's credibility even though his testimony was contradicted by the written *Miranda* warning timestamp, Chief Clark's written report and testimony from other officers that the warning was provided after the Muncie Bridge interrogation. R. Doc. 10-32, at 166, 173.

Second, by relying on the initial, unrecorded custodial interrogation, law enforcement engaged in a two-step interrogation procedure that violated Mr. Collings' constitutional rights. Namely, law enforcement waited to advise Mr.

Collings he had a right to remain silent until after he had provided inculpatory statements to Chief Clark. This technique is effective, but ultimately one that violates basic constitutional protections. *See Missouri v. Seibert*, 542 U.S. 600, 607 (2004).

Finally, law enforcement relied on the innate fear of reprisal Mr. Collings felt at the time he provided statements to law enforcement. Mr. Collings feared he would be subject to violent retaliation by members of the community and law enforcement played on this fear. Notably, law enforcement informed Mr. Collings that they could protect him, but only were he to cooperate and confess. Absent that, they discussed releasing him and noted they would be looking for a body in the morning.

Both the trial court and the Missouri Supreme Court held that Collings's first interrogation at the Muncie Bridge was a non-custodial interrogation and that Collings had been advised of his *Miranda* warnings prior to giving his statement. *State v. Collings*, 450 S.W.3d 741, 755 (Mo. 2014). These holdings are not supported by the facts and fundamentally misapply established Supreme Court precedent.

Collings's first statement to Chief Clark on November 9, 2007, was made at the Muncie Bridge located outside of town. Collings was identified from the outset as a suspect in the disappearance and murder of Rowan Ford. While law enforcement naturally focused the bulk of their attention on David Spears, the

victim's stepfather, Collings was also repeatedly questioned by law enforcement because he was one of the last people (along with David Spears and Nathan Mahurin) to see the victim alive.

Chief Clark viewed Collings as suspect and actively pursued additional questioning of Collings with the express purpose of extracting a confession. R. Doc. 10-14, at 934, 1012; R. Doc. 10-4, at 1219; R. Doc. 10-1, at 71; R. Doc. 10-15, at 1219. The record is clear Chief Clark affirmatively reached out to law enforcement handling the investigation seeking to be involved in the investigation and in particular, to pursue a confession from Collings. R. Doc. 10-3, pp. 567-69; R. Doc. 10-4, at 935-36. Law enforcement in charge of the investigation authorized Chief Clark to make additional approaches to Collings and he did so on several occasions in the week following Rowan's disappearance and then reported back his findings to the lead agents. Clark testified he administered the *Miranda* warning to Collings during one attempt to obtain a statement evidencing the custodial nature of the encounter as well as Clark's belief Collings was a suspect at the time he initiated contact. *See State v. Gaw*, 285 S.W.3d 318, 321 (Mo. banc 2009) ("A criminal suspect is entitled to *Miranda* warnings, consistent with the Fifth Amendment right against self-incrimination, once the suspect is subjected to a custodial interrogation.") (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

The Missouri Supreme Court's holding that Collings was neither a suspect nor a under a custodial interrogation is not supported by the undisputed record and is, therefore, not entitled to statutory deference. *Collings*, 450 S.W.3d at 753-54; 28 U.S.C. § 2254(d).

The Missouri Supreme Court held that Collings was provided with the appropriate warnings prior to giving a statement to Chief Clark at the Muncie Bridge. *Collings*, 450 S.W.3d at 755. This decision is inconsistent with the facts developed at the state trial court and ultimately drove the court's incorrect decision.

Chief Clark provided testimony regarding his interactions with Collings on November 9, 2007, that is plainly inconsistent with the objective facts. He testified during the suppression hearing that he provided Collings with the written *Miranda* waiver prior to taking Collings to the Muncie Bridge for questioning. R. Doc. 10-6, at 31-32. The written *Miranda* waiver, though, was signed and time-stamped *after* the interrogation at the Muncie Bridge. The time noted on the *Miranda* waiver is consistent with Chief Clark's radio check-ins with other law enforcement agencies showing they arrived back just prior to the time noted on the *Miranda* waiver. Moreover, another law enforcement officer testified he personally observed Collings sign the *Miranda* waiver while seated at the police station after the initial interrogation at the Muncie Bridge. R. Doc. 10-5, p. at 27. The facts simply do not

support the Missouri Supreme Court's holding that Collings had been properly advised of his constitutional rights prior to giving his initial statement.

Chief Clark attempted to conceal his failure to provide the advice of rights to Mr. Collings because the initial statements attributed to Mr. Collings from the Muncie Bridge interrogation impacted the admissibility of subsequent statements obtained by law enforcement. In this case, the initial statements attributed to Mr. Collings obtained by Chief Clark served as the foundation for the follow-up interrogations occurring later in the day at the Wheaton Police Department.

Law enforcement engaged in a two-step interrogation in an effort to obtain a statement from Mr. Collings. Law enforcement engaged with Mr. Collings repeatedly in the week following Rowan Ford's disappearance. Mr. Collings resisted law enforcement efforts to confess even though he was subjected to a variety of interrogation techniques. Chief Clark recognized that Chris was becoming frustrated with the law enforcement encounters and was about to terminate his cooperation. R. Doc. 10-5, at 52. Chief Clark then took another approach on November 9, 2007, by waiting until after obtaining a statement from Mr. Collings to advise him of his *Miranda* rights.

The Supreme Court addressed this exact issue in *Seibert*, reaffirming the *Miranda* holding:

Miranda addressed “interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice” about

speaking, and held that a suspect must be “adequately and effectively” advised of the choice the Constitution guarantees. The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

Seibert, 542 U.S. at 611 (internal citations omitted).

Law enforcement utilized the two-step interrogation tactic because they had been unable to convince Mr. Collings to confess to the murder of Rowan Ford. Chief Clark made repeated attempts to speak with Chris about Rowan Ford’s disappearance during the week between her disappearance and the recovery of the body. Chris Collings denied any involvement in each of these encounters and, according to Chief Clark, Chris was leaning toward withdrawing his cooperation with law enforcement. And each time Chris expressed a desire to assert his constitutional right to remain silent or to consult with an attorney, Chief Clark would encourage Chris not to do so and to continue to cooperate.

Chief Clark wanted to obtain a confession from Chris at the outset of his encounter with him on November 9, and chose not to advise Chris of his rights to avoid any chance Chris would stop cooperating. Chief Clark was ultimately successful in obtaining a statement from Mr. Collings but in doing so his actions render the subsequent statements – even though made after Chris was advised of his rights – inadmissible. *Seibert*, 542 U.S. at 613 (“Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would

hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.”). These subsequent statements were only made after law enforcement had obtained an initial illegal confession.

Reasonable jurists could disagree regarding the district court’s resolution of Mr. Collings’ claim. The district court adopted the findings of the Missouri Supreme Court, but like the Missouri Supreme Court, ignored the evidentiary record that undermined the denial of the motion to suppress. R. Doc. 58, at 13-14. In particular, the Missouri Supreme Court held that Chief Clark advised Collings of his *Miranda* rights prior to interrogating him even though Collings testified the *Miranda* warning was only given after the initial interrogation. *Collings*, 450 S.W.3d at 755. The Missouri Supreme Court then held, “There was no other evidence demonstrating Chief Clark deliberately tried to skirt the protections of *Miranda* on November 9th either before or after the Muncie Bridge confession.” *Id.* This is an inaccurate portrait of the evidence presented.

Chief Clark’s report reflected the *Miranda* form was signed after the initial interrogation at 3:00 PM. R. Doc. 10-6, at 667; R. Doc. 10-3, at 45, 89. This timing was consistent with the *Miranda* form signed and dated by Collings as well as corroborating testimony from two law enforcement officers that observed Collings sign the form after he returned from the initial interrogation. R. Doc. 10-4, at 258,

321, 326-27; R. Doc. 10-8, at 1247-48. Further, the timing was consistent with Chief Clark's call log that had he and Collings arriving back at the station following the Muncie Bridge interrogation at approximately 3:00 PM. R. Doc. 10-4, at 609-610, 665. Indeed, the only evidence offered by the state to substantiate the timing of the *Miranda* warnings was from Chief Clark. All of the additional evidence contradicted his testimony and supported Collings's testimony. The district court did not consider this additional evidence presented at the state court even though it bears directly on the consideration of the motion to suppress and whether, as Collings' asserted in his habeas petition, whether the law enforcement officers engaged in an unconstitutional two-step interrogation. There is sufficient evidence on this issue to support the finding that reasonable jurists could disagree as to the outcome of the claim.

The district court also failed to consider the circumstances of Collings's interrogation and whether law enforcement was required to advise him of his *Miranda* rights. The circumstances of the initial interrogation of Mr. Collings are entirely consistent with a custodial interrogation as long-established by the Supreme Court. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also, United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990) ("If [defendant] believed his freedom of action had been curtailed to a 'degree associated with formal arrest,' and that belief was reasonable from an objective viewpoint, then Griffin was being held in custody

during the interrogation.”)(quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). In these circumstances, law enforcement was required to advise Collings of his *Miranda* rights prior to interrogating him. *Id.* That did not occur in this case thus upending well-established Supreme Court precedent that would support a finding in favor of Collings request for habeas relief. *See* 28 U.S.C. § 2254(d)(1) and (2). Thus, this Court should issue a COA on this issue.

2 HABEAS CLAIM 2.

Collings’s claim raises a due process claim regarding the state trial court’s refusal to consider evidence relating to Wheaton Police Chief’s conduct during the investigation of Collings for murder. This conduct, described by the Missouri Supreme Court as an “egregious and blatant violation of Collings’ constitutional rights” was not considered by the trial court when evaluating Chief Clark’s conduct as a law enforcement officer nor for his credibility as a witness. *Collings*, 450 S.W.3d at 757-758. The failure to consider this information represented a substantial denial of Collings’s due process rights established through Supreme Court precedent.

Chief Clark’s egregious conduct involved attempts to interrogate Collings about the murder after Collings had been arrested, arraigned, and was represented by counsel. *Id.* Chief Clark knew he was being recorded at the time of the interrogation attempt and acknowledged he knew Collings was represented by counsel. R. Doc. 8-3, at 988. Despite this knowledge, Chief Clark repeatedly tried to

get Collings to speak about the murder investigation and even attempted to dissuade Collings to ignore the advice of his counsel not to talk about the murder case by telling Collings, “[W]hat you decide to do or say is up to you.” (*Id.*) Chief Clark only relented in his interrogation after Collings repeatedly told Clark he wanted his lawyer present for any interview about the murder investigation. (*Id.*)

Defense counsel sought to make an issue of Chief Clark’s conduct in his inquiries with Christopher Collings on November 14, 2007. Counsel offered the videotaped statement as well as a prepared transcript as an exhibit in the suppression hearing. R. Doc. 10-6, at 847. The State objected, arguing that the events of November 14, 2007, were irrelevant to the court’s inquiry on the motion to suppress. R. Doc. 10-6, at 854-55. The State contended that they were not going to be offering any statements made by Mr. Collings in the trial and, therefore, according to the state, the entire exchange on November 14, 2007, would be inadmissible. R. Doc. 10-6, at 847-50. The trial court agreed and sustained the state’s objection. R. Doc. 10-6, at 850, 854-55, 857.

The defense offered the videotape and transcript as an offer of proof to the trial court. R. Doc. 10-6, at 865. The court allowed the defense to play the video in court, but informed counsel that she would not consider it in making her decision on the motion to suppress. (*Id.*) The trial court stayed true to its ruling made during the hearing, holding:

The Defendant called Chief Clint Clark to testify about the contact he had with the Defendant at the Barry County jail on November 14, 2007. The testimony was taken in the form of an offer of proof. The State announced that the Defendant had an attorney on November 14, 2007, and the State has no intention to offer the November 14, 2007 statement in its case-in-chief. The statements were fully videotaped. The Court finds that the Defendant was in custody on November 14, 2007 and had been appointed counsel. Chief Clark did advise the Defendant of his Miranda rights and questioned him further about the murder of Rowan Ford. The state announced that the state will not introduce the statement in its case-in-chief at trial before the defense's offer of proof. The Court does not intend to allow the State to offer this video in the States case-in-chief.

The statements made by the Defendant on November 14, 2007 as an offer of proof by the defense is refused for the purpose of the offer of proof – to attack the Defendant's prior statements to Chief Clint Clark made prior to and on November 9, 2007. The November 14, 2007 interview and in court contact (Chief Clinton Clark stood near Defendant at his initial court appearance) does not operate to invalidate the Defendant's voluntary statements made through November 9, 2007.

R. Doc. 10-32, at 176-77. The trial court expressly rejected the offer of proof as it bore on the issue of Chief Clark's credibility as a witness. *Id.* Despite this, the Missouri Supreme Court held that the trial court did consider the evidence, but simply chose to believe Chief Clark's account. *Collings*, 450 S.W.3d at 757-758. This simply is not supported by the record and the district court in this case merely accepts the Missouri Supreme Court's view of the evidence with no consideration of the facts raised in *Collings*'s petition for habeas relief. R. Doc. 58, at 16-17.

The trial court's decision to sustain the State's objection and refuse to consider the evidence from the November 14, 2007, encounter materially impacted the trial court's consideration of the motion to suppress. As noted above, the statements obtained on November 9, 2007, were central to the State's case against Mr. Collings. Therefore, the motion to suppress was vitally important to Mr. Collings's overall defense.

The trial court credited the testimony of Chief Clark and sided with his version of events as they transpired on November 9, 2007. R. Doc. 10-32, at 166. The trial court noted that his tactics were appropriate and did not violate Mr. Collings's constitutional rights. R. Doc. 10-32, at 176-77. However, the only record the court could rely on to make such a finding were his statements to the trial court and not the totality of the circumstances. *United States v. LeBrun*, 363 F.3d 715 (8th Cir. 2004). This Court has made clear that a court's consideration of the voluntariness of a statement must include "an examination of both the conduct of the officers and the characteristics of the accused." *Wilson v. Lawrence County*, 260 F.3d 946, 952 (8th Cir. 2001).

The primary interactions at issue in the motion to suppress were made without the benefit of a recording. Indeed, the primary interactions occurred outside the police station and at a remote location chosen by Chief Clark. As a result, whether the interactions took place as Chief Clark described was based in

whole, or in part, on his credibility. Yet, the trial court chose not to consider crucial and relevant evidence of Chief Clark brazenly violating Mr. Collings's constitutional rights in an effort to obtain a further statement.

Had the trial court considered the evidence in whole the outcome likely would have been different. As noted in Habeas Claim 1, *supra*, the above argument, only Chief Clark testified that he provided Collings with the *Miranda* form prior to leaving for the Muncie Bridge. Chief Clark's testimony was undermined by the testimony of other officers present at a later point in time when Mr. Collings signed the *Miranda* form. Further, his testimony was undermined by his call logs, Mr. Collings's testimony and, most importantly, Chief Clark's own report made of the events of November 9, 2007. That he altered his timeline from his written report – something law enforcement officers rarely if ever do – to conform to the State's preferred version of events is highly unusual and suggestive he was not being candid with the court. Had the trial court considered the evidence from November 14, it would have determined that Chief Clark was a person willing to bend well-established constitutional rules in service of obtaining an incriminating statement.

Collings has more than established he meets the threshold for obtaining a COA on this issue. The Missouri Supreme Court's decision is not supported by the facts developed at the trial court nor does the court apply established Supreme Court precedent. This Court should issue a COA as to this claim.

3 HABEAS CLAIM 4.

The state's chief law enforcement witness – and the officer responsible for obtaining a statement from Collings – served time on a military prison stemming from his conviction for desertion during the Vietnam War. The state failed to acknowledge Chief Clark's criminal history until the issue was raised by Collings in his habeas petition. R. Doc. 8-2, at 283; R. Doc. 10-43.² Instead, the state concealed the full extent of Chief Clark's criminal history even though they were bound by statutory and constitutional obligations. The State's failure to fully disclose the impeachment evidence in a timely manner denied Mr. Collings his right to due process of law and a fair trial as the trial court and the jury lacked the necessary information to accurately assess Chief Clark's credibility.

The district court denied relief on two bases. First, the court held Collings failed to demonstrate the state withheld the *Brady* evidence from the defense. R.

² The State disclosed a redacted copy of Chief Clark's military records in its response to Collings's petition for writ of habeas corpus. R. Doc. 10-43. The State's records acknowledged for the first time that Chief Clark's arrest led to a conviction and sentence following his arrest on January 6, 1968. *Id.* The records also revealed three additional convictions for the same offense. R. Doc. 10-43, at 3-6, 9-10). Chief Clark was ordered to serve a sentence of six (6) months of hard labor in the Post Stockade at Fort Leonard Wood, Missouri. Chief Clark was then released in January 1969 and within three weeks of his release he deserted his post again until he was apprehended on or about May 9, 1969. R. Doc. 10-43, at 13-14, 16. Chief Clark was again sentenced to six (6) months imprisonment in the Post Stockade at Fort Leonard Wood, Missouri until his discharge "under conditions other than honorable" on October 23, 1969. R. Doc. 10-43, at 16. The records indicate Chief Clark was absent or in-custody for 726 of the 890 days of his service in the military. (*Id.*). None of this information was disclosed until the habeas proceedings.

Doc. 58, at 18. Second, the district court held that the prior convictions from the Vietnam War would not have made a difference in the outcome of the case. R. Doc. 58, at 18. The district court's decision is not supported by the available record and are inconsistent with established Supreme Court precedent.

The Supreme Court's holding in *Brady v. Maryland* requires disclosure of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S. at 87. The *Brady* rule is based on the requirement of due process. *United States v. Bagley*, 473 U.S. 667, 674–76 (1985). The Court extended the *Brady* holding to the disclosure of evidence affecting the credibility of a witness. *See Giglio v. United States*, 405 U.S. 150 (1972). The *Giglio* Court held:

“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*].

405 U.S., at 154 (citations omitted). The Supreme Court made clear in *United States v. Bagley*, that there is no distinction between the prosecution's duty to disclose exculpatory and impeachment evidence. 473 U.S. 667, 676-77 (1985). Missouri adopted procedures to compel state prosecutors to disclose relevant *Brady* material to the defense as a matter of course. *See Mo. Sup. Ct. R. 25.03*. Collings made the requisite request for disclosure by the state even though the State has an obligation

to disclose even in the absence of a particular request. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

The state prosecutors failed to meet their disclosure obligations when they presented an incomplete and misleading criminal history report for Chief Clark. On or about March 11, 2011, the State disclosed a single page report detailing the relevant criminal records for the Barry County witnesses. R. Doc. 8-2, at 283. This report included information for six officers, including Chief Clinton Clark. *Id.* Only Chief Clark had any relevant information included in the report and the information provided was as follows:

Chief Clint Clark, Wheaton Police Department, had one reported incident being arrested in Barry County on January 6, 1968 for Desertion from the U.S. Army with the charge amended to AWOL and an investigative arrest in Rogers, Arkansas on November 5, 1968 for investigation of forgery with no disposition shown on either charge.

R. Doc. 8-2, at 283. No additional information was provided by the State with respect to Chief Clark.

The State's untimely disclosure of Chief Clark's history was insufficient to meet its constitutional obligations to Mr. Collings. While the State provided some limited information related to Chief Clark's service in the military, they failed to disclose that his charge of desertion from the U.S. Army had been disposed in a way that resulted in a criminal conviction, three additional convictions for desertion, and his two sentences of imprisonment. R. Doc. 8-2, at 281-82. Collings's trial

counsel reasonably relied on the disclosures by the State indicating there was no disposition of Chief Clark's initial charge. *Strickler v. Greene*, 527 U.S. 263, 284 (1999). This reliance carries additional weight given Chief Clark's position as a law enforcement officer. State licensing requirements require a law enforcement officer to have a clean criminal record and the State's disclosure that there had been no disposition of Chief Clark's criminal history was inherently reasonable. See § 590.080.1 R.S.Mo. and § 590.100.1 R.S.Mo.

Military records available to the State at the time of trial reveal that Chief Clark deserted his post on four separate occasions beginning on September 9, 1967, four months after joining the Army. R. Doc. 8-2, at 282. Chief Clark's records show that he continued to desert his post after being returned to the Army. R. Doc. 8-2, at 282. He again deserted his post on April 29, 1968, July 11, 1968, and for the final time on November 23, 1968. R. Doc. 8-2, at 282. Chief Clark was court martialed for his repeated violations of military law and was sentenced on July 23, 1969. R. Doc. 8-2, at 643. He was held at the Correctional Housing Dispatch (CHD) at Ft. Leonard Wood, Missouri, until he was given an "Undesirable Disch[arge]" on October 23, 1969. R. Doc. 8-2, at 282. The State did not disclose any of this information to the defense. Instead, they relied on the incomplete March 11, 2011, report indicating, "no disposition was shown" for the charge of desertion. R. Doc. 8-2, at 282.

The State withheld evidence that would clearly have been admissible and relevant to Chief Clark's credibility as a witness. Chief Clark's military conviction would have been relevant and admissible to impeach his credibility. *See* § 491.050 R.S.Mo. Section § 491.050 provides:

Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

Id. The Missouri Supreme Court has consistently held, “section 491.050 to confer an absolute right, in both civil and criminal proceedings, to impeach the credibility of any witness, including the accused, with his or her prior criminal *convictions.*” *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. 1995) (emphasis in original). Chief Clark's courts martial conviction would squarely fall within the ambit of section 491.050. *See State v. Mitchell*, 659 S.W.2d 4, 5–6 (Mo. Ct. App. 1983) (“We do not question the validity of courts martial for the purposes of military order and discipline. Further, we find nothing objectionable in the use of courts-martial for the purpose of impeaching a witnesses' credibility.”) (citing *State v. Himmelmann*, 399 S.W.2d 58 (Mo. 1966)).

The State failed to disclose any information relevant to Chief Clark's sordid military past until well after the defense challenged his credibility during the suppression hearing. The State made its disclosure on or after March 11, 2011. R. Doc. 8-2, at 644. While this disclosure was made just prior to the original trial setting, the State chose not to disclose any information in advance of either Chief Clark's depositions (occurring over several dates in 2009) nor his testimony before the trial court in the hearing on the motion to suppress (beginning on October 30, 2010) even though his credibility was essential to the trial court's ruling. The late disclosure by the State materially impacted preparation of the defense and consideration of the motion to suppress.

The state also ignored the potential impact Chief Clark's criminal conviction would have had on his ability to be licensed as a law enforcement officer in the state of Missouri. Requirements for licensure prevent individuals like Chief Clark from serving in law enforcement. *See* § 590.080.1 R.S.Mo. and § 590.100.1 R.S.Mo. It is likely Chief Clark failed to disclose his criminal history to the state of Missouri as it would have prevented him from employment in law enforcement. His failure to disclose his full criminal history, along with the crimes themselves, would have been relevant to his overall credibility as a witness in Collings's criminal trial.

Chief Clark's credibility as a law enforcement officer was central to the trial court's consideration of the motion to suppress. Chief Clark took the lead role in

engaging with Collings in the days following Rowan Ford's disappearance. He met with Collings on multiple occasions throughout the week and, importantly, was the first person to meet with Collings on the day officers discovered Rowan Ford's body.

According to the State's case, Christopher Collings provided a full confession to the rape and murder of Rowan Ford when he was alone with Chief Clark at the Muncie Bridge. According to the State, Chief Clark administered a written *Miranda* warning to Mr. Collings and Chris acknowledged the statement by signing the paperwork. These facts, though, are very much in dispute. In fact, whether Chief Clark provided the *Miranda* warning to Mr. Collings *prior to* the custodial interrogation as the Muncie Bridge is a fundamental question for determining whether to suppress the statements attributed to Mr. Collings on November 9, 2007. The trial court sided with Chief Clark's version of events and found him to be credible.

Chief Clark's multiple court martials for desertion is relevant to the trial court's consideration of his credibility as a law enforcement witness. Military courts have allowed consideration of even lesser crimes – unauthorized absence – because they may affect the credibility of the witness. *See United States v. Brenizer*, 20 M.J. 78 (C.M.A. 1985). The *Brenizer* court noted:

We recognize that unauthorized absences often reflect irresponsibility and a disregard for duty and authority on the part of

the absentee. It is not illogical, therefore, for factfinders to infer that a servicemember who thinks so little of his service commitment as to depart without authority may also take lightly his obligation to testify truthfully, especially when his own neck is on the block.

Id. at 81.

Evidence of Chief Clark's lack of commitment to his service obligations – especially during a time of war – would have highlighted his similar lack of commitment to Mr. Collings's constitutional rights. In particular, the jury could have been informed that Chief Clark's desertion during a time of war carried a potential death sentence.

See 10 U.S.C. § 885(c).

Chief Clark crossed the line and violated Mr. Collings's constitutional rights as noted in Claims 1 and 2, *supra*. Chief Clark repeatedly tried to convince Mr. Collings to forgo his right to counsel and even attempted to obtain a statement from Mr. Collings after arraignment and after his Sixth Amendment rights had attached. Therefore, the issue of Chief Clark's overall criminal history and cover-up would have been relevant to the trial court's inquiry during the suppression hearing and the jury's credibility inquiry during the trial. This information was not available because the State chose to withhold the information in violation of Collings's constitutional rights.

The district court denied relief, in part, on finding that Collings could have raised this issue earlier through due diligence. R. Doc. 58, at 18. The district court

relied on this Court's opinion in *O'Neal v. Bowersox*, 73 F.3d 169 (8th Cir. 1995). *Id.* The district court's reliance on *O'Neal* is misplaced. In *O'Neal*, a majority of this Court held that the petitioner was at fault for failing to raise the *Brady* issue in the initial habeas petition instead of bringing the issue to light for the first time in a Fed. R. Civ. P. 60(b) motion. *Id.* at 169. This Court expressed no concern had the petitioner brought the issue to light in his initial habeas petition where, as here, the state failed to disclose relevant *Brady* evidence in a timely manner. In this case, Collings raised the *Brady* claim in his initial habeas petition when it was discovered the state withheld evidence of Chief Clark's prior criminal conviction and sentence of imprisonment.

Appellant Collings claim is one in which reasonable jurists could disagree as to the impact of Chief Clark's criminal conviction on the outcome of the suppression hearing where he was the key witness. Further, the impact of Chief Clark's charges of desertion during a time of war – carrying a potential death sentence – is an issue where reasonable jurists could disagree as to the impact this information would have on his credibility and in the confidence of the outcome of the trial. Moreover, Chief Clark's significant criminal history casts doubt on his qualifications as a law enforcement officer and whether he was truthful in applying for a Missouri law

enforcement license. These factors provide this Court with a substantial basis to grant Collings’s application for a COA on this claim.

4 HABEAS CLAIM NINE

Reasonable jurists could disagree with the district court’s resolution of this claim. Thus, this Court should grant a COA.

Mr. Collings’s principal defense was that reasonable doubt existed as to whether he formed the requisite mental state for first-degree murder. R. Doc. 10-44, at 242-43, 264-65. Collings had drunk to acute intoxication more than once before and had a history of alcoholic blackouts. R. Doc. 10-45, at p. 395-60. On the night of the offense, Collings had consumed “six six-packs of Smirnoff Ice Triple Black over the course of six hours with no food after lunch[.]” *Collings v. State*, 543 S.W.3d 1, 9-10 (Mo. banc 2018), and had smoked marijuana. *State v. Collings*, 450 S.W.3d 741, 747 (Mo. banc 2014).³ However, under Mo. Rev. Stat. § 562.076.3 and its associated jury instruction, Collings could not argue—and the jury could not consider—that due

³ Expert testimony indicated that, due to his acute intoxication, Mr. Collings’s capacity to “appreciate the criminality of his conduct [and] conform his conduct to the requirements of the law,” was “substantially impaired” at the time of the offense. *See Collings*, 543 S.W.3d at 10. Dr. Melissa Piasecki, an addiction neurobiology expert, explained that Collings was “genetically predisposed to addiction” and had begun drinking at age 14. *Collings*, 543 S.W.3d at 9. At the time of the offense, Collings was suffering from “acute significant alcohol intoxication” resulting in “aggressive brain functioning impairments, decreased inhibition, impaired comprehension, and a significantly compromised ability to pause and consider actions.” *Id.* at 10.

to his intoxication, a reasonable doubt existed as to whether he formed the requisite mental state for first-degree murder.

Mr. Collings challenged the constitutionality of the Missouri statute and instruction prohibiting the jury from considering the effect of his intoxication on his mental state. *Collings*, 543 S.W.3d at 8. The Missouri Supreme Court ruled that the statute was constitutional. *Id.* at *11; R. Doc. 58, at 23; R. Doc. 10 at 38-39.

In most jurisdictions, factfinders may consider evidence of voluntary intoxication for the purposes of negating the mental state element of the offense in question. *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996) (“[B]y the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged.”). Laws in other jurisdictions that exclude voluntary intoxication evidence may violate due process. *Egelhoff*, 518 U.S. at 57 (Ginsburg, J., concurring). The test for such unconstitutionality is whether the law is an evidentiary bar or a redefinition of the offense. *Id.* A law that renders a certain category of evidence irrelevant to the crime defined by the State is a permissible redefinition of the crime’s offense elements. *Id.*; *see also Egelhoff*, 518 U.S. at 71-72 (O’Connor, J., dissenting). However, a law that excludes a certain category of evidence, but still considers that evidence relevant to the requisite mental state, is

an unconstitutional evidentiary bar. *Egelhoff*, 518 U.S. at 57 (Ginsburg, J., concurring); *see also Egelhoff*, 518 U.S. at 71-72 (O'Connor, J., dissenting).

The Missouri Supreme Court historically has construed Missouri's bar on voluntary intoxication evidence to negate *mens rea* as an evidentiary bar, not as a redefinition of the mental-offense element. As early as over 150 years ago, (in analyzing the common law rule on which Missouri's statute is based), the Missouri Supreme Court acknowledged that drunkenness is relevant to the question of deliberation. *See State v. Cross*, 27 Mo. 332, 338 (1858) (stating that "drunkenness has deprived [a voluntarily intoxicated man] of the deliberating faculties"). The purpose of a rule excluding voluntary intoxication evidence, the court explained, was to ensure that crimes committed by drunk men did not go "unpunished." *Id.* Although the court endorsed this policy goal, this did not change its recognition that intoxication evidence nonetheless bore directly upon the question of deliberation. *Id.*

In recent years, the Missouri Supreme Court has continued to recognize the relevance of drunkenness on a defendant's ability to form a particular mental state at the time of an offense. Specifically regarding the question of deliberation in first-degree murder cases, the court has noted that, although a voluntarily intoxicated individual "is capable of forming an intent to kill[.]" intoxication can "remove a person's inhibitions and make the person more likely to act rashly, impulsively and

antisocially and increase the person’s susceptibility to passion and anger” *State v. Roberts*, 948 S.W.2d 577, 588 (Mo. banc 1997).⁴ Moreover, the court has recognized that evidence of voluntary intoxication is relevant to rebut circumstantial evidence of deliberation, such as whether a defendant failed to act as one would have expected a non-guilty person to act. *Id.* at 589; 32 Mo. Prac., Missouri Criminal Law § 4:9 (2nd ed.) (explaining that *Roberts* discusses categories of conduct evidence “which are relevant to the issue of deliberation” and therefore to which evidence of voluntary intoxication may be relevant). Although the Missouri Supreme Court once described Missouri’s statute as a rule to “treat a sober person and a voluntarily intoxicated person as equally responsible for conduct,” *State v. Erwin*, 848 S.W.2d 476, 482 (Mo. banc 1993), the court later reaffirmed that that the statute’s purpose is to prohibit “proof” negating the existence of a culpable mental state, even when intoxication exacerbates other behavior that is relevant to the defendant’s mental

⁴ This understanding is consistent with the medical community’s understanding of addiction and intoxication. As Dr. Piasecki explained, at the time of Mr. Collings’s trial, well-accepted scientific research acknowledged addiction as a brain disease. R. Doc. 10-44, at 22-23. Increasing levels of alcohol progressively compromise impulse control including the ability to inhibit queues that result in response inhibition. R. Doc. 10-44, at 31. Chronic and acute alcohol and cannabis use lead to cognitive impairments related to information processing, memory, motivation, impulsivity, and decreased inhibition. R. Doc. 10-44, at 32-33. Both alcohol and cannabis affect the frontal lobes’ ability to control behavior and exercise judgment; a person with chronic use of both substances is at risk for ongoing maladaptive decision-making, especially around substances. R. Doc. 10-44, at 33. In other words, as the post-conviction court concluded, at the time of Collings’s trial, the fact that alcohol and marijuana negatively influence judgment and decision-making was well known. R. Doc. 10-46, at 181-82.

state: “Section 562.076.3 clearly and unambiguously prohibits introduction of a voluntary drugged condition to negate a culpable mental state, *even where the drugged condition exacerbates a tendency toward rage and anti-social behavior.*” *Roberts*, 948 S.W.2d at 589 (emphasis added).⁵

The Missouri Supreme Court more recently reaffirmed that, in light of a defendant’s fundamental right to present a defense, excluding evidence affecting the defendant’s ability to deliberate is erroneous when the evidence is “both legally and logically relevant to the issue of whether the jury should believe the state’s evidence that he acted with deliberation.” *State v. Walkup*, 220 S.W.3d 748, 758 (Mo. banc. 2007). *Walkup* further indicates that evidence of an alcoholic blackout would be admissible if offered for its *effect* on the defendant’s mental state. *See Walkup*, 220 S.W.3d at 754-58.

The district court relied on *Gary v. Dormire*, 256 F.3d 753, 759 (8th Cir. 2001), for the proposition that, in Missouri, evidence of voluntary intoxication has no relevance to the mental elements of a crime, including a specific-intent offense such as first-degree murder. R. Doc. 58, at 23-24. *Gary* is inconsistent with the Missouri authorities cited above. Furthermore, since *Gary*, the Missouri Supreme Court

⁵ Moreover, this Court may consider even the *Erwin* court’s interpretation of the statute as a rule of evidence and not redefinition of the elements of first- degree murder. *See Erwin*, 848 S.W.2d at 486 (Limbaugh, J., dissenting) (criticizing the majority for analyzing the statute as a “rule of evidence.”).

issued *Walkup*, which unequivocally recognizes that any evidence negating the deliberation element of first-degree murder is legally and logically relevant to the question of the defendant's mental state. *Walkup*, 220 S.W.3d at 758. Thus, in Missouri, evidence of voluntary intoxication is relevant to the formation of the requisite mental state, *id.*, and *Gary's* conclusion to the contrary is incorrect.

Based on the above authorities, reasonable jurists could conclude that Missouri excludes evidence of voluntary intoxication but still considers it relevant to a defendant's mental state. *See* R. Doc. 8, at 108-14; R. Doc. 33, at 113-14. Accordingly, reasonable jurists could conclude that the Missouri Supreme Court's decision was contrary to or an objectively unreasonable application of clearly federal established law recognizing (1) that a criminal defendant has a fundamental right to present a defense and (2) under *Egellhoff*, Missouri's rule acts as an evidentiary bar and therefore violates due process.

Because Missouri's intoxication proscription barred Mr. Collings from presenting exculpatory evidence that the court has acknowledged is relevant to his alleged deliberation, it impermissibly infringed on his fundamental right to present a defense. This Court should grant a COA on this ground.

5 HABEAS CLAIM ELEVEN

Reasonable jurists could disagree with the district court's resolution of this claim, (R. Doc. 57, at 4; R. Doc. 58, at 25), and find (1) that the failure to consider it

“will result in a fundamental miscarriage of justice[.]” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991),⁶ and (2) that Mr. Collings is entitled to relief. Thus, this Court should grant a COA.

A petitioner can demonstrate a fundamental miscarriage of justice by showing that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (internal quotation omitted). This standard requires a “show[ing] that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Id.* Evidence showing that he was not guilty of the charge for which he was incarcerated satisfies the “actual innocence” standard. *Jones v. Delo*, 56 F.3d 878, 883 (8th Cir. 1995) (citing *Schlup*, 513 U.S. at 321).

Such evidence includes evidence negating the element of deliberation. *Id.*; *Nave v. Delo*, 22 F.3d 802, 810 (8th Cir. 1994) (claim of actual innocence lies when negation of intent negates an essential element of the crime), *vacated on other grounds*, 513 U.S. 1141 (1995). In *Jones*, this Court determined that evidence negating the element of deliberation “meets the definition of actual innocence.” *Jones*, 56 F.3d at

⁶ Reasonable jurists also could disagree with the district court’s determination that Mr. Collings “has shown under *Martinez* that the ineffective assistance of trial counsel claims is substantial.” R. Doc. 58, at 25. Collings will address this finding in his appeal of the district court’s denial of his Motion for Stay and Abeyance of Habeas Corpus Proceedings Pending Exhaustion of State Remedies.

883. The newly discovered evidence was expert evidence establishing that the petitioner was unable to deliberate on the day that the victim was killed. *Id.* at 882. The Court explained that should the petitioner’s “contention that he could not deliberate prove true, he would have been incapable of satisfying an essential element of the crime for which he was convicted.” *Id.* at 883.

“To be credible,’ a claim of actual innocence must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324). Mr. Collings’s petition and amended traverse contain ample reliable evidence negating the element of deliberation that was not presented at trial. Collings suffers from a “multiply injured brain.” R. Doc. 33-1, at III; R. Doc. 34-1, at 2. Accordingly, he suffers from brain dysfunction and did so at the time of the offense. R. Doc. 34-1, at 3. For example, diagnostic testing shows that he suffers from “deficits in circuits that are responsible for functions such as awareness (self-awareness, contextual awareness), judgment and deliberation, comportment, appropriate social inhibition, and circuits involved in emotional regulation[.]” R. Doc. 33-1, at III. EEG data show that he has brain dysfunction in the areas of the brain that are responsible for temporal lobe functioning, and these impairments exacerbate and are inextricably entangled with his frontal lobe deficits. R. Doc. 34-1, at 1-3. At the time of the crime, Collings’s mental disease or defect specifically diminished his ability to deliberate:

In Mr. Collings's case the testing and history support the fact that [his frontal lobe] regions along with abnormalities in the limbic circuit are disrupted, leaving him unable to engage human abilities of judgment, awareness, and comportment, especially in the face of alcohol intoxication. In these states, actions are reflexive, impulsive, and undeliberated, based on primal instincts instead of typical human cognitive consideration.

R. Doc. 33-1, at 112. These brain abnormalities “made the effects of the alcohol he consumed that day of the crime that much more deleterious to his capacity to exercise judgment and deliberate.” R. Doc. 33-1, at 111.

Moreover, at the time of the offense, Mr. Collings very likely was “suffering from a state of ‘non-convulsive status epileptics’ the night of the crime.” R. Doc. 33-1, at 107. Collings's delirious state of mind and corresponding mental status and confusion substantially impaired his capacity to deliberate. *Id.* at 106. Furthermore, EEG “data show abnormalities in his neural substrate that are consistent with epilepsy and make him very vulnerable to transient intoxication with alcohol.” R. Doc. 34-1, at 2-3. His alcohol consumption exacerbated the effects of this brain dysfunction. *Id.*; R. Doc. 33-1, at 106.

Reasonable jurists could conclude that had the jury considered this evidence in light of the paucity of physical evidence establishing that Mr. Collings committed the murder, as well as other available evidence inconsistent with Collings's statement and the State's case against Collings, such as David Spears's confession to killing the victim, it is more likely than not that no reasonable juror would have

found petitioner guilty beyond a reasonable doubt of first-degree murder. *See, e.g., House v. Bell*, 547 U.S. 518, 533-34 (2006); *Rivas v. Fischer*, 687 F.3d 514, 545 (2d Cir. 2012); *Smith v. Baldwin*, 466 F.3d 805, 807 (9th Cir. 2006); *Walker v. McDaniel*, 495 F. App'x 796, 798 (9th Cir. 2012); *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995). In other words, reasonable jurists could conclude that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *See id.*

This claim is presented in “a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence[.]” and as such, “§ 2254(e)(2) . . . does not address the type of petition at issue here[.]” *House*, 547 U.S. at 539. Thus, § 2254(e)(2) does not pose any barrier to the consideration of the new reliable evidence not presented at trial, and reasonable jurists could conclude that the evidence satisfies the “actual innocence” gateway. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 396-97 (2013).

Reasonable jurists also could conclude that this evidence entitles Mr. Collings to relief. Because counsel never investigated this evidence, counsel could not have made a strategic decision to exclude it. Under *Strickland*, “strategic choices made after less than complete investigation are reasonable precisely as to the extent that reasonable professional judgment supports the limitations on investigation.” *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Chambers v. Armontrout*, 907 F.2d 825, 831 (8th Cir. 1990). Here, despite counsel’s strategy of negating the element of

deliberation and the numerous red flags suggesting that Collings suffered from neurological impairments at the time of the offense, counsel did not consult with any expert who possessed the neurological expertise the case required. If counsel had reason to investigate further but did not do so, the number of *other* experts with whom counsel consulted is irrelevant. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 381, 387-90 (2005) (finding that counsel’s mitigation investigation was deficient even though counsel consulted with *three* mental health experts); *Williams v. Stirling*, 914 F.3d 302, 314 (4th Cir. 2019) (finding deficient performance for failure to explore relevant aspects of the mitigation case even though “counsel had experience in capital cases; counsel consulted with [*five*] experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments.”); *see also Kimmelman v. Morrison*, 477 U.S. 365, 383-86 (1986) (rejecting the notion that the entirety of trial counsels’ performance automatically negates a specific instance of deficient performance). Thus, reasonable jurists could conclude that because counsel had reason to investigate further but failed to do, any subsequent “decision” to proceed without the omitted evidence cannot have been the result of a strategic decision and instead was objectively unreasonable. *See, e.g., Strickland*, 466 U.S. at 690-91; *Chambers*, 907 F.2d at 831.

Similarly, reasonable jurists could conclude that counsel’s failure to investigate and present this evidence prejudiced Mr. Collings. Had counsel

presented this evidence, Collings would have been entitled to a diminished capacity jury instruction. *Walkup*, 220 S.W.3d at 754-55. Particularly when the only issue at trial was the defendant's mental state, reasonable jurists have concluded that the failure to investigate and present an available, meaningful defense prejudiced the defendant. *See, e.g., Wolfs v. Britton*, 509 F.2d. 304, 311 (8th Cir. 1975) (holding that where principal issue was the defendant's mental state, counsel's failure to investigate a mental state defense prejudiced the defendant); *Jacobs v. Horn*, 395 F.3d 92, 105 (3d Cir. 2005) (finding counsel's failure to investigate and present expert testimony negating the formation of the requisite mental state prejudiced the defendant); *Walkup*, 220 S.W.3d at 758 (finding prejudice when the defendant's defense was that he did not deliberate and "the excluded evidence went directly to the issue of Walkup's mental condition and its affect [sic] on his ability to deliberate.").

This Court should grant a COA on this ground.

6 HABEAS CLAIM FOURTEEN

Reasonable jurists could disagree with the district court's resolution of this claim. Thus, this Court should grant a COA.

The state court and the district court concluded that because counsel talked with eight experts, their investigation could not have been deficient. *Collings*, 543 S.W.3d at 13; R. Doc. 58, at 28. However, *none* of the experts with whom counsel

consulted possessed the expertise the facts required: a medical expert with expertise in addiction. R. Doc. 10-45, at 356. Thus, reasonable jurists could conclude that counsel were unable to make, and did not make, an informed decision about excluding evidence establishing two statutory mitigating circumstances that the jury did not otherwise consider. *See Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

The Supreme Court has rejected the notion that the entirety of trial counsel's performance automatically negates a specific instance of deficient performance. *Kimmelman*, 477 U.S. at 383-86. Under *Strickland*, counsel have a duty to discover and present all substantial, available mitigating evidence. *Wiggins*, 539 U.S. at 524; *Williams v. Taylor*, 529 U.S. 362, 394-98 (2000); *Kenley*, 937 F.2d at 1304. When counsel are aware of potentially mitigating evidence, counsel must follow those leads; otherwise, counsel are unable to make an informed choice about the possible methods of supporting the case for life. *Wiggins*, 539 U.S. at 525. The relevant question does not ask how many experts with whom counsel consulted; rather, it asks whether the known evidence would have led a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 527. If counsel had reason to investigate further, the number of experts that counsel consulted is irrelevant. *See, e.g., Rompilla*, 545 U.S. at 381, 387-90 (finding that counsel's mitigation investigation was deficient even though counsel consulted with *three* mental health experts); *Williams*, 914 F.3d

at 314 (finding deficient performance for failure to explore relevant aspects of the mitigation case even though “counsel had experience in capital cases; counsel consulted with [five] experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments.”).

Here, counsel knew Mr. Collings had consumed large amounts of alcohol on the night of the offense. R. Doc. 10-44, at 230; R. Doc. 10-44, at 355, 391. Counsel also knew about Collings’s long-standing alcohol and marijuana addiction. R. Doc. 10-44, at 230; R. Doc. 10-45, at 355. Specifically, counsel knew that (1) Collings had genetic and environmental risk factors, such as childhood trauma and parents who were substance abusers, making it more likely for Collings to develop an addiction to alcohol and drugs, (R. Doc. 10-44, at 230; R. Doc. 10-45, at 356); (2) Collings was a “drunk” and smoked a lot of marijuana, (R. Doc. 10-44, at 229); (3) Collings had drunk to acute intoxication more than once before, (R. Doc. 10-45, at 360); and (4) Collings had a history of alcoholic blackouts, (R. Doc. 10-45, at 395).

Counsel further knew that intoxication affects a person’s mental state. Specifically, counsel knew that cognitive impairments are associated with acute and chronic intoxication. R. Doc. 10-44, at 230; R. Doc. 10-45, at 355, 356. Counsel wanted to offer evidence supporting statutory (or non-statutory) mitigating circumstances, R. Doc. 10-45, at 244, 255), and this evidence fit that bill. *Collings*, 543 S.W.3d at 9, 10; R. Doc. 10-44, at 70.

Given what counsel knew about Mr. Collings and the facts of the offense but failed to investigate further, reasonable jurists could conclude that (1) the Missouri Supreme Court’s decision rests on an unreasonable determination of the facts and is contrary to or an objectively unreasonable application of *Strickland* and (2) counsel’s performance was deficient.

Because the Missouri Supreme Court did not reach the prejudice component of this error, section 2254(d) does not apply, and this Court’s review of prejudice is de novo. *Wiggins*, 539 U.S. at 534 (reviewing prejudice de novo because the state courts never reached the issue of prejudice); *Nooner v. Norris*, 402 F.3d 801, 810 (8th Cir. 2005) (“Because the Arkansas Supreme Court never reached the prejudice issue, we review that issue de novo.”). At sentencing, the State argued that Mr. Collings exercised cool deliberation and full conscious choice. However, without the omitted evidence of alcohol dependence and its effect on his mental state at the time of the crime, the jurors did not have a single statutory mitigating circumstance to weigh against the state’s aggravating circumstances. R. Doc. 10-33, at 689.

The omitted evidence would have countered the weight of the aggravating circumstances in at least four meaningful ways. First, the omitted evidence would have shown that Mr. Collings’s “decision” to drink was not a voluntary choice but instead a result of a brain disease. *See* R. Doc. 10-44, at 22-23, 30. Collings’s “choices” regarding intoxication were not the “moral failure[s]” of a 32-year-old average guy,

as the State contended, (R. Doc. 10-29, at 6479); rather, they are rightly identified as the products of “a serious medical condition.” *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1172 (N.D. Iowa 2014). Second, the omitted evidence explained that although Collings generally knew right from wrong, due to medical illnesses affecting his cognition and judgment at the time of the crime, he was not able to *refrain* from doing wrong at the time of the crime. Third, the omitted evidence would have explained that Collings’s behavior at the time of the crime was a product of his mental illnesses, not anti-social behavior. *Hill v. Lockhart*, 28 F.3d 832, 846 (8th Cir. 1994) (finding that mitigating evidence based on medical evidence was a “vastly more credible” explanation of events in question than one that did not rely on such evidence and a reasonable probability existed that the jury would not have given the death penalty if counsel had discovered and presented mitigating circumstances of the defendant's medical disorder); *see also Anderson v. Sirmons*, 476 F.3d 1131, 1144, 1148 (10th Cir. 2007). Fourth, because this testimony was the only evidence sufficient to satisfy a statutory mitigating circumstance, the evidence would have countered the aggravating evidence in a way that the other mitigating evidence could not. *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995) (finding prejudice when the omitted evidence of the defendant’s “mental condition would have required the submission of additional statutory mitigating instructions.”); *Hill*, 28 F.3d at 846.

Reasonable jurists could conclude that a reasonable probability exists that the omitted evidence would have made a difference to at least one juror. *Antwine*, 54 F.3d at 1368; *Hill*, 28 F.3d at 846. This Court should grant a COA.

7 HABEAS CLAIM SIXTEEN

Reasonable jurists could disagree with the district court's resolution of this claim. Thus, this Court should grant a COA.

Although counsel knew that (1) Mr. Collings had been sexually abused as a child and teenager and had disclosed that molestation to his stepmother, Julie Pickett, well before the offense, and (2) no other witness could testify about this pre-offense disclosure, counsel did not present this disclosure to the jury. As a result, the state was able to argue that Collings's later disclosure of these facts to Dr. Draper was untruthful and was a post-hoc justification for the commission the offense. R. Doc. 10-29, at 6321, 6342-25, 6341. Pickett also had observed Collings's alcoholic blackouts, and no other witness testified about those.

The state court concluded that Pickett's testimony would have been cumulative of the testimony of other family members and Dr. Draper; thus, any decision not to call her could not have been deficient performance. *Collings*, 543 S.W.3d at 20. The court also concluded that counsel made a reasonable strategic decision not to call Pickett after a verbal exchange between Mr. Collings's biological father and the jurors. *Id.*

The district court appears to have concluded that because Dr. Draper testified about the sexual abuse of Mr. Collings, Collings’s prior disclosure of abuse to Pickett—well before the crime occurred—was cumulative of Draper’s testimony. R. Doc. 58, at 30. The district court further concluded that trial counsel made this decision “after [Julie Pickett] and other Collings’ family members engaged in a verbal exchange with members of the jury in a hallway.” *Id.* Thus, the court determined, the state court decision was a reasonable application of *Strickland*. *Id.*

Reasonable jurists could disagree. Trial counsel did not present to the jury Mr. Collings’s prior disclosure nor Pickett’s observations of Collings’s blackouts. Because the evidence *was not presented*, reasonable jurists could conclude that it was not cumulative of the evidence that was presented. *Southard v. Russell*, 57 U.S. 547, 554 (1853) (“Evidence of distinct and independent facts of different character, though it may tend to establish some ground of defense or relate to some issue, is not cumulative within the rule.”) (internal quotation omitted); *Simmons v. Luebbers*, 299 F.3d 929, 937 (8th Cir. 2002) (concluding that the Missouri Supreme Court’s decision was based on an unreasonable determination of fact under 28 U.S.C. § 2254(d) when the court erroneously characterized omitted evidence as having been presented at trial); *see also Haliym v. Mitchell*, 492 F.3d 680, 719 n.13 (6th Cir. 2007) (explaining that evidence showing difficulties with impulse control and evidence of brain damage was not cumulative because such evidence had not been presented).

The State recognized that no other witness discussed any prior disclosure of sexual abuse, and specifically because no prior disclosure was presented, the State argued that Dr. Draper's testimony was untrue. R. Doc. 10-29, at 6324-25, 6341. And even though the omitted evidence corroborated Draper's testimony, "[e]vidence that provides corroborating support to one side's sole witness on a central and hotly contested factual issue cannot reasonably be described as cumulative." *Mosley v. Atchison*, 689 F.3d 838, 848 (7th Cir. 2012); *see also Arizona v. Fulminante*, 499 U.S. 279, 299 (1991) (concluding that second defendant's confession was not merely cumulative of first defendant's confession where the two confessions could reinforce and corroborate each other).

Reasonable jurists could conclude that the Missouri Supreme Court's decision rests on an unreasonable determination of the facts or is contrary to or an objectively unreasonable application of clearly established federal law. Similarly, reasonable jurists could conclude that the state court's assumption that trial counsel made a strategic decision not to call Pickett due to the jury incident is an unreasonable determination of fact.

Trial counsel agreed that Pickett had valuable information, and counsel wanted her to testify. *Collings*, 543 S.W.3d at 20. Attorney Moreland, who primarily was responsible for the sentencing phase, R. Doc. 10-44, at 235, could not recall why they did not call her. R. Doc. 10-45, at 360. However, he thought that the decision

was made at the end of the guilt phase or at the beginning of the sentencing phase, R. Doc. 10-45, at 361, which would have been before the jury incident occurred. Pickett's post-conviction testimony also supports the conclusion that defense counsel decided not to call her before the jury incident. *See* R. Doc. 10-44, at 162-63.

Mr. Collings's attorneys did not even learn of the jury incident until the morning after it allegedly occurred. R. Doc. 10-44, at 236; R. Doc. 10-29, at 6229-30. At that point, counsel had already begun the testimony of their last witness, Dr. Draper. R. Doc. 10-28, at 6120. Thus, counsel must have made the decision not to call Pickett prior to the defense team learning of the jury incident.

Although Attorney Zembles speculated that the jury incident *may have affected* Moreland's decision, R. Doc. 10-44, at 234-38, the record does not support her speculation. Thus, reasonable jurists could conclude that the state court's decision is an improper post-hoc rationalization inconsistent with the available record evidence, *see Harrington v. Richter*, 562 U.S. 86, 109 (2011); *Simmons*, 299 F.3d at 937, and therefore is based on an unreasonable determination of the facts. *See Gabaree v. Steele*, 792 F.3d 991, 999 (8th Cir. 2015) ("We cannot impute to counsel a trial strategy that the record reveals she did not follow.").

Because the Missouri Supreme Court did not reach the prejudice component of this error, section 2254(d) does not apply, and this Court's review of prejudice is

de novo. *Wiggins*, 539 U.S. at 534; *Nooner*, 402 F.3d at 810. Reasonable jurists could conclude that counsel's failure to present Pickett prejudiced Mr. Collings.

The Supreme Court consistently has recognized that evidence of a troubled childhood, particularly one involving sexual abuse, is meaningful mitigating evidence. *See, e.g., Wiggins*, 539 U.S. at 536-37. Furthermore, had counsel presented Pickett's testimony, the state would not have been able engage in its argument suggesting that Mr. Collings's sexual abuse was illegitimate due to Collings's late disclosure of it, because Pickett's testimony would have established that Collings *did* disclose his sexual abuse when he was in his twenties, well before the crime occurred. The disclosure would have countered the force of the State's general theme of its cross-examination of Dr. Draper: that because information was not stated the records, it was untrue and merely a post-hoc explanation or disingenuous request for sympathy. Also, without Pickett's testimony, the jury did not know that Collings's addiction was so severe that he suffered from blackouts—a fact that is mitigating on its own, *see Kenley*, 937 F.2d at 1308, but also casts doubt on whether the events of the offense truly unfolded in the way they were relayed in Collings's statement.

For all the above reasons, this Court should grant a COA on this ground.

8 HABEAS CLAIM SEVENTEEN

Reasonable jurists could disagree with the district court’s resolution of this claim, R. Doc. 57, at 4; R. Doc. 58, at 31, and find (1) that the failure to consider it “will result in a fundamental miscarriage of justice[.]” *Coleman*, 501 U.S. at 750,⁷ and (2) that Mr. Collings is entitled to relief. Thus, this Court should grant a COA.

A petitioner can demonstrate a fundamental miscarriage of justice by showing that he was “actually innocent of the death penalty.” Such actual innocence “must focus on those elements which render a defendant eligible for the death penalty[.]” which includes the elements of a first-degree murder conviction. *Sawyer v. Whitley*, 505 U.S. 333, 345, 347 (1992). To satisfy the actual innocence of the death penalty standard, a habeas petitioner “must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty[.]” *Id.* at 336.

Reasonable jurists could conclude that the new evidence satisfies the ‘actual innocence of the death penalty’ standard. At the time of the offense, Mr. Collings suffered from a “multiply injured brain.” R. Doc. 33-1, at 111. He has “abnormalities in medial temporal lobe structures particularly on the right side[.]” and “the right hippocampus is smaller in size than the left one.” *Id.* EEG data show that he has

⁷ Reasonable jurists also could disagree with the district court’s determination that Mr. Collings did not show cause and prejudice for review of this claim. R. Doc. 58, at 31. Collings will address this finding in his appeal of the district court’s denial of his Motion for Stay and Abeyance of Habeas Corpus Proceedings Pending Exhaustion of State Remedies.

brain dysfunction in the areas of the brain that are responsible for temporal lobe functioning, and these impairments exacerbate and are inextricably entangled with his frontal lobe deficits. R. Doc. 34-1, at 1-3. His brain dysfunction significantly impaired his ability to deliberate and established two mental-impairment statutory mitigating circumstances that the jury did not consider. *Id.* at 107-08, 111-112. These brain abnormalities “made the effects of the alcohol he consumed that day of the crime that much more deleterious to his capacity to exercise judgment and deliberate.” *Id.* at 111; see also R. Doc. 33-1, at 106 (same); R. Doc. 34-1, at 2-3 (explaining that Mr. Collings’s EEG “data show abnormalities in his neural substrate that are consistent with epilepsy and make him very vulnerable to transient intoxication with alcohol.”).

This claim is presented in “a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence[,]” and as such, “§ 2254(e)(2) . . . does not address the type of petition at issue here[.]” *House*, 547 U.S. at 539. Thus, § 2254(e)(2) does not pose any barrier to the consideration of the new reliable evidence not presented at trial, and reasonable jurists could conclude that the evidence satisfies the “actual innocence” gateway. *McQuiggin*, 569 U.S. at 386, 396-97.

Reasonable jurists also could conclude that this evidence entitles Mr. Collings to relief. As explained above in Habeas Claim Fourteen, the Supreme Court

has rejected the notion that the entirety of counsels' performance automatically negates a specific instance of deficient performance. *Kimmelman*, 477 U.S. at 383-85; *see also Williams*, 914 F.3d at 314 (finding deficient performance when counsel consulted with five experts but failed to follow up on red flags indicating that the defendant might suffer from fetal alcohol disorder). Under *Strickland*, the relevant question does not ask how many experts with whom counsel consulted; rather, it asks whether the known evidence would have led a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 527; *Rompilla*, 545 U.S. at 381, 387-90; *Williams*, 914 F.3d at 314.

Here, counsel employed a trial strategy designed to cast reasonable doubt on the question of whether Mr. Collings deliberated. R. Doc. 10-44, at 242-43, 264-65; R. Doc. 10-45, at 390. Counsel were (1) aware of red flags such as history of seizures, head injuries, poor performance on school standardized testing, communication deficits, traumatic childhood including neglect and sexual abuse, early-onset substance abuse, and mental health treatment involving psychotropic medication; and (2) knew that Collings exhibited dissociative symptoms at the time of the offense. However, despite their strategy and knowledge of those red flags, trial counsel did not adequately investigate Collings's brain dysfunction or seizure disorder and the effect of these impairments at the time of the offense. Reasonable jurists could conclude that counsel should have investigated further.

Reasonable jurists could conclude that counsels' failure prejudiced Mr. Collings. It is undisputed that Collings suffered psychological trauma and head injuries and a child and adolescent, and the omitted evidence gave meaningful context to the extent of that trauma. R. Doc. 33-1, at 101-112; R. Doc. 18-1, at 66-81. This evidence shows that the prosecution's assertion that "[t]here's nothing mentally wrong with him" is patently incorrect. Rather, throughout his life, Collings has suffered from this brain damage and dysfunction affecting his judgment. R. Doc. 33-1, at 106-08; 110-112; R. Doc. 34-1, at 1-3; *see also Jermyn v. Horn*, 266 F.3d 257, 311 (3d Cir. 2001) (explaining that counsel's omission of testimony regarding the defendant's childhood trauma and mental illness prejudiced the defendant because it would have provided the jury with an entirely different view of the defendant's life and childhood, which in turn would have aided the jurors' understanding of the seriousness and origin of his mental illness and provided an understanding of the defendant's relationship with the deceased).

This evidence would have been meaningful to the jury because the only information the jurors received was that Mr. Collings's "choices" all were free and voluntary. R. Doc. 10-29, at 6370-71. Dr. Draper, who was not a medical doctor, specifically testified that Collings did not have any "brain problems" or "brain disfunction [sic]" or suffer from brain damage. R. Doc. 10-29, at 6245, 6249, 6316.

However, as the foregoing establishes, the omitted *medical evidence* establishes that he certainly did. R. Doc. 33-1, at 101-112; R. Doc. 34-1, at 1-14.

The omitted evidence also satisfied two mental-impairment statutory mitigating circumstances that the jury did not otherwise consider. *Antwine*, 54 F.3d 181 at 1368 (finding prejudice when the omitted evidence of the defendant’s “mental condition would have required the submission of additional statutory mitigating instructions.”). The jury did not consider *any* statutory mitigating circumstances to weigh against the two aggravating circumstances they found to exist. R. Doc. 10-33, at 684-93, 696. Thus, the omitted evidence would have been particularly meaningful. *Antwine*, 54 F.3d at 1368 (“Since the jury found only two aggravating circumstances, the balance of aggravating and mitigating circumstances in the penalty phase of the trial would have been altered enough to create a reasonable probability that the jury would not sentence *Antwine* to death.”).

Without the omitted evidence, the jury was likely to believe—as the State contended—that Mr. Collings was just a bad person who freely and voluntarily chose to do the worst things people can do. In other words, without the understanding that Collings suffers from brain damage and dysfunction, given that the prosecution specifically attempted to cast Mr. Collings’s actions as motivated by antisocial personality disorder, (R. Doc. 10-29, at 6338, 6360, 6367, 6368), jurors likely perceived Collings’s personality traits or actions as “meanness” or antisocial

behavior. However, the omitted expert evaluation and explanation would have properly explained Collings's behavior as deriving not from a desire to be mean or antisocial but instead from his brain defects and dysfunction. *Hill*, 28 F.3d at 846 (finding that mitigating evidence based on medical evidence was a "vastly more credible" explanation of events in question than one that did not rely on such evidence and a reasonable probability existed that the jury would not have given the death penalty if counsel had discovered and presented mitigating circumstances of the defendant's medical disorder); *see also Anderson*, 476 F.3d at 1144, 1148.

Reasonable jurists could conclude that a reasonable probability exists that the omitted evidence would have made a difference to at least one juror. *Antwine*, 54 F.3d at 1368; *Hill*, 28 F.3d at 846. This Court should grant a COA.

CONCLUSION

For the foregoing reasons, Mr. Collings requests a COA as to Grounds 1, 2, 4, 9, 11, 14, 16, and 17 of his petition for writ of habeas corpus. Reasonable jurists could disagree with the district court's conclusions as to those claims.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document contains 13,912 words and exceeds the word limit of Fed. R. App. P. 27(d)(2)(A). Mr. Collings has filed concurrently with this pleading a motion requesting permission to file and overlength pleading.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2015 and Californian FB font 14 point.

/s/ Jeremy S. Weis
Jeremy S. Weis

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing pleading electronically with the clerk of the court to be served by operation of the court's electronic filing system upon all attorneys of record on April 23, 2023.

/s/ Jeremy S. Weis
Jeremy S. Weis

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHRISTOPHER COLLINGS,)

Appellant,)

v.)

No. 23-1064

CINDY GRIFFITH,)

Death Penalty Case

Appellee.)

No Execution Date

PETITION FOR REHEARING *EN BANC*

Appellant Christopher Collings moves this Court to grant his petition for rehearing *en banc* pursuant to F.R. App. P. 35 and 40 and set aside this Court's order of June 28, 2023. Pursuant to Rule 35, rehearing *en banc* is warranted because the panel's decision is contrary to the Supreme Court's holdings in: *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Miranda v. Arizona*, 384 U.S. 436 (1966), *Spano v. New York*, 360 U.S. 315 (1959), *Arizona v. Fulminante*, 499 U.S. 279 (1991), *Southard v. Russell*, 57 U.S. 547 (1853), *Kimmelman v. Morrison*, 477 U.S. 365 (1986). The panel's blanket COA denial and dismissal of the rest of the appeal is contrary to the decisions of this Court and the Supreme Court cited below, and consideration by the full court is necessary to secure and maintain uniformity of decisions. This appeal also involves questions of exceptional importance as set forth in Fed. R. App. P. 35(b)(1), including: (1) whether it was fundamentally unfair for the district court to rely on

Shinn v. Ramirez, 142 S.Ct. 1718 (2022), issued 343 days after Appellant submitted his amended traverse, to deny habeas relief without permitting Appellant to comply with *Ramirez*; and (2) whether the dismissal of an application for COA constitutes a dismissal of an appeal that is otherwise permitted under § 1291.

In *Johnson v. Vandergriff*, this Court determined that en banc review was necessary to overturn a panel decision granting a COA. No. 23-2664 (8th Cir. banc Jul. 29, 2023). As in *Johnson*, this Court should grant en banc review to consider whether a COA is warranted in this case. The en banc Court, or alternatively the panel, also should consider Appellant's appeal of the district court's denial of his *Rhines* motion.

A COA IS NOT REQUIRED TO APPEAL THE DENIAL OF A *RHINES* MOTION.

Under § 1291, review of the district court's denial of Appellant's motion for a *Rhines* stay of the habeas proceedings to allow him, through appointed counsel, to exhaust his state court remedies considering *Ramirez* does not require a COA. See *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (holding that a COA is required under 28 U.S.C. §2253(c)(1)(a) only if the district court's order disposed of a habeas corpus proceeding's merits); *Rhines v. Weber*, 346 F.3d 799, 800 (8th Cir. 2003), *vacated and remanded on non-jurisdictional grounds*, 544 U.S. 269 (2005) ("We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas

petition in abeyance pending exhaustion of state court remedies.”); *see also Johnson v. Steele*, 999 F.3d 584, 587 (8th Cir. 2021) (appeal of district court's denial of motion to recuse). Thus, this Court's order dismissing Appellant's appeal in its entirety conflicts with this precedent.

Furthermore, as illustrated by the fact that COA is not required to appeal the district court's denial of Appellant's motion, this appeal involves a question of exceptional importance. It was fundamentally unfair and an abuse of discretion for the district court to rely on *Ramirez*—which the Supreme Court did not issue until May 23, 2022, 343 days after Appellant submitted his amended traverse on June 15, 2021—yet deny Appellant the opportunity to comply with *Ramirez* before the court denied habeas relief. This Court should grant en banc review or alternatively panel rehearing on this issue.

**A COA ONLY REQUIRES A SHOWING THAT THE CLAIMS ARE
DEBATABLE.**

A court should grant a COA when an appellant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337. Instead, a COA should issue when the district court's decision is “debatable among jurists of reason” or “the issues presented are adequate to deserve encouragement to proceed further.” *Id.* at 336.

The standard is minimal: “[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.” *Id.* at 338. A claim is “debatable” when it is “open to dispute on any logical basis. The focus is on the existence of a debatable issue, not on which party was correct.” *Adam v. Stonebridge Life Ins. Co.*, 612 F.3d 967, 974 (8th Cir. 2010).

The nature of the penalty “is a proper consideration in determining whether to issue a certificate[.]” *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). Capital cases demand heightened standards of reliability because of the unique severity and finality of the death penalty. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). Thus, in death-penalty cases, this Court must resolve in favor of Appellant any doubts regarding whether a COA should issue. *See Barefoot*, 463 U.S. at 893.

ISSUES REQUIRING A COA

I HABEAS CLAIM ONE

The State's case against Collings depended on statements obtained from him on November 9, 2007, that were the product of unconstitutional police tactics that denied Collings his Fifth, Sixth, and Fourteenth Amendment rights. The Missouri Supreme Court denied relief but only after ignoring evidence presented in the trial court that substantiated the unconstitutional police interrogation tactics. The district court denied relief on Collings's claim by adopting the Missouri Supreme Court's reasoning but ignoring the challenges raised in Collings's habeas petition. R. Doc. 58, at 13-14. Collings's habeas claim challenges the Missouri Supreme Court's decision on its application of established Supreme Court precedent as well as its decision not being supported by the record developed in the state court. These factors, when taken as a whole, demonstrate Collings's basis for relief and entitlement to a COA in this Court.

I.I. THE DISTRICT COURT OPINION IS NOT SUPPORTED BY THE STATE COURT RECORD.

Collings was in custody at the time of his initial interrogation requiring law enforcement to advise him of his constitutional rights. *See, e.g., Miranda*, 384 U.S. at 444. "A custodial interrogation is defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise

deprived of his freedom in any significant way.” *United States v. Johnson*, 619 F.3d 910, 919 (8th Cir. 2010) (quoting *United States v. Flores-Sandoval*, 474 F.3d 1142, 1146 (8th Cir.2007)). This Court outlined some factors relevant to whether the suspect is in custody in *Flores-Sandoval*, 474 F.3d at 1146-47. The district court overemphasized one factor while ignoring relevant evidence supporting a finding that Collings was in a custodial interrogation before being *Mirandized*. Reasonable jurists could disagree as to the application of these factors.

The trial court held – and the federal district court affirmed – that the circumstances of the interrogation was not custodial and, therefore, did not require Chief Clark to provide the *Miranda* warnings. R. Doc. 10-32, at 173. The trial court’s analysis, though, ignored most of the factual considerations in determining the custodial nature of the interrogation. The trial court emphasized a single factor – that Chris Collings initiated the contact – while ignoring all other relevant factual issues at play. R. Doc. 10-32, at 172-73.

The circumstances of the initial interrogation support a finding that Collings was in custody at the time of his initial statement. Collings agreed to meet Chief Clark and did so by meeting with him at his home. R. Doc. 10-6, at 662-665. Collings traveled with Chief Clark in his squad car to the Police Department. R. Doc. 10-5, at 743-44. Collings departed the police station in Chief Clark’s vehicle and then traveled to a remote bridge a few miles away. R. Doc. 10-6, at 709. Collings was not

free to leave because he had no way to depart the scene. The circumstances of this interrogation – the remoteness of the location combined with Collings having no way to depart – weigh heavily in favor of finding a custodial interrogation situation mandating that he be advised of his *Miranda* rights.

Similarly, the conduct of Chief Clark during the Muncie Bridge interrogation supports finding that it was custodial. Chief Clark was aware Collings was feeling threatened by people in the community and Chief Clark, by his own admission, conditioned his ability to “protect” Collings on his willingness to cooperate and confess. R. Doc. 10-6, at 743-44; R. Doc. 10-8, at 1206. Chief Clark’s actions reinforced the coercive nature of the encounter that occurred in a remote location and in a setting where Collings was dependent on Chief Clark for transportation. That Collings initiated the contact does not override all other circumstances establishing a custodial interrogation.

1.2. THE DISTRICT COURT OPINION CONFLICTS WITH WELL-ESTABLISHED SUPREME COURT PRECEDENT.

The district court’s decision upholding the Missouri Supreme Court’s decision conflicts with the Supreme Court’s decisions in *Spano v. New York*, and *Arizona v. Fulminante*. These cases involve coercive police interrogation tactics designed to play on the vulnerabilities of the defendant to prevent him from invoking his constitutional rights.

In this case, law enforcement officers repeatedly engaged Collings in discussions that played upon his friendship with Clark and Collings's fears of reprisal from members of the community. R. Doc. 10-5, at 604; R. Doc. 10-6, at 935-36, 1037. Collings expressed his fear of people in the community coming after him and recounted an incident where he believed he was being followed through town. R. Doc. 10-6, at 588-89, 663, 899; R. Doc. 10-6, at 1289-90. Chief Clark encouraged Collings to continue to cooperate with the FBI when Collings's expressed an interest in speaking with a lawyer. R. Doc. 10-5, at 567-69; R. Doc. 10-6, at 937. Clark emphasized to Collings that cooperation was the only way for Clark to protect him. R. Doc. 10-6, at 595-96. Another officer told Collings he might be released from custody and that if they did, they would be "looking for your body" in the morning and that "You would have to get out of this area to stay alive." R. Doc. 10-4, at 306.

These facts demonstrate that law enforcement played on Collings's long-standing friendships and fear of reprisals from members of the community in order to obtain a confession in violation of his constitutional rights. This issue is debatable among reasonable jurists and this Court should issue a COA.

2 HABEAS CLAIM FOUR

The Sate violated its constitutional obligations to disclose evidence favorable to the defense by withholding evidence that Chief Clark, the State's primary law enforcement witness, had multiple prior criminal convictions that resulted in him

serving time in a military prison for desertion during the Vietnam War. The State failed to disclose Clark's prior criminal convictions until Collings raised the issue in his habeas petition. R. Doc. 8-2, at 283; R. Doc. 10-43. The State's failure to fully disclose the impeachment evidence in a timely manner denied Collings his right to due process of law and a fair trial as the trial court and jury lacked the information necessary to accurately assess Chief Clark's credibility and qualifications to serve as a law enforcement officer.

The Supreme Court's holding in *Brady v. Maryland* requires disclosure of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S. 83, 87 (1963). The Court extended *Brady* to the disclosure of evidence affecting the credibility of a witness. See *Giglio v. United States*, 405 U.S. 150 (1972).

The State disclosed a single page report detailing the relevant criminal records for the Barry County witnesses. R. Doc. 8-2, at 283. The report stated:

Chief Clint Clark, Wheaton Police Department, had one reported incident being arrested in Barry County on January 6, 1968 for Desertion from the U.S. Army with the charge amended to AWOL and an investigative arrest in Rogers, Arkansas on November 5, 1968 for investigation of forgery with no disposition shown on either charge.

R. Doc. 8-2, at 283. This was the full extent of the information provided to the defense at the time of trial. Chief Clark's criminal record while in the military was extensive but was never disclosed by the prosecution.

Military records available to the State reveal that Chief Clark deserted his post four times beginning on September 9, 1967, four months after joining the Army. R. Doc. 8-2, at 282. He again deserted his post on April 29, 1968, July 11, 1968, and for the final time on November 23, 1968. R. Doc. 8-2, at 282. Chief Clark was court-martialed for his repeated violations of law and was sentenced twice to terms of six-month imprisonment. R. Doc. 8-2, at 643. He was given an “Undesirable Disch[arge]” on October 23, 1969. R. Doc. 8-2, at 282.

Chief Clark’s credibility as a law enforcement officer was central to the trial court’s consideration of the motion to suppress. Chief Clark took the lead role in engaging with Collings in the days following the disappearance. Chief Clark’s criminal history would have been relevant in assessing his credibility as a law enforcement officer. *See* R.S.Mo. § 491.050; *see also*, *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. 1995). Chief Clark’s credibility was central to the trial court’s determination of the suppression motion. Evidence of Chief Clark’s lack of commitment to his service obligations – especially during a time of war – would have highlighted his similar lack of commitment to Collings’s constitutional rights. The jury could have been informed that Chief Clark’s desertion during a time of war carried a potential death sentence had he not successfully entered into a plea bargain. *See* 10 U.S.C. § 885(c). These factors provide this Court with a substantial basis to grant Collings’s application for a COA on this claim.

3 HABEAS CLAIM NINE

Reasonable jurists could conclude under *State v. Walkup*, 220 S.W.3d 748, 758 (Mo. banc. 2007), that Missouri excludes evidence of voluntary intoxication but still considers it relevant to a defendant's mental state. *See* R. Doc. 8, at 108-14; R. Doc. 33, at 113-14. Reasonable jurists could conclude that the state court's decision was contrary to or an objectively unreasonable application of Supreme Court law recognizing (1) the fundamental right to present a defense and (2) under *Montana v. Egelhoff*, 518 U.S. 37 (1996), Missouri's rule acts as an evidentiary bar violating due process.

The district court relied on *Gary v. Dormire*, 256 F.3d 753, 759 (8th Cir. 2001), to find that in Missouri evidence of voluntary intoxication has no relevance to the mental elements of a crime, including the specific-intent offense of first-degree murder. R. Doc. 58, at 23-24. But years after *Gary*, the Missouri Supreme Court reaffirmed that, given a defendant's fundamental right to present a defense, evidence affecting the defendant's ability to deliberate is "both legally and logically relevant to the issue of whether the jury should believe the state's evidence that he acted with deliberation." *Walkup*, 220 S.W.3d at 758. *Walkup* further indicates that evidence of an alcoholic blackout would be admissible for its *effect* on the defendant's mental state. *See id.* at 754-58.

Walkup unequivocally recognizes that any evidence negating the deliberation element of first-degree murder is legally and logically relevant to the question of the defendant's mental state. *Id.* at 758. Thus, *Gary's* conclusion to the contrary is incorrect. Reasonable jurists could conclude that because Missouri's intoxication proscription barred Appellant from presenting exculpatory evidence relevant to his alleged deliberation, it impermissibly infringed on his fundamental right to present a defense.

4 HABEAS CLAIM SIXTEEN

Because Julie Pickett's testimony regarding Appellant's prior disclosure of his sexual abuse nor his blackouts *was not presented to the jury*, reasonable jurists could find it was not cumulative of the evidence presented. *Southard*, 57 U.S. at 554; *Simmons v. Luebbers*, 299 F.3d 929, 937 (8th Cir. 2002). Appellee has presented no evidence or argument suggesting that another trial witness discussed Appellant's prior disclosure of his sexual abuse nor his alcoholic blackouts. Because no other witness discussed a prior disclosure of sexual abuse, the State argued that Dr. Draper's testimony was untrue. R. Doc. 10-29, at 6324-25, 6341. Reasonable jurists could conclude that the Missouri Supreme Court's decision on this point rests on an unreasonable determination of the facts or is contrary to or an objectively unreasonable application of clearly established federal law. *Simmons*, 299 F.3d at 937.

Reasonable jurists also could conclude that the state court unreasonably assumed that trial counsel made a strategic decision not to call Pickett due to the jury incident. Attorney Moreland and Ms. Pickett's testimony shows counsel decided not to call her before the jury incident. R. Doc. 10-45, at 361; R. Doc. 10-44, at 162-63. Counsel first learned of the jury incident the morning after it allegedly occurred, R. Doc. 10-44, at 236; R. Doc. 10-29, at 6229-30, and at that point, counsel had begun the testimony of their last witness, Draper. R. Doc. 10-28, at 6120. Appellee contests none of these facts.

Although Attorney Zembles speculated that the jury incident *may have affected* Moreland's decision, R. Doc. 10-44, at 234-38, the record does not support her speculation. Thus, reasonable jurists could conclude that the state court's decision is an improper post-hoc rationalization inconsistent with the available record evidence, *see Harrington v. Richter*, 562 U.S. 86, 109 (2011); *Simmons*, 299 F.3d at 937, and therefore is based on an unreasonable determination of the facts. *See Gabaree v. Steele*, 792 F.3d 991, 999 (8th Cir. 2015) ("We cannot impute to counsel a trial strategy that the record reveals she did not follow.").

Because the Missouri Supreme Court did not reach the prejudice component, § 2254(d) does not apply. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Evidence of a troubled childhood, particularly one involving sexual abuse, is meaningful mitigating evidence. *See, e.g., id.* at 536-37. Because Pickett's testimony would have

established that Appellant *did* disclose his sexual abuse when he was in his twenties, well before the crime occurred, the State would not have argued that Appellant's sexual abuse was illegitimate due to Appellant's "late" disclosure to Draper. The disclosure similarly would have countered the general theme of the State's cross-examination of Draper: that because information was not stated the records, it was untrue and merely a post-hoc explanation or disingenuous request for sympathy. Also, without Pickett's testimony, the jury did not know that Appellant's addiction was so severe that he suffered from blackouts—a fact that is mitigating on its own, *see Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991), but also casts doubt on whether the offense unfolded as relayed in Appellant's statement. Reasonable jurists could conclude that counsel's failure prejudiced Appellant.

5 HABEAS CLAIM SEVENTEEN

At the time of the offense, Appellant suffered from a "multiply injured brain." R. Doc. 33-1, at 111. He has "abnormalities in medial temporal lobe structures particularly on the right side[,] and "the right hippocampus is smaller in size than the left one." *Id.* EEG data show that he has brain dysfunction in temporal lobe functioning, and these impairments exacerbate and are inextricably entangled with his frontal lobe deficits. R. Doc. 34-1, at 1-3. His brain dysfunction significantly impaired his ability to deliberate and established two mental-impairment statutory mitigating circumstances that the jury did not consider. R. Doc. 33-1, at 107-08, 111-

112. These brain abnormalities “made the effects of the alcohol he consumed that day of the crime that much more deleterious to his capacity to exercise judgment and deliberate.” *Id.* at 111; *see also id.* at 106; R. Doc. 34-1, at 2-3.

Reasonable jurists could disagree with the district court’s resolution of procedural default. In evaluating *Martinez*’s “some merit” standard, the court erroneously determined that “[t]he Eighth Circuit has stated that the standard of prejudice is higher than that required to establish ineffective assistance of counsel under *Strickland*.” R. Doc. 58, at 12 (citing *Charron v. Gammon*, 69 F.3d 851, 858 (8th Cir. 1995)). This determination directly contradicts decisions of this Court and the Supreme Court.

In *Dorsey v. Vandergriff*, 30 F.4th 752, 756 (8th Cir. 2022), this Court held “that *Martinez*’s some-merit requirement means that whether [the claimant’s] trial counsel was ineffective ... must at least be debatable among jurists of reason.” (internal quotation omitted). This standard is the same as the COA standard, *Dorsey*, 30 F.4th at 756, which is lower than a merits-relief standard. *Buck*, 580 U.S. at 115-16; *Miller-El*, 537 U.S. at 338. Thus, the district court’s application of a higher standard was erroneous. Reasonable jurists could conclude that post-conviction counsel had a duty to investigate and present all potentially meritorious claims and did not have a strategic reason for omitting this claim. R. Doc. 33, at 196-98.

Reasonable jurists also could conclude that Appellant may be entitled to relief. The Supreme Court has rejected the entirety of counsels' performance automatically negating a specific instance of deficient performance. *Kimmelman*, 477 U.S. at 383-86; *see also Rompilla v. Beard*, 545 U.S. 374, 381, 387-90 (2005). Under *Strickland*, the relevant question does not ask how many experts with whom counsel consulted; rather, it asks whether the known evidence would have led a reasonable attorney to investigate further. Counsels' consultation with experts does not foreclose disagreement about whether counsel should have investigated further.

Counsel (1) were aware of red flags including seizure history, head injuries, poor performance on standardized testing, communication deficits, childhood neglect and sexual abuse, early-onset substance abuse, and psychiatric treatment involving psychotropic medication; (2) knew that Appellant exhibited dissociative symptoms at the time of the offense; and (3) and wished to present mitigating circumstances based on Appellant's impairments at the time of the offense. R. Doc. 10-45, at 244, 255. However, despite their strategy and knowledge of red flags, trial counsel did not adequately investigate Appellant's brain dysfunction or seizure disorder. Reasonable jurists could conclude that counsel should have investigated further. *See Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir.), *opinion amended on reh'g*, 939 F.2d 586 (8th Cir. 1991).

As to prejudice, it is undisputed that Appellant suffered psychological trauma and head injuries and a child and adolescent; the omitted evidence contextualized the extent of that trauma. R. Doc. 33-1, at 101-112; R. Doc. 18-1, at 66-81. This evidence would have countered the prosecution’s assertion that “[t]here’s nothing mentally wrong with him” and shown that throughout his life, Appellant has suffered from this brain damage and dysfunction affecting his judgment. R. Doc. 33-1, at 106-08; 110-112; R. Doc. 34-1, at 1-3.

The only information the jurors received was that Appellant’s “choices” all were free and voluntary. R. Doc. 10-29, at 6370-71. The omitted medical evidence establishes the contrary. R. Doc. 33-1, at 101-112; R. Doc. 34-1, at 1-14.

The jury did not consider *any* statutory mitigating circumstances to weigh against the two aggravating circumstances they found. R. Doc. 10-33, at 684-93, 696. Thus, the omitted evidence establishing two mental-impairment statutory mitigating circumstances would have been particularly meaningful. *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995) (finding reasonable probability of sentence other than death when the jury found only two aggravating circumstances but omitted evidence established mental-impairment statutory mitigating circumstances).

Without the omitted evidence, the jury was likely to believe—as the State contended—that Appellant was just a bad person who freely and voluntarily chose to do the worst things people can do. The omitted evidence would have shown

Appellant's behavior derived instead from his brain defects and dysfunction. *Hill v. Lockhart*, 28 F.3d 832, 846 (8th Cir. 1994).

CONCLUSION

For the foregoing reasons, Mr. Collings requests en banc review or alternatively issuance of a COA on the requested claims. Collings further requests this Court hear his appeal of the denial of his *Rhines* stay motion.

Respectfully Submitted,

/s/ Jeremy S. Weis

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/s/ Jeremy S. Weis
Jeremy S. Weis

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing pleading electronically with the clerk of the court to be served by operation of the court's electronic filing system upon all attorneys of record on August 10, 2023.

/s/ Jeremy S. Weis
Jeremy S. Weis

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

JUDGMENT IN A CIVIL CASE

CHRISTOPHER COLLINGS,

vs.

CINDY GRIFFITH,

)
)
)
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)
)
)
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)

Case No. 18-8000-CV-W-MDH

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to determination before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner's Petition for Writ of Habeas Corpus is denied without a certificate of appealability.

September 30, 2022
Date

Paige Wymore-Wynn
Clerk of Court

Entered on: September 30, 2022

s/Linda Howard
(By) Deputy Clerk

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

CHRISTOPHER COLLINGS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 18-CV-08000-MDH
)	
CINDY GRIFFITH,)	
)	
Respondent.)	

ORDER

Before the Court is Petitioner Christopher Collings’s Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. For the reasons explained below, Petitioner’s Petition is **DENIED**.

Factual Background

Petitioner was convicted of first degree murder in the Circuit Court of Phelps County, Missouri. The jury recommended a sentence of death and the court imposed the death sentence on May 11, 2012. The facts as summarized by the Missouri Supreme Court are:

Nine-year-old Rowan Ford (hereinafter, “Rowan”) lived with her mother, Colleen Munson (hereinafter “Colleen”), and her stepfather, David Spears (hereinafter, “Spears”) in Stella, Missouri, located in Newton County. Spears had been friends with Collings for many years. Collings lived with Spears' family for several months during the summer and fall of 2007. Collings slept in the basement, and Rowan referred to him as “Uncle Chris.” Collings moved to his family's farm in late October 2007 and lived in a travel trailer on the property, located in Wheaton, Missouri, in Barry County.

On the evening of Friday, November 2, 2007, Nathan Mahurin (hereinafter, “Mahurin”), a mutual friend of Collings and Spears, met them at a farm where they were working. They went to a liquor store to buy two or three six packs of malt liquor and then went to Spears' home to play pool and drink. At 8:30 p.m., Colleen left for work and left Rowan in Spears' care. The men continued to drink after purchasing more alcohol.

Later that evening, Collings asked Mahurin to drive him home. Mahurin and Collings talked Spears into going with them and leaving Rowan home alone, asleep on the floor in her bedroom. On the way to Collings' trailer, the men stopped to buy

more alcohol. At Collings' trailer, they continued to drink and smoked marijuana. After an hour, Mahurin and Spears left to go home. Mahurin decided to take the back roads instead of the direct highway route to Spears' house because he was intoxicated and he did not want to get stopped by the police. Mahurin dropped off Spears and returned home by midnight.

On November 3rd, Colleen returned home from her overnight work shift at 9:00 a.m. and could not find Rowan. After searching the house, Colleen woke Spears and asked him where Rowan was. Spears told Colleen that Rowan was staying with a friend, but he could not identify the friend. Colleen walked the neighborhood searching for Rowan to no avail. Colleen wanted Spears to call the police, but he insisted Rowan was at a friend's house. When Rowan did not return that afternoon, Colleen contacted the Newton County sheriff's department to report Rowan missing, at which time a large scale search was launched to find her. Spears, Mahurin, and Collings were all considered "persons of interest" because they were the last people to see Rowan at the house.

On November 4th, Newton County deputies spoke with Collings on the parking lot of a local restaurant about Rowan's disappearance. Collings gave the deputies the same account Mahurin did about their activities that evening, but omitted that they had smoked marijuana. Collings told the deputies he stayed home and went to sleep after Mahurin and Spears left. Collings denied speaking to Spears since he left and claimed he was unaware Rowan was missing until the police spoke to him. The deputies described Collings as cooperative, concerned, and polite. Later that evening, Collings visited Colleen at her home, asked how the search was going, and offered to help find Rowan.

On November 5th, the FBI became involved in the investigation. While Newton County deputies continued to interview Spears, FBI technicians seized and searched Spears' pickup truck and a vehicle Spears' mother said she loaned Spears after Mahurin dropped him off on the night Rowan disappeared. In the meantime, Newton County deputies approached Collings at work and requested he answer more questions. Collings agreed and drove himself to the sheriff's department. Collings gave a similar statement to the one he had given the day before. Collings was read his Miranda rights after being questioned about Spears' potential involvement in Rowan's disappearance. Collings indicated that he understood his rights and waived them. Collings also agreed to submit to a polygraph test and a Computer Voice Stress Analysis (CVSA) test. Collings was read his rights again prior to testing and waived them. After the testing was completed, Collings spoke to the deputies. Collings insisted he knew nothing about Rowan's disappearance and offered to help in the search.

Later that afternoon, Wheaton Chief of Police Clinton Clark (hereinafter, "Chief Clark") was on routine patrol in Wheaton. Collings and Chief Clark had a relationship spanning seventeen years. Chief Clark had known Collings since he was a young boy, he was close friends with Collings' adoptive mother, and he knew

Collings' adoptive father. Collings trusted Chief Clark and turned to him for advice, sought solace from him when Collings' mother died, and made a point to visit Chief Clark when he came to visit when he lived out of town.

Collings flagged down Chief Clark, told him that Rowan was missing, and he was trying to find her. Chief Clark described Collings as “kind of excited” and “not his normal self.” Chief Clark encouraged Collings to continue to do what he could to help find Rowan. After speaking to Collings, Chief Clark notified the FBI that Collings contacted him about Rowan's disappearance. Chief Clark told the FBI that he and Collings had a long-standing relationship and a good rapport. Chief Clark believed Collings knew something about Rowan's disappearance and offered his help in the investigation. Chief Clark was encouraged by the FBI and Newton County deputies to continue to talk with Collings.

That evening, Collings went to Colleen's home to speak to her about the investigation. The FBI spoke to Colleen and Collings individually at Colleen's home. Collings was described as cooperative, and he gave the same account of the evening's activities as he had given previously. Collings spoke about his relationship with Spears, told the FBI he believed Spears was involved in Rowan's disappearance, and offered to wear a wire to help the investigation. Collings also suggested locations in which to search for Rowan.

On November 6th, law enforcement officials continued to search for Rowan, but the focus of the investigation was on Spears. Spears was interviewed repeatedly, his home was searched, and he was driven around the area in an effort to find Rowan. In the late afternoon or early evening, Collings went to Chief Clark's office to let him know he had spoken to the FBI and was active in the search to find Rowan, even suggesting places for them to search. Chief Clark believed Collings “had something on his mind” and appeared “apprehensive.” Collings would not make eye contact with Chief Clark, which was unusual. Chief Clark told Collings that he knew how to contact him if he needed help with anything. After this conversation, Chief Clark contacted the FBI and told them about his talk with Collings. The FBI believed if Collings were going to confess or reveal any information, it would be to Chief Clark. Hence, the FBI encouraged Chief Clark to help in the investigation, to which Chief Clark agreed.

On November 7th, Collings met with the FBI at the Newton County sheriff's department. Collings consented to provide a buccal swab for DNA testing. Collings executed consent forms to search a safe he owned located at Spears' home, his property, and trailer. Collings submitted to additional testing, which required a voluntary waiver of his rights. Afterwards, Collings was interviewed, but not Mirandized. Collings spoke with the FBI about an alibi Spears presented for the night Rowan disappeared, which Collings said was untrue. As the interview progressed, Collings became more emotional, tense, and nervous when asked about Rowan. Collings told the agents that if they were going to accuse him of being

involved with Rowan's disappearance, he was not going to talk to them anymore. This concluded the interview.

In the evening, Collings went to Chief Clark's office and was very upset about his FBI interview that day. Collings told Chief Clark he was going to “dummy up about anything else ...,” and maybe he needed to get a lawyer. Chief Clark told Collings that was his right, but he also encouraged Collings to continue to do anything he could to help find Rowan and stated it was not in his best interest to stop cooperating. Collings told Chief Clark, “[I]f I have anything else to say, I'll talk to you.” Chief Clark then advised Collings of his Miranda rights. Collings agreed to speak and signed a waiver form. Chief Clark told Collings he felt there was something on his mind and asked if he knew anything about Rowan's disappearance. Collings began to cry and stated he always loved Rowan and would not have done anything to hurt her. At this point, someone came into the police department, interrupting their conversation, which caused Collings to leave abruptly.

Chief Clark contacted the FBI after his discussion with Collings. Chief Clark informed them he believed Collings was “near a breaking point” and suggested Collings needed a day off from questioning. Chief Clark further advised Collings was “about to lawyer [up]” and he tried to dissuade him from doing that and encouraged him to continue to cooperate.

On November 8th, Collings had no contact with law enforcement. Chief Clark spoke with the FBI about Collings, the dynamics of his family, and Chief Clark's unique relationship with him. Chief Clark thought Collings knew something about Rowan's disappearance but believed they needed to find her body first. The FBI told Chief Clark once they found Rowan's body, they wanted him to be the one to speak to Collings.

On November 9th, Rowan's body was discovered at the bottom of a sinkhole known as Fox Cave. The sinkhole was twenty to thirty feet from the road in a heavily wooded area. Rowan was nude from the waist down, except for one sock. She had a ligature mark around her neck and trauma, blood, and tissue damage to her vaginal area. She was covered with leaves and debris.

Chief Clark heard about Rowan's body being found on the news that morning. He received a page from his office that Collings came by asking for him and inquired about what time he came on duty because Collings needed to speak to him. Chief Clark was contacted by the FBI, who directed him to find Collings and tell him that they found Rowan's body.

Chief Clark went looking for Collings, but to no avail. Collings called Chief Clark on his cellular telephone and asked if law enforcement officers were following him in a gray minivan. Chief Clark denied knowing about any surveillance being conducted. Collings relayed how he had been driving “all over the area ... trying

shake it” and that he was nervous and felt threatened. Chief Clark advised Collings to go to the police department, but Collings suggested they meet up.

After they met, Collings told Chief Clark they needed to talk and agreed to ride back to the police department in Chief Clark's patrol car. They discussed the gray minivan, and Collings indicated he was worried that people might take matters into their own hands now that Rowan's body had been recovered. Chief Clark told Collings he could not protect him twenty-four hours a day and could not guarantee his safety.

When they arrived at the police department, Chief Clark read Collings his Miranda rights. Collings indicated he understood his rights and agreed to talk. Chief Clark told Collings, “[W]ell, son, it's over.... We found Rowan's body this morning.” Collings dropped his head and his eyes began to water. Chief Clark believed Spears “had done something” to Rowan and suspected Collings had knowledge of what Spears did. Chief Clark told Collings he needed to tell him what Spears did to Rowan, to which Collings reacted with surprise and looked at Chief Clark “kind of funny.” The police department was busy and Collings indicated he did not want to talk with so many people nearby. Chief Clark recommended they go somewhere quiet to talk. Collings suggested they go to the Muncie Bridge, located a few miles outside of Wheaton.

Chief Clark contacted law enforcement officials to inform them he and Collings were headed to the Muncie Bridge. After they arrived, Collings held his hands out, indicating Chief Clark ought to handcuff him. Chief Clark stated that was not necessary, to which Collings replied, “[F]or what I am about to tell you, you will.” Collings and Chief Clark sat on a slope near the bridge, and Collings told him what occurred the evening Rowan disappeared.

Collings relayed the same story he maintained all week about his activities up until the time Mahurin and Spears left his trailer. Collings confirmed that Mahurin and Spears took the back roads home to avoid being detected because they wanted to finish drinking and smoking marijuana. Collings told Chief Clark he knew if he hurried, he could get back over to Spears' house and get Rowan “out of there” before the other men returned. Collings took the highway, which was the “quickest route” back to Spears' house. Once back at Spears' house, Collings went in, used the bathroom, and retrieved Rowan off of the floor in her bedroom. Collings carried Rowan, who was still sleeping, outside and put her inside his pickup truck. Rowan remained asleep during the drive back to Collings' trailer. Collings carried Rowan inside, placed her on the bed, and removed her pajama pants and underwear. Collings did not speak to Rowan so she would not recognize his voice and kept the lights off so that she would not see him. Collings then said, “I had sex with her” in the “missionary position” and also “used my finger a little bit.” Rowan woke up when Collings penetrated her, struggled at first, and then stopped. Intercourse lasted a few minutes, and Collings could not remember if he ejaculated.

Afterward, Collings told Chief Clark he intended to return Rowan to her house. Collings said he took Rowan outside; he held her in front of him by her arms and facing away from him so she would not see his face. Rowan looked back over her shoulder and could see Collings in the moonlight. Collings knew Rowan recognized him and “freaked out.” In an old pickup truck sitting on the property, Collings saw a coil of “chicken house rope” and looped it around Rowan's neck. Collings remained behind Rowan and pulled the rope tight around her neck with his fists clenched, pulling his arms away from each other. Rowan struggled, but Collings said he “kept it tight” even after Rowan stopped struggling and fell to the ground. Eventually, Rowan stopped moving.

Collings realized he “was in a lot of trouble” and put Rowan's body in the bed of his pickup truck. Collings planned to dispose of Rowan's body off of the Muncie Bridge, but rejected that idea because he thought her body would be discovered too quickly. As Collings drove around considering his options, he decided to go to Fox Cave. Collings told Chief Clark he threw Rowan's body into the sinkhole and tried to pull some branches and limbs over to cover the entrance to the sinkhole, but it was too big and the debris fell inside.

Collings got back into his pickup truck and returned to his trailer. At the trailer, Collings discovered blood on his mattress and his clothes, which he did not remove when he had sex with Rowan. Collings said he knew he needed to get rid of these items, in addition to Rowan's pajama pants, her underwear, and the rope he used to strangle her. Collings put everything except the mattress into a wood stove and burned it. Collings rolled up the mattress and put it into a fifty-five gallon drum used as a burn barrel with some old carpet. Collings said, “I got to thinking, now that's gonna make a hell of a fire. Somebody's gonna see that burning.” Collings then dragged the barrel into a barn and set the contents on fire to avoid detection.

When Collings finished talking, he and Chief Clark returned to the Wheaton police department because Chief Clark wanted the other law enforcement officials involved in the investigation to hear Collings' story. During the ride back to the police department, Collings rode in the front seat, smoked a cigarette, and was not handcuffed. Collings was advised of his rights, and deputies from Barry and Newton County, along with the FBI, listened as Collings repeated his confession. Collings executed a consent form to allow a search of his property during this interview. This interview was not recorded.

Afterward, Collings was transported to the Barry County sheriff's department, where he gave a videotaped statement after being advised of his rights. Collings said on the videotape he had been advised of his rights “several times” throughout the week. Collings repeated the same series of events during the first videotaped statement. Collings felt guilty and remorseful and said he had been “bawling like a baby all afternoon.”

Collings' confession was surprising to the investigators because they were operating under the assumption that Spears killed Rowan and Collings merely had knowledge of the event. As a result, Newton County deputies questioned Spears again, at which time Spears implicated himself. Upon learning this, Collings was questioned again at Barry County in a recorded interview. The deputies and Chief Clark told Collings that Spears stated he called his mother, had her bring a vehicle to his home, and then he joined Collings back at his trailer. Spears stated he also had sex with Rowan, was there when Collings killed her, and helped Collings dispose of her body. Collings vehemently and repeatedly denied Spears had any involvement in Rowan's rape, murder, and disposal of her body.

Collings' trailer and adjacent properties were searched while Collings gave the second videotaped statement. Among the items collected were: a rusted metal spool inside the bed of an old pickup truck; a piece of string or twine found on the driver's side floor of the old pickup truck; rope or wire found inside Collings' pickup truck; a fifty-five gallon drum with burned remnants inside; a burn pile that contained an item appearing to be a cord; ashes collected from a woodstove; and a light-to-medium brown hair, found in the bed of Collings' pickup truck.

The autopsy revealed Rowan died from ligature strangulation. Rowan was conscious for approximately ten seconds, quit breathing after approximately two to three minutes, and would have been brain dead in approximately twelve minutes. Rowan's body had signs of decomposition. The body had additional small scrapes, bruises, and injuries inflicted prior to death and significant facial trauma likely inflicted after her death as a result of being thrown into the sinkhole. The body also had a laceration approximately 3/4 of an inch long from her vagina to her anus. This laceration was consistent with blunt force trauma inflicted by a penis, which caused significant bleeding and would have been very painful. During the autopsy, a rape kit was collected, including vaginal swabs, blood samples, and two foreign hairs from Rowan's pubic area.

Collings was charged with one count of first degree murder, one count of forcible rape, and one count of statutory rape. The murder charge was severed from the rape charges, which later were dismissed. Venue was changed to Phelps County, and a jury was selected from Platte County.

Collings filed a motion to suppress, seeking to exclude evidence of all statements taken from him by law enforcement agents throughout the entire investigation and all evidence obtained from the searches of his body, pickup truck, trailer, and property. The circuit court overruled Collings' motion, finding Collings was not in custody for any of the interviews until November 9th, after he returned to the Wheaton police department with Chief Clark and met with other law enforcement officers to give a statement.

At the conclusion of the guilt phase, the jury found Collings guilty of murdering Rowan. During the penalty phase, the State presented victim impact testimony from

six witnesses. Collings presented two witnesses who offered testimony about Spears' potential involvement in Rowan's murder. Collings' family members testified describing Collings' tumultuous upbringing, his shuffling back and forth between his biological and adoptive parents who had significant substance abuse and legal issues, and the issues he encountered as a teenager and young adult. Collings also presented testimony from an expert in the field of human development that explained Collings was handicapped developmentally due to severe emotional neglect during the first six months of his life and beyond. As a result, the expert testified Collings suffered confusion in his connections with other people that resulted in a diagnosis of “severe disorganized disassociative attachment disorder” and “intermittent explosive personality disorders.”

After the penalty phase, the jury recommended a sentence of death. The jury found Rowan's murder involved torture, and, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhumane. The jury also determined Rowan was a potential witness in a pending investigation of her rape and was killed as a result of her status as a potential witness.

State v. Collings, 450 S.W.3d 741, 747–53 (Mo. 2014).

Procedural Background

On August 19, 2014, Petitioner’s first-degree murder conviction and death sentence were affirmed on direct appeal by the Missouri Supreme Court. *Id.* Certiorari was denied on February 25, 2015. *Collings v. Missouri*, No. 14-7051 (Mem), 135 S. Ct. 1401 (2015). Following an evidentiary hearing, the post-conviction review court denied Petitioner’s motion for post-conviction relief. The Missouri Supreme Court affirmed the denial of post-conviction relief on March 6, 2018. *Collings v. State*, 543 S.W.3d 1 (Mo. 2018). Petitioner’s motion for rehearing was denied on April 17, 2018.

Legal Standard

A. Antiterrorism and Effective Death Penalty Act

“The Antiterrorism and Effective Death Penalty Act of 1996 [(“AEDPA”)] modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible

under law.” *Bell v. Cone*, 535 U.S. 685, 693, 122 S. Ct. 1843, 1849, 152 L. Ed. 2d 914 (2002), citing *Williams v. Taylor*, 529 U.S. 362, 403-404, 102 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Supreme Court has stated that “habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 102–03, 131 S. Ct. 770, 786–87, 178 L. Ed. 2d 624 (2011)(internal citation omitted).

Pursuant to 28 U.S.C. § 2254(d), a writ of habeas corpus shall only be issued on behalf of a person in custody pursuant to the judgment of a State court with respect to any claim adjudicated on the merits in State court, if 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.

Id. at 97-98.

“Under § 2254(d)(1), a state court decision is ‘contrary to’ clearly established federal law when the state court (1) arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law; or (2) decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *White v. Dingle*, 757 F.3d 750, 754 (8th Cir. 2014) (internal citation and quotation omitted). “A decision is an ‘unreasonable application’ of clearly established federal law when the state court ‘identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s

case.” *Id.* “[T]he Supreme Court has repeatedly stressed that an unreasonable application is different from an incorrect one.” *Colvin v. Taylor*, 324 F.3d 583, 587 (8th Cir. 2003) (internal citations omitted). The Eighth Circuit has stated “we may not grant a writ of habeas corpus unless the relevant state court decision is both wrong and unreasonable.” *Id.*

28 U.S.C. § 2254(e)(1) states: “In a proceeding instituted by an application for 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.” 28 U.S.C. § 2254(e)(1). The Supreme Court has not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1). *Brumfield v. Cain*, 576 U.S. 305, 322, 135 S. Ct. 2269, 2282, 192 L. Ed. 2d 356 (2015). The Supreme Court has stated, however, that in the context of § 2254(d)(2), the term “unreasonable” is difficult to define.” *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 849, 175 L. Ed. 2d 738 (2010). The Supreme Court has held “that a state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Id.*

B. Ineffective Assistance of Counsel

An ineffective assistance of counsel claim has two components: (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687-88. “Judicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. “A fair assessment of attorney performance requires that every effort be

made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* A court must presume that a challenged action was sound trial strategy, and the defendant is required to overcome such presumption. *Id.*

With respect to the prejudice prong, a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Id.* at 695. A defendant must establish both prongs of the *Stickland* test by a preponderance of the evidence to prove ineffective assistance of counsel. *Tisius v. State*, 519 S.W.3d 413, 420 (Mo. 2017).

C. Procedural Default

“A claim is procedurally defaulted if a habeas petitioner failed to raise it in state proceedings.” *Wooten v. Norris*, 578 F.3d 767, 777 (8th Cir. 2009) (citation omitted). In *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), the Supreme Court held, “[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” “Negligence on the part of a prisoner’s postconviction attorney does not qualify as

‘cause.’” *Maples v. Thomas*, 565 U.S. 266, 280, 132 S. Ct. 912, 922, 181 L. Ed. 2d 807 (2012) (internal citation omitted).

Petitioner admits that several of the grounds for relief he raises were procedurally defaulted. Petitioner argues, however, that the narrow exception announced by the Supreme Court in *Martinez v. Ryan* applies allowing this Court to review his otherwise procedurally defaulted claims.¹ In *Martinez*, the Supreme Court recognized a defaulted claim of ineffective assistance of trial counsel may be excused if the default was due to ineffective assistance of post-conviction relief counsel. *Martinez v. Ryan*, 566 U.S. 1, 17, 132 S. Ct. 1309, 1320, 182 L. Ed. 2d 272 (2012).

To overcome procedural default under *Martinez*, Petitioner must show (1) that post-conviction counsel was “ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984),” and (2) “that the underlying ineffective-assistance-of-trial-counsel claim has some merit.” *Id.* at 13. As discussed above, to show ineffective assistance of counsel under *Strickland*, Petitioner must show (1) “[his] counsel’s performance was deficient,” and (2) “the deficient performance prejudiced [his] defense.” *Strickland*, 466 U.S. at 687.

The Eighth Circuit has stated that the standard of prejudice is higher than that required to establish ineffective assistance of counsel under *Strickland*. *Charron v. Gammon*, 69 F.3d 851, 858 (8th Cir.1995) (“To demonstrate prejudice, a petitioner must show that the errors of which he complains ‘worked to his actual and substantial disadvantage, infecting his entire [hearing] with error of constitutional dimensions.”). The Eighth Circuit has further stated, in analyzing the “narrow question of postconviction counsel’s performance, as *Martinez* instructs us to do, we must determine whether the ineffective-assistance-of-trial-counsel claim was ‘substantial enough’ that

¹ Petitioner filed a Motion for Stay and Abeyance of Habeas Corpus Proceedings pending Exhaustion of State Remedies. (Doc. 44). The Court has denied this motion in a separate Order.

the failure to raise it on postconviction review was itself ineffective.” *Deck v. Jennings*, 978 F.3d 578, 582–83 (8th Cir. 2020), *cert. denied sub nom. Deck v. Blair*, 211 L. Ed. 2d 76, 142 S. Ct. 186 (2021) (internal citation omitted). The Eighth Circuit held that failing to make an argument that would “require the resolution of unsettled legal questions” is generally not “outside the wide range of professionally competent assistance.” *Id.* Further, an attorney’s decision to not raise a claim ... is not deficient performance unless that claim was plainly stronger than those actually presented. *Id.*

In *Shinn v. Ramirez*, the United States Supreme Court reaffirmed the principle that claims that are not raised in accordance with state court rules are procedurally barred as opposed to unexhausted. *Shinn v. Ramirez*, 212 L. Ed. 2d 713, 142 S. Ct. 1718, 1728 (2022). The Court held that if the state courts would dismiss a claim for failure to follow procedural rules then the claim is exhausted through default. *Id.* at 1732.

Discussion

Petitioner raises 28 claims for relief which are discussed herein:

Ground 1: The trial court failed to suppress Petitioner’s statements to law enforcement.

Petitioner argues his statements to law enforcement on November 9, 2007 were used to collect “most of the evidence used at trial” to link him to the murder and that without the statement the State would not have had sufficient evidence to convict him. Petitioner argues the statements were the product of unconstitutional police tactics and denied him his Fifth and Fourteenth Amendment rights.

Petitioner appealed the trial court’s ruling on the motion to suppress raising the same arguments presented here, including: that law enforcement officers exploited the close relationship Petitioner had with Chief Clark; that law enforcement officers engaged in an unlawful two step

interrogation; that law enforcement exploited a fear of vigilante justice to induce his confession; and that law enforcement failed to give required *Miranda* warnings. The Missouri Supreme Court rejected all of Petitioner's arguments and found there was no violation of the *Spano* "false friend" prohibition; there was no violation of the *Seibert* "two step interrogation;" Petitioner was given *Miranda* warnings; and Petitioner's confession was not coerced by exploitation of threats of vigilante justice. *State v. Collings*, 450 S.W.3d at 753-56 (Mo. 2014). The Missouri Supreme Court also addressed other attacks on the confessions raised by Petitioner and found the confessions were admissible and affirmed the denial of the motion to suppress.

In addition, the Missouri Supreme Court addressed the totality of the circumstances regarding Petitioner's confession and motion to suppress and reiterated that on the videotaped interview Petitioner repeatedly asserted that he understood his rights, that he had heard his rights several times throughout the week, that he was not threatened, that no promises were made to him, and that he signed the *Miranda* waiver of his own free will. *Id.* at 756.

Here, the decision of the Missouri Supreme Court is entitled to deference as Petitioner has not established an unreasonable determination of the facts in light of the evidence presented in the State court proceeding or 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. The Court denies Ground One.

Ground Two: Petitioner was denied his right to due process of law when the State court refused to admit and consider substantial evidence of police misconduct.

Petitioner alleges the trial court made erroneous evidentiary rulings during the suppression hearing and that this violated his right to due process of law. To the extent Petitioner again challenges the state law evidentiary rulings those claims are not properly before the Court and are denied. However, with regard to an alleged due process violation arising from the state court

evidentiary ruling, Petitioner must establish that there was evidentiary impropriety and that the impropriety was so egregious that “absent the alleged impropriety the verdict probably would have been different.” *Skillicorn v. Luebbers*, 475 F.3d 965, 972 (8th Cir. 2007). This Court does not re-examine the state court’s interpretation and application of the state’s evidentiary rules and laws. *Id.* at 974.

The Missouri Supreme Court also rejected this claim based on a plain error review procedurally barring the claim from review by this Court. *Collings*, 450 S.W.3d at 756.

The Supreme Court’s decision states:

Collings was arrested on November 9th, appointed counsel, and arraigned on November 13, 2007. Chief Clark was present at the arraignment and heard defense counsel advise Collings to not speak to anyone about his case. On November 14th, Collings asked to speak to Chief Clark about a personal legal matter unrelated to the murder case. When Chief Clark arrived, he *Mirandized* Collings prior to engaging in conversation. Chief Clark told Collings he was instructed not to discuss anything with him until Collings answered additional questions about Rowan's murder and explained the inconsistencies between his statement and Spears' statement. Chief Clark told Collings, “I have some questions in my mind that I really wish that you would help me with, if you will.” Collings responded, “Well, it depends. If it's about my case, I can't—I was advised by my lawyer not to talk to anybody as far as my case.”

Instead of terminating the discussion at this point, the conversation continued for approximately forty minutes. Chief Clark repeatedly asked Collings to “clear up details,” “explain discrepancies,” “put things at ease,” and urged Collings to “get this over with and get it behind [him]” regarding the questions Chief Clark felt were still unresolved about the case. Chief Clark repeatedly explained to Collings that he was “not going to pressure or force,” “attempt to coerce,” and would “never dream of pressuring or coercing” Collings into answering any questions. Collings stated unequivocally, at least nine times, that he could not answer any questions regarding the case on the advice of counsel. Each time Collings invoked his rights, Chief Clark acknowledged them, but continued to pose questions and interject personal comments about their relationship in an effort to get Collings to speak. Collings told Chief Clark he did not agree with the murder charges lodged against him and said, “This is well out of your hands at this point.” Chief Clark responded, “Let me tell you something, son. It's not out of my hands as much as you think. I told you I would stand by you and would—would be there for you all the way, all the way through to the extent that I could, and I have done that, and I will continue to do

that. But I can only do that to the extent that you allow it.” Nevertheless, Collings refrained from answering any of Chief Clark's questions.

At the suppression hearing, Collings attempted to admit the November 14th videotape into evidence, arguing the videotape would permit the circuit court to see the nature of his and Chief Clark's interactions while they were alone, how Chief Clark pressured Collings, and how his constitutional rights were disregarded. Collings argued this videotape went straight to the issue of Chief Clark's credibility regarding his testimony at the suppression hearing that he did not believe he pressured or coerced Collings into confessing to Rowan's murder on the Muncie Bridge and was admissible as part of the totality of the circumstances.

The State objected to the admission of the videotape. It recognized the videotape would be inadmissible at trial due to Chief Clark's blatant disregard for Collings' constitutional rights. The State further argued Collings could not “bootstrap” the issue of voluntariness by way of this videotape due to the fact that it occurred five days after Collings was arrested, represented by counsel, and arraigned. The circuit court permitted Collings to play the videotape as part of an offer of proof, but the circuit court ultimately sustained the State's objection.

This Court is troubled deeply by Chief Clark's egregious and blatant violation of Collings' constitutional rights while knowingly being recorded. However, the record refutes Collings' claim that the circuit court failed to consider the videotape for his intended purpose. In overruling Collings' motion to suppress, the circuit court found the November 14th videotape did not operate to invalidate Collings' voluntary statements made through his confessions on November 9th. This ruling demonstrates the circuit court considered the videotape on its merits when ruling on whether Collings' confessions were voluntary. The fact that the circuit court found the videotape unavailing does not mean Collings was barred from presenting the evidence. Further, the fact that Collings was able to invoke his rights and withstand Chief Clark's repeated barrage of inappropriate and illegal questioning undercuts his argument of coercion.

Finally, the record further refutes Collings' claim regarding Chief Clark's credibility. Collings testified at the suppression hearing and used the phrase “badgering and pestering” to characterize his interaction with other law enforcement officials. However, Collings never once indicated Chief Clark threatened, pressured, or coerced him into speaking during any of the times he sought out Chief Clark to talk.

State v. Collings, 450 S.W.3d at 757–58.

Here, counsel for Petitioner cannot establish that the state court evidentiary ruling violated due process as Petitioner cannot establish an evidentiary impropriety that was so egregious that

absent the alleged impropriety the verdict probably would have been different. This Court will not re-examine the state court's interpretation. Further, the Missouri Supreme Court rejected this claim on plain error review. This Court denies Ground Two.

Ground Three: Trial counsel was ineffective in failing to properly preserve in a motion for new trial that Petitioner was denied the opportunity to present evidence of law enforcement's coercive tactics.

Petitioner argues trial counsel failed to follow through on their objection to the trial court's refusal to consider "Chief Clark's egregious and blatant violation of Collings' constitutional rights while being recorded." *Id.* at 758. Petitioner argues trial counsel must include the issue in a timely filed motion for new trial or the matter will only be considered on plain error review and while trial counsel filed a timely motion for new trial, trial counsel failed to include this issue.

Respondent argues that while the claim is barred because petitioner did not properly present it in state court. the claim is also without merit because the Missouri Supreme Court found in an alternate holding, in the direct appeal, that the suppression court committed no error in its evidentiary rulings. *Id.* at 756-59. As a result, Respondent argues Petitioner cannot establish an ineffective assistance claim for declining to preserve a meritless claim that was rejected by the Missouri Supreme Court in an alternate holding. *Citing Strickland v. Washington*, 466 U.S. 668 (1984).

Here, Petitioner "may establish cause for a default of an ineffective assistance claim... where appointed counsel in the initial review, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)." *Martinze*, 566 U.S. at 14. Petitioner must demonstrate that the underlying ineffective assistance of counsel claim is a substantial one, that the claim has some merit. *Id.* Petitioner must show: 1) counsel's deficient performance - that his attorney's performance fell below "an objective standard of

reasonableness,” and (2) prejudice - that confidence in the result of the original proceeding is undermined as a result of counsel’s deficiencies. *Strickland v. Washington*, 466 U.S. 668 (1984). Prejudice is present whenever “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

The Court has reviewed the record before it and finds Petitioner has failed to establish that there is a likelihood that Petitioner’s claim would have resulted in a reversal of the trial court’s evidentiary ruling if trial counsel had properly preserved the claim in a motion for new trial. In addition, Petitioner has failed to provide any other basis for relief and Ground Three is denied.

Ground Four: State failed to disclose their primary law enforcement witness had a prior criminal disposition that impacted his credibility.

Petitioner argues that the State did not disclose Chief Clark’s history that he was a “deserter” from the United States Army after being conscripted for service during the Vietnam War. Respondent argues the police chief had been convicted of being “AWOL” in 1968 and 1969. Respondent argues this claim is procedurally barred because Petitioner did not raise it in state court, despite a pretrial disclosure of the police chief’s arrest on the offense, with a notation that the disposition was unknown. Respondent further argues Petitioner could have, through due diligence, raised it in the ordinary course of review based on the information the State disclosed. *O’Neal v. Bowersox*, 73 F.3d 169 (8th Cir. 1995) (petitioner could have obtained undisclosed prior convictions of corrections officer, who witnessed the murder, through due diligence and there was no reasonable probability that knowledge of the convictions would have changed the outcome of the proceedings).

Petitioner acknowledges that this claim is procedurally defaulted but argues the procedural default can be excused under *Martinez*. Petitioner must show actual prejudice sufficient to

overcome a default, that it worked to his actual and substantial disadvantage, not merely that it allegedly created the possibility of prejudice. *United States v. Frady*, 456 U.S. 152, 153 (1982). Here, the periods of time Chief Clark was AWOL occurred in 1968 and 1969, decades before his involvement in Petitioner's case. Petitioner cannot show a reasonable probability the outcome of the proceeding was changed, even if a failure to disclose occurred (which has not been proven). Ground Four is denied.

Ground Five: Trial counsel was ineffective for failing to investigate Chief Clark's military record and to reopen the motion to suppress.

Petitioner argues his trial attorneys, and later his post-conviction counsel, had an affirmative duty to conduct a thorough investigation and their failure to follow up and investigate Chief Clark's criminal background after they were placed on notice of it on or after March 11, 2011 constitutes ineffective assistance of counsel. Petitioner contends this evidence would have served to impeach Chief Clark's credibility and supply additional evidence supporting the Missouri Supreme Court's view of his behavior – quoting the opinion's language that “Chief Clark's egregious and blatant violation of Collings' constitutional rights while being recorded.” *Collings*, 450 S.W.3d at 758. Petitioner acknowledges that this claim is procedurally defaulted but that under *Martinez* he can present a claim.

Petitioner “may establish cause for a default of an ineffective assistance claim ... where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).” *Martinez*, 566 U.S. at 14. Petitioner “must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Id.*

Respondent argues that the claim cannot be reviewed because it was not raised in the state courts and further that there is no actual prejudice. Respondent also argues the claim is without legal merit because there is no reasonable probability that the outcome of the proceeding was changed because the defense did not try to introduce Chief Clark's military record at the suppression hearing. Petitioner cites to Chief Clark's criminal conviction as admissible to impeach his credibility. Petitioner also states that this information was not disclosed prior to the suppression hearing.

Here, again the Court finds there is no reasonable probability that the outcome of the proceeding was changed because the defense did not try and introduce the decades old military record of the police chief. The Court denies Ground Five.

Ground Six: Trial counsel was ineffective for failing to conduct a thorough investigation substantiating Spears's involvement in the abduction and murder.

Petitioner argues his trial attorneys, and later his post-conviction counsel, had an affirmative duty to conduct a thorough investigation and their failure to follow up and investigate Spears involvement in this abduction and murder was ineffective assistance of counsel. Petitioner contends his claims now go beyond the strategic decisions of counsel and extend to counsel's failure to investigate Spears. Petitioner states that trial counsel wanted to keep Spears' involvement from the jury during the first part of the trial, but that this decision was made without the benefit of a full investigation.

The Missouri Supreme Court rejected the claim that trial counsel was ineffective for not investigating Spears and found that the decision not to pursue that line of defense was reasonable trial strategy. Specifically, trial counsel testified that Spears' confession that he and Petitioner acted together suggested more deliberation than Petitioner's own confession and that counsel did

not want the jury to hear Spears' statement. *Collings*, 543 S.W.3d at 15-16. Further, the jury heard other evidence that Spears confessed to the murder.

Here, the Missouri Supreme Court's decision is entitled to deference under § 2254(d) and Petitioner has not established a decision that was contrary to or involved an unreasonable application of clearly established law as determined by the Supreme Court of the United States. Ground Six is denied.

Ground Seven: Trial counsel was ineffective for failing to conduct a thorough investigation of Collings's statements to law enforcement and whether they were substantiated by physical evidence.

Petitioner argues trial counsel failed to investigate and did not attack his confession based on the lack of physical evidence that resulted in a defense theory without the benefit of a thorough investigation and that "was ultimately contradicted by the physical evidence available to the defense team." Petitioner argues Spears was not implicated as a participant in the murder. Petitioner argues that although the claim is procedurally defaulted the application of *Martinez* should allow him to overcome the procedural deficiencies. Petitioner states he need only "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14. Petitioner contends this is a low burden that he has met.

Here, Petitioner cannot meet the *Martinez* requirements. The Missouri Supreme Court found that the trial counsel made a reasonable strategic decision and that arguing Petitioner committed the murder only in a sudden panic after the victim recognized him, as opposed to more deliberate actions, was consistent with his confession. Petitioner cannot show a reasonable probability that the outcome would have been different when there is a risk to bringing in evidence of an accomplice or acting jointly in a deliberated murder.

Further, Petitioner alleged in another claim that trial counsel was ineffective for not investigating the idea that the victim's stepfather was the real killer and trying to blame the murder on him. The post-conviction review court rejected this claim after an evidentiary hearing, finding that the decision not to pursue this line of defense was reasonable trial strategy. The Missouri Supreme Court agreed. *Collings*, 543 S.W.3d at 15–16 (trial counsel testified at the evidentiary hearing that Spears' confession, that he and Collings acted together in carrying out the murder, suggested more deliberation than Collings' own confession and that he never wanted that jury to hear Spears' statements at all for any reason). Again, here there is no reasonable probability that the outcome of the proceeding would have been different had counsel pursued a defense strategy of attacking Collings' confession as not independently supported by other evidence. Ground Seven is denied.

Ground Eight: Petitioner's post-conviction counsel suffered a conflict of interest that violated his constitutional rights.

Petitioner alleges that the public defender's office had a conflict of interest because the office employed the victim's stepfather in a clerical capacity during Petitioner's post-conviction review litigation. Respondent argues that the claim is procedurally barred because it was not raised in the appeal and that even if the claim was cognizable, it is without merit. Petitioner contends that there is both cause and prejudice for any procedural default arising from post-conviction counsel's failure to raise this claim earlier and that the reason the post-conviction counsel failed to do so was because of the conflict of interest.²

² Petitioner requests that if he must first present this claim to state court before this Court will address it then the proceedings should be stayed and held in abeyance so he can complete necessary state court proceedings. The Court has denied this request.

The government cites to *Gee v. Groose*, 110 F.3d 1346, 135-52 (8th Cir. 1997) stating that this claim is not cognizable because alleged ineffective assistance of post-conviction counsel, and alleged improprieties in the state post-conviction review does not raise claims that can be made under § 2254. Petitioner argues that *Gee* is inconsistent with Supreme Court law establishing that improprieties in post-conviction proceedings are cognizable to the extent they affect petitioner’s constitutional rights.

Here, the Court agrees there is no real adverse impact identified. Petitioner cannot establish a *Strickland* prejudice. Petitioner argues an adverse effect results from a conflict of interest if counsel fails to pursue a “plausible” defense or strategy that “was inherently in conflict with or not undertaken due to the attorney’s other loyalties.” As set forth herein, Petitioner has failed to show any such failure with regard to a defense or strategy. Ground Eight is denied.

Ground Nine: Missouri’s rules and jury instructions on voluntary intoxication evidence to negate the *mens rea* element of first-degree murder are unconstitutional.

Petitioner argues that Missouri’s bar on using evidence of voluntary intoxication to negate the required mental state for a crime is unconstitutional. Petitioner did not raise this claim on direct appeal and Respondent argues it is procedurally barred. Petitioner argued on appeal of the denial of post-conviction relief that the rule is unconstitutional and that his trial counsel was ineffective for not making the argument. The Missouri Supreme Court found the rule is constitutional and that counsel was not ineffective for declining to argue the issue. *Collings v. State*, 543 S.W.3d at 8–12, citing *Montana v. Egelhoff*, 518 U.S. 37 (1996).

In *Gary v. Dormire*, the Eighth Circuit stated “Missouri treats voluntarily intoxicated individuals and sober individuals equally culpable for criminal activity. It accomplishes this by giving evidence of voluntary intoxication no relevance insofar as the mental elements of the crime are concerned. Because evidence of voluntary intoxication has no exculpatory relevance under

Missouri law, a criminal defendant has no corresponding constitutional right to have the jury consider this evidence.” *Gary v. Dormire*, 256 F.3d 753, 759 (8th Cir. 2001).

Here, the Missouri Supreme Court’s decision is again entitled to deference under 28 U.S.C. § 2254(d). The Court denies Ground Nine.

Ground Ten: Trial counsel was ineffective in failing to adequately investigate and present expert evidence to support a constitutional challenge to Missouri’s bar against the use of voluntary intoxication evidence to negate the *mens rea* element of first-degree murder.

Petitioner alleges that trial counsel was ineffective for not presenting expert evidence in support of the claim that Missouri’s bar on using evidence of voluntary intoxication to negate the required mental state for a crime is unconstitutional. Again, on appeal of the post-conviction relief denial, Petitioner raised a claim that the rule was unconstitutional and that his trial counsel was ineffective for not presenting this argument and evidence to support it.

The Missouri Supreme Court found the rule is constitutional and counsel was not ineffective for failing to raise this argument. *Collings v. State*, 543 S.W.3d at 8–12. The Missouri Supreme Court found that in *Montana v. Egelhoff*, 518 U.S. 37 (1996) the United States Supreme Court approved a statute finding voluntary intoxication does not negate the mental state for an offense. Here, trial counsel cannot have been ineffective for failing to make a meritless objection. See *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Wright v. Nix*, 928 F.2d 270, 272–73 (8th Cir. 1991) (rejecting claim that counsel could be ineffective by not objecting to actions that were legally correct under the law as it existed at the time of trial).

Petitioner has failed to establish that the Missouri Supreme Court decision is an unreasonable application of United States Supreme Court precedent. The Court finds the decision is entitled to deference under 28 U.S.C. § 2254(d). Ground Ten is denied.

Ground Eleven: Trial counsel was ineffective in failing to adequately investigate and present a diminished capacity defense.

Petitioner alleges that trial counsel was ineffective for not investigating and presenting a diminished capacity defense. Specifically, that he was incapable of forming the mental state required for conviction, based on a mental disease or defect. Respondent argues that Petitioner did not raise this claim to the Missouri courts and therefore it is procedurally barred. Petitioner states that although the claim is procedurally defaulted, he has shown cause and prejudice to enable review by this Court. In addition, Respondent contends that the claim is without legal merit.

This claim is similar to a claim that Petitioner did raise on appeal. Petitioner alleged that counsel was ineffective for not presenting an addiction expert and a mental health expert at the penalty phase to present evidence on the impact substance abuse and childhood trauma had on his ability to conform his conduct to the law. The Missouri Supreme Court found that trial counsel conducted a thorough investigation. Counsel hired eight experts relating to Petitioner's mental diseases and development and made a strategic decision to call a single expert during the penalty phase. *State v. Collings*, 543 S.W.3d at 12–13. The Missouri Supreme Court held it was a reasonable strategic decision not to present a diminished capacity defense.

Here, counsel made a reasonable strategic decision to proceed the way that he did, after consulting eight mental health and development experts. Further, Petitioner's claim is procedurally barred and Petitioner has not shown under *Martinez* that the underlying ineffective assistance of trial counsel claim is substantial. Ground Eleven is denied.

Ground Twelve: Trial counsel was ineffective in failing to adequately investigate and present testimony of search and rescue dog handler.

Petitioner alleges trial counsel was ineffective for not calling a cadaver dog handler to testify at the guilt phase of trial.³ Petitioner contends the handler would have testified that no cadaver dog alerted on his truck but two alerted on the victim's stepfather's vehicle. Petitioner raised this claim on appeal and the Missouri Supreme Court found the claim was without legal merit. *Collings v. State*, 543 S.W. 3d at 17–18. The Missouri Supreme Court stated that guilt phase counsel testified that he made a strategic decision during the guilt phase of trial to mention Spears name as few times as possible and counsel for the penalty phase wanted the dog handler to cast doubt on Petitioner's sole involvement. *Id.* The Court found the strategic decision was reasonable given Petitioner's detailed confession to law enforcement. Further, the Court held there was no reasonable probability the evidence would have changed the outcome of the guilt phase. The Court reasoned that if the jury had any doubt Petitioner was solely responsible for the murder, after hearing the dog handler's testimony, they would have voted to sentence him to life rather than death. However, the jury voted to impose the death penalty after hearing the dog handler's testimony. As a result, there is not a reasonable probability the evidence would have resulted in a different verdict. *Id.* at 18.

Petitioner argues that the Missouri Supreme Court's decision is not entitled to deference because its rests on unreasonable determinations of fact. This Court disagrees. The Missouri Supreme Court's decision is entitled to deference under 28 U.S.C. § 2254(d). Ground Twelve is denied.

³ The dog handler did testify during the penalty phase that two dogs trained to alert at the scent of human remains separately alerted on Spears's mother's Suburban, but not on Petitioner's truck. *Collings v. State*, 543 S.W.3d at 17.

Ground Thirteen: Trial counsel was ineffective in failing to request a second-degree felony murder instruction.

Petitioner alleges that trial counsel was ineffective for requesting a felony second-degree murder instruction, as opposed to a standard second-degree murder instruction, or not requesting a felony second-degree murder instruction in addition to the standard second-degree murder instruction. Petitioner did not present this claim to the Missouri courts. Respondent states it is therefore procedurally barred. Petitioner contends he has shown cause and prejudice to allow this Court to review the claim despite the procedural deficiencies.

The claim is also without merit. Collings' confession admits that he knowingly killed the victim, the mental state for conventional second-degree murder, and the jury found deliberation, the higher mental state required for a first-degree murder conviction. Respondent argues a jury would not have reached a felony murder instruction because it did not even reach the lesser offense of conventional second-degree murder. As a result, Respondent argues there is no ineffectiveness of counsel when there is no reasonable probability that the outcome of the proceeding was changed. Citing *State v. Kinder*, 942 S.W.2d 313, 330 (Mo. 1997) (a jury must acquit of first-degree murder before it can convict of the lesser offense of conventional second-degree murder, and when it convicts of first-degree murder there than can be no prejudice from not submitting a felony murder instruction in addition to a conventional second-degree murder instruction); *Winfield v. Roper*, 2005 WL6112420 (E.D. Mo. 2005) at *12 (same); *Hall v. Luebbbers*, 296 F.3d 685, 699 (8th Cir. 2002) (citing cases for the proposition that when the jury convicts of first-degree murder, and does not reach conventional second-degree murder, there can be no prejudice from not giving additional lesser included instructions beyond conventional second-degree murder). This Court agrees with the arguments presented by Respondent that counsel cannot have been ineffective under *Strickland* for not requesting a second-degree felony murder instruction here. This claim is denied.

Ground Fourteen: Trial counsel was ineffective in failing to investigate and present at sentencing mitigating evidence of Petitioner’s mental health and intoxication.

Petitioner alleges that his counsel was ineffective for not presenting additional mental health evidence and intoxication evidence at the penalty phase. The Missouri Supreme Court found that trial counsel conducted a thorough investigation. Trial counsel hired eight different expert witnesses from the fields of psychiatry, psychology, neuropsychology, and neuroradiology, and experts on sex offenses and human development.⁴ *State v. Collings*, 543 S.W.3d at 13. After consulting with the experts, counsel made a strategic decision to call a single expert during the penalty phase to testify concerning Petitioner’s emotional development and history of sexual abuse. *Id.* The Missouri Supreme Court discussed that Petitioner’s counsel also made a strategic decision not to focus on evidence of his drug and alcohol use as they believe such evidence and argument would antagonize the jury. *Id.* The Court stated: “[t]rial counsel’s selection of which expert witnesses to call at trial is generally a question of trial strategy and is virtually unchallengeable.” *Id.* (internal citation omitted).

This Court finds the Missouri Supreme Court’s decision is a reasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984) and is entitled to deference under 28 U.S.C. § 2254(d). Ground Fourteen is denied.

⁴ “A neuropsychologist gave Collings’s trial counsel recommendations about the direction they should pursue. His trial counsel asked for a consultation with another psychologist, who had experience with fetal alcohol syndrome. Defense counsel also hired a forensic psychiatrist and an expert on sex offenses. Consultation with the sex offenses expert led trial counsel to hire a neuroradiologist to conduct scans of Collings’s brain to look for evidence of possible brain damage caused by his drug and alcohol use. The scans, however, did not reveal any brain damage. Trial counsel also consulted a specialist on gigantism as both Collings and his father had acromegaly, a disorder that develops from the pituitary gland producing excess growth hormone. The defense also hired a mental health expert to assess Collings while he was incarcerated after a change in his behavior made them concerned for his well-being.” *Collings v. State*, 543 S.W.3d at 13.

Ground Fifteen: Trial counsel failed to investigate, develop, and present compelling penalty phase evidence.

Petitioner alleges that that trial defense counsel ineffectively failed to investigate and present mitigating evidence. Petitioner argues the only way counsel could move the jury to understand how he could take the actions he took, or to show mercy on him for those actions, was to explain the “unrelenting horrors he endured” during his life. Petitioner argues counsel failed to do so. Petitioner argues the evidence that was presented allowed the prosecution to “capitalize” on the alleged deficient performance turning mitigation evidence into aggravation.

Respondent again argues the Missouri Supreme Court found that trial counsel conducted a thorough investigation before making a strategic decision to call only a single expert during the penalty phase. *State v. Collings*, 543 S.W.3d at 12–13. As a result, to the extent this claim overlaps with the claim presented to the Missouri Supreme Court, the Court gives deference to the reasonable decision of the Missouri Supreme Court.

However, to the extent this claim goes beyond the claim raised to the state court it is procedurally barred. Here, Petitioner argues his present claim is that trial counsel was ineffective for failing to conduct a constitutionally requisite investigation and that the defaulted claim is reviewed under *Martinez*. Here, the record reflects trial counsel made a reasonable investigation, and then made a strategic decision regarding what evidence to present. Further, Petitioner cannot establish any prejudice that resulted. The Court agrees with Respondent that Petitioner is attempting to use hindsight to attack strategic decisions which are not an appropriate basis for a habeas claim. See *Strickland*, 466 U.S. at 689-92 (criticizing use of hindsight to attack strategic decisions by trial counsel and noting the requirement for prejudice).

Further, because of default, Petitioner would have to show enhanced prejudice under *Charron*, which is greater than the normal *Strickland* prejudice. *Charron v. Gammon*, 69 F.3d at

858 (“the procedural bar prejudice is higher than that required to establish ineffective assistance of counsel under *Strickland*). Petitioner has failed to meet this burden and Ground Fifteen is denied.

Ground Sixteen: Trial counsel was ineffective in failing to call lay mitigation witnesses Julie Pickett and Bobby Thomas.

Petitioner argues trial counsel was ineffective for not calling his stepmother and stepbrother during the penalty phase. The Missouri Supreme Court found that counsel had originally planned to call Julie Pickett, the stepmother, but made a reasonable decision not to call her after concluding it would be duplicative testimony of several other family members and Dr. Draper. Further, trial counsel made the decision after the stepmother and other Collings’ family members engaged in a verbal exchange with members of the jury in a hallway. *Collings v. State*, 543 S.W.3d at 20. The Missouri Supreme Court found counsel’s decision was a reasonable strategy. This Court finds the state court’s decision is again entitled to deference as it was a reasonable application of *Strickland*.

Bobby Thomas, the stepbrother’s, alleged testimony was that Petitioner found the stepbrother who had tried to hang himself and elevated his body until someone came to cut the rope. The Missouri Supreme Court found that Dr. Draper’s testimony discussed Petitioner saving a man from hanging, without identifying the man, and that there was no reasonable probability that additional testimony regarding that specific incident would have changed the outcome of the penalty phase. *Collings v. State*, 543 S.W.3d at 20-21.⁵

The Missouri Supreme Court’s decision is reasonable and entitled to deference under 28 U.S.C. § 2254(d) and this claim is denied.

⁵ The Missouri Supreme Court also noted counsel testified he was unaware of the identity of who was involved in this incident and that Petitioner did not tell counsel it was his stepbrother.

Ground Seventeen: Trial counsel was ineffective in failing to investigate and present at sentencing mitigating evidence of Petitioner’s mental impairments.

Petitioner argues that counsel failed to present mental health evidence at the penalty phase. Respondent argues that this claim is similar to Petitioner’s claim that counsel was ineffective for not presenting an addiction expert and mental health expert regarding Petitioner’s substance abuse and childhood trauma. The Missouri Supreme Court held that trial counsel hired a total of eight experts, conducted a thorough investigation and made a strategic decision to only call one expert. This decision is entitled to deference under 28 U.S.C. § 2254(d).

Respondent further contends that to the extent that this claim goes beyond Petitioner’s prior challenge the claim it is procedurally barred. Respondent further contends that any new claim is also without merit because defense counsel conducted a reasonable investigation and then made a strategic decision about what to present, or not present, and Petitioner cannot establish prejudice as a result of counsel’s decision.

Petitioner states that although this claim is procedurally defaulted, he has shown cause and prejudice enabling this Court’s review of the claim. This Court finds Petitioner has failed to show a basis for review and Ground Seventeen is denied.

Ground Eighteen: Trial counsel was ineffective in failing to admit into evidence social, medical, and educational history records.

Petitioner argues trial counsel was ineffective for failing to admit records of Collings social, medical, and educational history. Petitioner made this argument to the Missouri Supreme Court, which found the argument to be without merit, that direct appeal counsel was ineffective for not challenging the trial court’s exclusion of the records. *Collings v. State*, 543 S.W.3d at 14–15. The Missouri Supreme Court found that the argument on appeal was different than the argument at trial and was not properly preserved. The Court further stated that under plain error review the Court had discretion to review unpreserved claims. *Id.* at 14. The Missouri Supreme

further found that the records were excluded based on hearsay and relevance objections, but that Dr. Draper was allowed to testify to information in the records. *Id.* at 14. The Missouri Supreme Court found that direct appeal counsel considered challenging the exclusion of the records but decided not to in light of page limitations, and the brief already containing ten claims, although in hindsight she would make a different decision. *Id.* at 15. The Missouri Supreme Court found that in the post-conviction appeal Collings argued that the records were independently admissible as business records and court records, but that counsel had argued at trial that the records should be admitted as support for Dr. Draper's testimony. *Id.*

The Missouri Supreme Court found that it not would have been an abuse of discretion under either theory for the trial court to exclude the records as duplicative. *Id.* The Missouri Supreme Court found the records would have offered duplicative, corroborating evidence for the mitigation expert testimony offered. *Id.* The Court found it was not an abuse of discretion to limit cumulative evidence. *Id.* 14-15 (“Because the jury was presented with the relevant information through Dr. Draper's testimony, it was not evident, obvious, and clear error for the trial court to have excluded the related documents that would have provided duplicative evidence.”).

Here, Petitioner argues trial counsel, as opposed to direct appeal counsel, was ineffective. This claim is procedurally barred. However, regardless of the whether the claim is barred it is also without merit. The Court finds Petitioner has failed to establish a basis for this claim and it is denied.

Ground Nineteen: Appellate counsel was ineffective in failing to challenge the aggravating circumstance instruction on whether the murder involved torture and as a result was outrageously and wantonly vile, horrible, and inhuman.

Petitioner alleges that direct appeal counsel was ineffective for not challenging the constitutionality of the aggravating circumstance instruction concerning whether the murder involved torture, and whether as a result thereof the murder was outrageously and wantonly vile,

horrible, and inhuman. Respondent argues Petitioner raised the claim in the Missouri Supreme Court, and the Missouri Supreme Court found that the claim is without merit. *Collings v. State*, 543 S.W.3d at 21–22.

The Missouri Supreme Court found that counsel testified she considered raising the claim in a separate point in her opening brief but decided to instead include the argument in the reply brief in support of the point attacking the proportionality of punishment. *Id.* The Missouri Supreme Court found that counsel made a reasonable strategic decision. *Id.* at 22. The Court noted that counsel had the ability to strategically winnow out weaker arguments, that no case law supported the argument that an impropriety occurred, and in fact the case law supported the opposite proposition. The Missouri Supreme Court found that no case law supported the argument that the instruction was unconstitutional, and counsel had no duty to make such a novel claim on appeal. *Id.*, see also *Deck v. Jennings*, 978 F.3d 578, 582–83 (8th Cir. 2020) (postconviction counsel raised a number of other claims, including that trial counsel should have presented more mitigating evidence at the third trial. Although none of these claims proved successful, there was a well-established legal basis for them, and counsel could have reasonably concluded that an ineffective-assistance claim focused exclusively on the delay would have only detracted from other, stronger arguments. In sum, postconviction counsel's performance was reasonable and the Martinez exception—the only conceivable basis for excusing Deck's procedural default—is unavailable to him.).

This Court finds the Missouri Supreme Court's decision is reasonable and entitled to deference under 28 U.S.C. § 2254(d) and Petitioner has failed to provide a basis for habeas relief. Ground Nineteen is denied.

Ground Twenty: Missouri jury instructions on imposing the death penalty improperly lessened the State's burden of proof for the imposition of a death sentence.

Petitioner alleges that the Missouri instructions on imposing the death penalty are unconstitutional. The Missouri Supreme Court rejected Petitioner's claims based on earlier precedent rejecting the same claims in earlier cases. The Missouri Supreme Court found that the instructions were proper under *Kansas v. Marsh*, 548 U.S. 163, 170–71 (2006). *Collings*, 450 S.W.3d at 766. Petitioner also argued that because he was sentenced to death the information should have charged him with “aggravated” first-degree murder, as opposed to first-degree murder, the crime that exists under Missouri law, and that the information should have listed all aggravating circumstances, at the time of charging. The Missouri Supreme Court rejected this claim citing four decisions that had already rejected the same claim. *Id.*

Here, this Court finds the Missouri Supreme Court decisions are reasonable and entitled to deference under 28 U.S.C. § 2254(d). Ground Twenty is denied.

Ground Twenty One: The State prosecutor's closing argument in which the prosecutor acted out the strangling of the victim violated Petitioner's constitutional rights.

Petitioner argues that the trial court erred by overruling objections to the State's guilt-phase closing argument and further erred in not declaring a mistrial. The Missouri Supreme Court found the challenged closing argument was not improper and instead constituted proper rebuttal to the defense's argument that *Collings* did not deliberate. *Collings*, 450 S.W.3d at 763–64. The Missouri Supreme Court noted that when counsel was demonstrating the strangulation he was rebutting the argument that “*Collings* did not reflect coolly upon Rowan's murder.” The trial court stated “we probably need to stop” but that the prosecutor was demonstrating what was shown in the evidence.⁶

⁶ The Missouri Supreme Court found that *Rhodes* was distinguishable because the prosecutor did not make any statements about the jurors placing themselves in Rowan's shoes or to imagine what she went through when she was raped and murdered. Instead, the Missouri Supreme Court found

Respondent argues what Petitioner is “really alleging” here is a claim of “personalization” under Missouri law, and not a constitutional claim. Respondent argues however to the extent Petitioner presents a due process claim the Missouri Supreme Court acted reasonably in rejecting it. Citing *Darden v. Wainright*, 477 U.S. 168, 181–82 (1986) (discussing difficult standard that must be met to show a due process violation by argument and noting that if the argument did not misstate the evidence, did not disparage a particular right of the defendant, or was responsive to defense argument, those factors cut against finding a due process violation). Here, the Court denies Ground Twenty One.

Ground Twenty Two: The trial court erred in overruling Petitioner’s objection and request for a mistrial based on Collings’ father’s penalty phase testimony.

Petitioner presented this claim in his appeal and the Missouri Supreme Court found it to be without merit. *Collings*, 450 S.W.3d at 765-66. Petitioner argues that the Missouri Supreme Court’s determination rests on an unreasonable determination of the facts and is contrary to or an unreasonable application of clearly establish Supreme Court law.

Petitioner’s father testified during the penalty phase and on direct examination that he knew a man can change. However, on cross-examination Petitioner’s father was asked whether he had wanted the death penalty for the man who had murdered his own brother. Petitioner’s father testified, “I wanted to be the one to kill him.” *Id.* The trial court held a bench conference and defense counsel argued the prosecutor’s question was improper. Defense counsel requested a mistrial. The trial court overruled the objection and the request for mistrial.

that the prosecutor held his hands in the same fashion several witnesses described as what Collings depicted during the murder. Further, the Court stated that the prosecutor was entitled to rebut Collings’ argument that he did not reflect coolly upon Rowan’s murder with a demonstration of how long it took to strangle Rowan. *State v. Collings*, 450 S.W.3d at 763-64.

The Missouri Supreme Court’s opinion states that the “[a]dmission of a victim's family members’ characterizations and opinions about the appropriate sentence are inadmissible. This bar applies equally to family members of the defendant.” *Id.* at 765, citing *State v. Taylor*, 944 S.W.2d 925, 938 (Mo. banc 1997) and *State v. Roll*, 942 S.W.2d 370, 378 (Mo. banc 1997). However, the Missouri Supreme Court found that the “isolated question posed by the prosecutor” did not seek an opinion from the father on what would be an appropriate sentence for Petitioner, that the statement was “isolated, that it was not emphasized or repeated, and that it was not mentioned during either party’s closing argument.” *Id.* The Missouri Supreme Court found that even if this comment was erroneously admitted, which it did not find, Petitioner failed to demonstrate there was a reasonable probability the outcome of the penalty phase was changed by the testimony. *Id.*

This Court finds the decision is reasonable and entitled to deference under 28 U.S.C. § 2254(d). Here, again, Petitioner has not shown an unreasonable determination of the facts or that the ruling is contrary to or an unreasonable application of Supreme Court law. Ground Twenty Two is denied.

Ground Twenty Three: The state’s improper statement directing the jurors not to consider mitigating evidence.

Petitioner alleges during the penalty phase of trial the prosecutor improperly informed the jurors they could not consider evidence that Spears, the victim’s stepfather, was the killer. This argument was raised during Petitioner’s appeal. Petitioner argued the trial court plainly erred in failing, *sua sponte*, to bar the prosecutor from his statements regarding Petitioner’s evidence of Spears’ possible involvement in the murder.

During the penalty phase, the prosecutor stated:

Now, when it comes to ... Spears, folks, he's not on trial here today. He never has been during any part of this trial.... It's just something to distract you with. Distract and confuse. Distract and confuse. Try to get some some little thing burrowed down

deep, something to distract and confuse you. Don't let it happen.... Spears is not on trial and has nothing to do with this [Collings'] punishment.

Id. at 764. The Missouri Supreme Court found that “the prosecutor’s comments did not instruct the jury it could not consider the evidence of Spears’ potential involvement in Rowan’s murder but rather, attacked the relevance and credibility of the defense’s theory, which is permissible.” *Id.* (“Comments directed at the tactics of defense counsel are permissible.”) (internal citation omitted). The Missouri Supreme Court held that the trial court “did not plainly err in failing, *sua sponte*, to intercede to prevent the prosecutor's argument regarding Collings' evidence concerning Spears' potential involvement in Rowan's murder. These comments did not disparage defense counsel, and they did not prevent the jury from considering mitigating circumstance evidence in Collings’ favor.” *Id.* at 764–65.

Here, the Supreme Court found no plain error so Petitioner’s claim is procedurally barred. Further, Petitioner also fails to meet the standard pursuant to § 2254(d). *See James v. Bowersox*, 187 F.3d 866, 869 (8thCir. 1999) (“habeas relief should only be granted if the prosecutor’s closing argument was so inflammatory and so outrageous that any reasonable judge would have *sua sponte* granted a mistrial.”) Ground Twenty Three is denied.

Ground Twenty Four: Trial counsel was ineffective in failing to object to the State’s improper statement directing jurors not to consider proper mitigating evidence.

Petitioner alleges trial counsel was ineffective for not objecting to penalty phase closing argument that Petitioner characterizes as directing the jury it could not consider proper mitigating evidence. Petitioner’s claim is procedurally barred because he did not raise his current factual and legal theory of the claim in state court.

The Missouri Supreme Court rejected a claim attacking the trial court for permitting the same argument. *Collings*, 450 S.W.3d at 764–65. The Missouri Supreme Court found the prosecutor did not instruct the jurors they could not consider evidence but instead attacked the

relevance and credibility of the defense theory. *Id.* Counsel cannot have been ineffective for declining to make a meritless objection. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Ground Twenty Four is denied.

Ground Twenty Five: Trial counsel was ineffective in failing to object to the prosecution's improper closing argument regarding the role of mercy in the sentencing determination and appeal to a community desire for vengeance.

Petitioner alleges defense counsel was ineffective for not objecting when the prosecutor allegedly improperly asked the jury not to consider mercy, and allegedly asked the jury to carry out the community's desire for vengeance. Respondent argues this claim is procedurally barred because Petitioner did not raise it in state court.

Respondent also argues the claim is also without legal merit. Respondent contends a review of the transcript reflects the prosecutor did not argue that the jurors could not consider mercy or that they should take vengeance on Petitioner. Instead, the prosecutor made a proper argument that the jury should do justice, as opposed to granting unwarranted mercy. Respondent states there was no proper objection for counsel to make and as a result counsel could not have been ineffective. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Petitioner argues to the extent that the Missouri Supreme Court did consider this claim on the merits, the state court's decision is not entitled to any deference because the decision rests on an unreasonable determination of fact and is contrary to or an unreasonable application of clearly existing Supreme Court law. This Court disagrees. Further, Petitioner contends to the extent that this claim is procedurally defaulted he has shown cause and prejudice enabling this Court's review of the claim. The Court finds that this claim is not substantial and that Petitioner does not meet the *Martinez* standard. Ground Twenty Five is denied.

Ground Twenty Six: Trial counsel was ineffective in failing to adequately investigate and present Joni Blake's testimony at guilt or sentencing.

Petitioner argues that defense counsel should have called a neighbor, Ms. Blake, at the guilt or penalty phase to attack details surrounding Petitioner's confession. On appeal to the Missouri Supreme Court Petitioner argued that counsel should have called Ms. Blake at the guilt phase to attack the confession as it concerned events before the murder. Petitioner argues on appeal that Ms. Blake saw Spears and Petitioner at the convenience store where they went to buy beer earlier on the night of the murder, but that her description of the car that they drove differed in details from the way Mahurin described it. The Missouri Supreme Court found that the claim was without merit. *Collings*, 543 S.W.3d at 19–20. The Missouri Supreme Court found that there was no dispute that Spears, Collings, and Mahurin were out buying alcohol at that time, and that any potential discrepancies in the exact description of the vehicle they used would not have created a reasonable probability that the outcome of the proceeding would have been changed. *Id.* This decision is reasonable and entitled to deference under 28 U.S.C. § 2254(d).

To the extent Petitioner expands his claim beyond the guilt phase claim that he presented to the Missouri Supreme Court, the claim is procedurally barred and also without legal merit. Petitioner has failed to show cause and prejudice for further review. This claim is denied.

Ground Twenty Seven: Trial counsel was ineffective in failing to adequately investigate and present Lisa Blevin's testimony at guilt or sentencing.

Petitioner alleges that counsel should have called a neighbor, Ms. Blevins, at the guilt or penalty phase to attack details surrounding Petitioner's confession. The Missouri Supreme Court held that the claim is without merit. *Collings*, 543 S.W.3d at 18–19. Petitioner alleged in state court that counsel should have called Blevins at the guilt phase. *Id.* The Missouri Supreme Court noted counsel testified that he was aware of the content of Blevins' interview with the FBI and did not view it as beneficial. *Id.*

Ms. Blevin's testimony about the night of the murder at the evidentiary hearing was that she left home about 3 p.m. and returned about 11:30 p.m.; and between 1:30 a.m. and 2:00 a.m. on November 3, she heard a car rev its engine loudly from the direction of Spears' house. *Id.* The Missouri Supreme Court found that this testimony did not provide a viable defense. *Id.* The Court also found that in her earlier statement to the FBI Blevins stated she could hear vehicles but could not identify their location. *Id.* The Missouri Supreme Court found the claim that counsel was ineffective for not calling Ms. Blevins to be without merit. *Id.*

The Missouri Supreme Court's decision is reasonable and entitled to deference under 28 U.S.C. § 2254(d). Further, to the extent Petitioner expands his claim beyond the guilt phase to the sentencing phase the claim is procedurally defaulted and Petitioner has failed to show cause and prejudice for further review. Ground Twenty Seven is denied.

Ground Twenty Eight: The trial court erred in admitting physical evidence.

Petitioner alleges the trial court erred in admitting strands of fiberglass from Collings' property, a pile of ashes from a burn barrel, a partial DNA profile, and hair comparison evidence. The Missouri Supreme Court found all this evidence was relevant and admissible. *Collings*, 450 S.W.3d at 756–59.

Respondent argues if Petitioner is alleging the admission of the evidence violates due process that any such claim is without merit. For a state court evidentiary ruling to violate due process there must have been an evidentiary impropriety, and the impropriety must have been so egregious that "absent the alleged impropriety the verdict probably would have been different." *Skillicorn v. Luebbbers*, 475 F.3d 965, 972 (8th Cir. 2007). A federal habeas court will not take issue with a state court's interpretation and application of its evidentiary rules. *Id.* at 974, citing *Schleeper v. Goose*, 36 F.3d 735, 737 (8th Cir. 1994) ("A federal court may not re-examine a state court's interpretation and application of state law."). Whether there was an evidentiary impropriety

under Missouri law is a question on which the Missouri Supreme Court is the highest authority and the Missouri Supreme Court found no evidentiary impropriety. This decision is reasonable and entitled to deference under 28 U.S.C. § 2254(d). Ground Twenty Eight is denied.

Certificate of Appealability

A movant can appeal a decision to the Eighth Circuit only if a court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability should be issued only if a movant can make a substantial showing of a denial of a constitutional right. *Id.* § 2253(c)(2). To meet this standard, a movant must show reasonable jurists could debate whether the issues should have been resolved in a different manner or the issues deserve further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). For the reasons stated throughout this Order, Petitioner fails to make the requisite showing for issuance of a certificate of appealability.

Conclusion

Petitioner fails to demonstrate that the Missouri Supreme Court made an unreasonable determination of fact or made a decision involving an unreasonable application of federal constitutional law. Further, he cannot overcome the procedural default of many of his claims and fails to demonstrate cause to establish they are entitled to the *Martinez* equitable exception as set forth herein. Petitioner also fails to show that an evidentiary hearing would assist the Court in the resolution of his claims. Accordingly, it is **ORDERED** that Petitioner's Petition for Writ of Habeas Corpus is denied without a certificate of appealability.

IT IS SO ORDERED.

Date: September 30, 2022

/s/ Douglas Harpool
Douglas Harpool
UNITED STATES DISTRICT COURT

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

CHRISTOPHER COLLINGS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 18-CV-08000-MDH
)	
CINDY GRIFFITH,)	
)	
Respondent.)	

ORDER

Before the Court is Petitioner Christopher Collings’s Motion for Stay and Abeyance of Habeas Corpus Proceedings Pending Exhaustion of State Remedies. (Doc. 44). Petitioner’s motion seeks a stay to allow Petitioner to attempt and exhaust his procedurally defaulted claims. Petitioner argues, “[a]lthough the Supreme Court’s recent decision in *Shinn v. Ramirez* limits this Court’s ability to grant an evidentiary hearing under 28 U.S.C. § 2254(e)(2), *Ramirez* recognizes a petitioner may still rely on *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013) to overcome procedural defaults resulting from the ineffective assistance of post-conviction counsel.” Petitioner requests that the Court stay and hold in abeyance his federal habeas proceedings pursuant to the procedure approved in *Rhines v. Weber*, 544 U.S. 269 (2005), so that he can comply with *Ramirez* and exhaust his procedurally defaulted claims in state court.¹

¹ Petitioner states “[c]laims 3, 5, 7, 11, 13, 15, 17, 18, and 24-27 of Mr. Collings’s habeas petition and amended traverse set forth meritorious ineffective-assistance-of-trial counsel claims that have not been raised in state post-conviction proceedings. Mr. Collings requests that this Court (1) apply *Martinez* and *Trevino* to determine whether Mr. Collings can overcome any procedural defaults due to the ineffective assistance of post-conviction counsel and if so, (2) determine whether he is entitled to habeas relief. To the extent that *Ramirez* requires any evidence this Court considers to be a part of the state court record, Mr. Collings requests that his habeas case be stayed so that he can exhaust these procedurally defaulted claims in state court and present evidence there first.”

The government has responded arguing this Court cannot consider evidence outside of the state court record and that Petitioner cannot meet the requirements to have this Court review his procedurally defaulted claims. On August 8, 2022, the Court conducted a telephone conference and heard oral argument on the pending motion for stay and abeyance. Petitioner argued that the reasons for the late filing of the pending motion for stay is the recent decision in *Shinn*. For the reasons set forth herein, Petitioner’s Motion is **DENIED**.

In *Shinn v. Ramirez*, the United States Supreme Court stated, “[t]he question presented is whether the equitable rule announced in *Martinez* permits a federal court to dispense with § 2254(e)(2)’s narrow limits because a prisoner’s state postconviction counsel negligently failed to develop the state-court record. We conclude that it does not.” *Shinn v. Ramirez*, 142 S. Ct. 1718, 1728, 212 L. Ed. 2d 713 (2022). The writ of habeas corpus is an “extraordinary remedy” that guards only against “extreme malfunctions in the state criminal justice systems.” *Id.* (internal citations omitted). “...Under § 2254(e)(2), a prisoner is “at fault” even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)’s stringent requirements.” *Id.*

In affirming the denial a habeas petitioner’s requests for discovery and “embedded request for a hearing” to prove that cause and prejudice exist to excuse the procedural default of an ineffective assistance of trial counsel claim, the Eighth Circuit addressed *Shinn*. The Eighth Circuit stated “that, under [28 U.S.C.] § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.” *Marcyniuk v. Payne*, 39 F.4th 988, 998–99 (8th Cir. 2022); citing *Shinn v. Ramirez*, 212 L. Ed. 2d 713, 142 S. Ct. 1718, 1734 (2022). Instead,

“a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)’s stringent requirements.” *Id.* The Eighth Circuit stated that “*Shinn* explicitly rejects the idea that “because § 2254(e)(2) bars only ‘an evidentiary hearing on the claim,’ a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice,” finding that because “holding a *Martinez* hearing when the prisoner cannot ‘satisfy [the Antiterrorism and Effective Death Penalty Act’s] demanding standards’ in § 2254(e)(2) would ‘prolong federal habeas proceedings with no purpose[,] ... a *Martinez* hearing is improper if the newly developed evidence never would ‘entitle [the prisoner] to federal habeas relief.’” *Id.*

Missouri, like the federal courts, permits review of defaulted claims through gateway actual innocence. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000). Missouri also uses cause and prejudice analysis to permit review of defaulted claims. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215–216 (Mo. 2001). Further, in Missouri allegations of ineffective assistance of post-conviction counsel are “categorically unreviewable” and cannot provide a basis for subsequent post-conviction review. *Barton v. State*, 486 S.W. 3d 332, 337–339 (Mo. 2016) (declining to adopt a rule similar to *Martinez v. Ryan* and denying successive post-conviction review to a capital defendant). There is no procedure in Missouri courts to allege or present evidence about ineffective assistance of post-conviction counsel, so there is no basis to stay for state review in this matter. *Id.* In *Barton*, the Missouri Supreme Court explicitly held that “litigants who received ineffective assistance of post-conviction counsel may not receive relief in Missouri state courts” and that the petitioner “was not required to seek further relief in the Missouri courts as a necessary step to pave the way for a federal habeas petition.” *Id.* at 338–339.

Here, Petitioner has provided no basis for this Court to stay the case or hold in abeyance the case for state court exhaustion. This Court must review Petitioner’s habeas case on the record

before it and while not ruling on the underlying issues raised in Petitioner's habeas petition, the Court finds no basis to grant a stay, remand the case to state court, or expand the record on Petitioner's claims that are procedurally barred.

In the alternative, Petitioner requests this Court evaluate "cause and prejudice" and the merits of Claims 3, 7, 13, 15, 18, and 24-27 using the existing state court record and full consideration of Claims 11 and 17. Petitioner argues failure to evaluate the claims "will result in a fundamental miscarriage of justice." Citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner further requests full consideration of Claim 5 because Respondent relied on its own evidence outside of the state-court record to rebut Petitioner's claims for relief or in the alternative, consideration of Claims 5, 11, and 17 using the existing state court record.

Here, Petitioner seeks a stay for state court review of claims of ineffective assistance of trial counsel for which he alleges that ineffective assistance of post-conviction counsel provides cause to excuse the default. However, in Missouri allegations of ineffective assistance of post-conviction counsel are "categorically unreviewable" and cannot provide a basis for subsequent post-conviction review. See *Barton v. State*, 486 S.W. 3d 332 (Mo. 2016). As a result, the Court finds no basis to enter a stay or to hold in abeyance the habeas proceedings.

Wherefore, for the reasons set forth herein, the Court **DENIES** Petitioner's Motion for Stay and Abeyance. The Court shall issue a subsequent Order on the merits of Petitioner's habeas petition and will determine what, if any, review the claims that are procedurally barred are entitled to in the Court's subsequent Order.

IT IS SO ORDERED.

Date: September 30, 2022

/s/ Douglas Harpool
Douglas Harpool
UNITED STATES DISTRICT COURT

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

CHRISTOPHER COLLINGS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 18-CV-08000-MDH
)	
CINDY GRIFFITH,)	
)	
Respondent.)	

ORDER

Before the Court is Petitioner Christopher Collings’s Rule 59(e) motion and suggestions in support. (Doc. 61). Petitioner requests that the Court alter or amend its judgment and grant a Certificate of Appealability (“COA”) on his claims. The government has filed an opposition stating Petitioner has not raised any manifest errors of law or fact or new evidence and the motion should be denied. The government also opposes Petitioner’s motion that the Court grant a COA.

After a review of the record before the Court, the Court finds Petitioner has failed to provide a basis to alter or amend the Court’s ruling. For the reasons set forth in the government’s suggestions in opposition the Petitioner’s Motion is **DENIED**.

IT IS SO ORDERED.

Date: December 13, 2022

/s/ Douglas Harpool _____
Douglas Harpool
UNITED STATES DISTRICT COURT

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

CHRISTOPHER COLLINGS)	
)	
<i>Petitioner,</i>)	
)	
v.)	Case No. 4:18-cv-08000
)	
CINDY GRIFFITH,)	
)	
<i>Respondent.</i>)	

NOTICE OF APPEAL

Notice is hereby given that Christopher Collings, petitioner above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on September 30, 2022 (Doc. 58), this Court's Order denying Petitioner's Motion for Stay (Doc. 59), and this Court's Order denying Mr. Collings' motion under Rule 59(e), entered on December 13, 2022 (Doc. 67).

Respectfully Submitted,

/s/ Jeremy S. Weis
JEREMY S. WEIS, Mo. Bar No. 51514
DANIEL E. KIRSCH, Mo. Bar No. 57022
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Attorneys for Petitioner Christopher Collings

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing pleading electronically with the clerk of the court to be served by operation of the court's electronic filing system upon all attorneys of record on January 11, 2023.

/s/ Jeremy S. Weis
Jeremy S. Weis
Attorneys for Petitioner Christopher Collings

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

CHRISTOPHER COLLINGS,

Petitioner,

vs.

CINDY GRIFFITH,

Respondent.

(CAPITAL CASE)

APPLICATION FOR EXTENSION OF TIME
IN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI

TO: THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE
JUSTICE FOR THE UNITED STATES SUPREME COURT AND
CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT

Pursuant to United States Supreme Court Rule 13.5, Petitioner requests a sixty (60) day extension of time in which to file his Petition for a Writ of certiorari in this Court up to and including February 5, 2024 (sixty (60) days from the current deadline of December 7, 2023). In support of this Application, Mr. Collings states:

1. Petitioner, Christopher Collings, is a Missouri death-sentenced prisoner housed currently at the Potosi Correctional Center in Mineral Point, Missouri.

2. Pursuant to United States Supreme Court Rule 13.5, Petitioner

requests a sixty (60) day extension of time in which to file his Petition for a Writ of certiorari in this Court up to and including February 5, 2024 (sixty (60) days from the current deadline of July 30, 2023). In support of this Application, Mr. Collings states:

3. Mr. Collings seeks review in this Court of the decision of the United States Court of Appeals for the Eighth Circuit denying a certificate of appealability as to either of the eight (8) grounds for relief in his habeas corpus petition. *See* attached Exhibit.

4. The judgment of the United States Court of Appeals was entered on September 9, 2023.

5. Mr. Collings's motion for rehearing with suggestion for rehearing *en banc* was considered, and denied, by the United States Court of Appeals on September 9, 2023. *See* attached.

6. Mr. Collings's time in which to petition this Court for a Writ of Certiorari expires on December 7, 2023 (90 days calculated from September 9, 2023).

7. Pursuant to United States Supreme Court Rule 13.5, this Application is being filed more than ten days before December 7, 2023.

8. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §

1254.

9. This is a capital habeas corpus case. Mr. Collings is indigent. The undersigned counsel has been appointed by the United States Court of Appeals to represent Mr. Collings on appeal from the district court and in certiorari proceedings in this Court.

10. Pursuant to counsel's obligations to Mr. Collings`, the undersigned counsel has a duty pursuant to reasoned professional judgment to draft and present a Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

11. Counsel requests an extension in this case because of previously set scheduling deadlines in other cases that require counsel's attention, and also other work in capital cases, including:

(Mr. Weis) Motion for relief pursuant to Federal Rule of Civil Procedure 59(e) filed on October 27, 2023, in the United States District Court for the Eastern District of Missouri. *Shockley v. Crews*, Case No. 4:19-cv-02520-SRC. A response to the State's motion to set an execution date in the Missouri Supreme Court filed on November 13, 2023. *State v. Hosier*, SC93855.

12. Mr. Collings has not previously petitioned this Court for an extension of time in which to file a Petition for a Writ of Certiorari.

13. Counsel avers that this Application is made in good faith and not for purposes of delay.

Wherefore, Mr. Collings requests respectfully that an order issue establishing the due date for Petitioner's Petition for a Writ of Certiorari on **February 5, 2024**.

Dated November 22, 2023.

Respectfully Submitted,

/s/ Jeremy S. Weis

JEREMY S. WEIS, MO Bar No. 51514

DANIEL KIRSCH, MO Bar No. 57022

Capital Habeas Unit

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ATTORNEYS FOR PETITIONER

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 28, 2023

Mr. Jeremy Sean Weis
Federal Public Defender - MOW
1000 Walnut St.
Ste. 600
Kansas City, MO 64106

Re: Christopher Collings
v. David Vandergriff, Warden
Application No. 23A477

Dear Mr. Weis:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on November 28, 2023, extended the time to and including February 5, 2024.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by 

Sara Simmons
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Jeremy Sean Weis
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Kansas City, MO 64106

Clerk
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