No. 18-1132

IN THE

Supreme Court of the United States

OSCAR FRANKLIN SMITH,

Petitioner,

v.

TONY MAYS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF

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REPLY

The petition lays out a 3-to-3 circuit split on a question two Justices of this Court have already flagged as appropriate for certiorari. Remarkably, respondent does not contest that this split exists on a certworthy question—indeed, respondent does not contest almost anything in the petition. Instead, respondent tries a single argument: It says the question presented is not in fact implicated here because state post-conviction counsel *did* raise the relevant ineffective-assistance-of-trial-counsel (IATC) claim, which petitioner than defaulted in his state post-conviction appeal. As explained below, this argument boils down to the precise merits question the petition presents—namely, whether an incantation of an IATC claim, presented without any supporting evidence, is a procedural default (as petitioner and three circuits say) or instead raises the claim and leads to a disposition against it on the merits (as respondent and three other circuits say). If petitioner and the courts of appeals that side with his argument are right, there was nothing for state post-conviction appellate counsel to default, because the relevant IATC claim was never asserted in the state post-conviction proceeding. Thus, respondent's opposition is ultimately nothing more than an invitation to this Court to resolve the question presented, not just for this case, but for countless others like it causing confusion throughout the lower courts.

ARGUMENT

1. As explained in the petition, Oscar Smith's trial counsel was ineffective for failing to discover and thus failing to present critical evidence during the mitigation phase of his state capital case—evidence that could have made the difference between a life sentence and a sentence of death. *See* Pet. 25-26. Likewise, in his state habeas case, Smith's counsel failed to submit any such evidence to the court in support of his claim of IATC at the sentencing proceeding. *See* Pet. App. 114a. It is no surprise, then, that the state habeas court—the first court that could hear such a claim pursuant to Tennessee law—rejected it. *Id.* And it did so on unambiguous grounds: Although the State tries to insinuate that this IATC claim was denied because Smith himself had not wanted to put on mitigation evidence at trial (*see* BIO 2-3), the state court was "of the opinion that" the claim failed because "petitioner has *not presented mitigation evidence* which should have been presented by counsel and which would likely have changed the result." Pet. App. 114a (emphasis added). Put otherwise, the court recognized that Smith's state habeas counsel had invoked the idea of IATC at sentencing, but had entirely failed to put on the evidence necessary to substantiate that claim.

The petition identified three courts of appeals that would have treated this failure to put on any evidence in support of an IATC claim as a default of that claim for purposes of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 423 (2013). In the Ninth, Fifth, and Eighth Circuits, a wholly unsupported IATC claim is no different from one that is not presented at all, and so the default may be excused

based on a more fulsome record developed during federal habeas proceedings. Pet. 15-18. This is also the precise position Justice Breyer laid out in *Gallow v. Cooper*, 570 U.S. 933, 933 (2013) (Breyer, J., respecting the denial of the petition for writ of certiorari), where he suggested that incanting an IATC claim "without any evidence to support it might as well be no claim at all." Respondent does not contest that this is the rule in those circuits, or suggest that Smith would have been denied access to *Martinez* and *Trevino* in those circuits or under Justice Breyer's view. That suffices to show that the question raised in the petition *is* presented here, and is appropriate for this Court to resolve.

To be sure, Smith lost below, and was denied even the possibility of invoking *Martinez* and *Trevino*, on the ground that he had raised sentencing IATC in state habeas proceedings and not on appeal. But the lower courts reached that holding here only because the Sixth Circuit does not follow the approach of the three circuits and Supreme Court concurrence described above. As in the Tenth and Eleventh Circuits, the Sixth Circuit holds that by merely mentioning *some* sentencing IATC claim, a petitioner's counsel effectively raises and obtains a merits determination on *all* sentencing IATC claims, no matter how little evidence or argument counsel devoted to the winning issue. In these circuits, the federal court is then effectively *required* to rule against the petitioner in every such case—no matter how ineffective their state trial and post-conviction counsel—because *Cullen v. Pinholster*, 563 U.S. 170 (2011), closes the record, and there is (by hypothesis) no evidence in the state post-

conviction record of what competent trial counsel would have put before the court.

Accordingly, the State is just dead wrong to say that "it is undisputed that the petitioner raised this same claim during his state post-conviction proceedings." BIO 7. Instead, *that is the whole dispute*. On Smith's view, and on the view of the many other jurists described above, Smith's counsel did *not* "raise[] this same claim during his state post-conviction proceedings" because—as the state court found—he did "not present[] [the] mitigation evidence which should have been presented by [trial] counsel." Pet. App. 114a. Indeed, he failed to present any such evidence at all. Whether that suffices to "raise" the relevant IATC claim is precisely what Smith asks this Court to decide; it is the opposite of "undisputed." *Contra* BIO 7.

Respondent's suggestion that Smith only defaulted the relevant sentencing IATC claim on appeal from the state habeas proceeding is just a variation on this same theme. The premise of that argument is that the issue *was raised* in the initial habeas proceeding, such that there was something to be defaulted on appeal. But Smith's position (again, shared by three circuits) is that this premise is incorrect: Because there was no mitigating evidence submitted whatsoever, there was in substance no claim on which to take an appeal at all. Put another way, this argument just boils down once more to a pure merits argument on who has the right answer to the question presented.

2. Smith laid out four reasons why that question presented needs answering, and why this case is a certworthy vehicle for doing so. In short, there is a well-developed split on the question presented, this case is an unusually good vehicle for addressing it, the

issue is recurring and important, and the Sixth Circuit is wrong. *See* Pet. 13-32. Respondent effectively concedes the first three points. The argument described above is, at best, simply the argument that the Sixth Circuit is *right* about what it means to "raise" IATC in state post-conviction proceedings. *Compare* BIO 10-11 (arguing that "[n]othing in *Martinez*'s narrow holding indicates that it … allow[s] a petitioner to relitigate, or reinforce, a claim that was rejected in state court, even if … his post-conviction counsel failed to submit evidence"), *with* Pet. 15-18 (explaining that the Ninth, Fifth, and Eighth Circuits apply *Martinez* in precisely that way). But a respondent's own disagreement with the petitioner about the right rule on the merits in this particular case is perhaps the worst reason a respondent can give for why this Court should leave a confusing, three-to-three circuit split in place throughout the Nation.

Respondent perhaps avoids confronting the other reasons this case is a good candidate for certiorari because they point quite strongly towards a grant. Most importantly, there is now a well-developed split on an issue two Justices have *already* recognized as likely to require this Court's eventual resolution. *See Gallow*, 570 U.S. at 933 (noting the import of the question but explaining that, at the time, no split had yet developed); *see also* BIO 11 (only arguing that "the circuit courts of appeal, *in general*," have not applied *Martinez* and *Trevino* to functionally defaulted claims) (emphasis added). Because Smith's case cleanly falls on one side of the line, such that a ruling in either direction would be outcome determinative in his federal habeas proceeding, this case is the perfect vehicle to

address the question presented and resolve the exact split Justice Breyer foresaw.

3. The only other point of note in respondent's opposition is its suggestion that the state habeas court denied relief because "petitioner did not want counsel to raise mental health or family background issues," until he "ultimately changed his mind" as to the latter. BIO 2, 7; *see* Pet. App. 114a. While the state court noted this evidence, however, it is clear that this was not the basis of the court's holding. In fact, the court's conclusion went to an entirely separate part of the analysis under *Strickland v. Washington*, 466 U.S. 668 (1984): Testimony that Smith himself rejected this evidence would go to counsel's effective representation; the failure to put on the missing "mitigation evidence" at the post-trial stage (the point the state habeas court invoked, Pet. App. 114a) goes to whether Smith could show *prejudice*. So respondent's point in this regard is at best a red herring given the state post-trial court's own account of its rationale.

But it is worse for respondent than that. Far from being evidence that the IATC claim was fairly presented in Smith's initial state habeas proceeding, as Respondent argues, BIO 7, this simply goes to show that his trial counsel failed to develop and then present the compelling mitigation evidence discovered by his federal habeas counsel. Put another way, saying "we did not even look to see what mitigating evidence might exist, even *after* the defendant 'ultimately' said he was ok with it," is just confirmation that Smith's trial counsel was constitutionally deficient, and that state habeas counsel was also ineffective for failing to do the same in the collateral proceedings as well.

To be clear, the state habeas court did not set forth any conclusions as to the testimony's import or reliability. At most, the statements just add to why the case is an unusually good vehicle for addressing the question presented. Smith had a substantial IATC claim, which could easily have been supported had state habeas counsel attempted to develop the record, and the state habeas court rejected the IATC claim specifically because counsel failed to submit any evidence to support it.

Here, we happen to know exactly what evidence Smith's trial counsel should have discovered and submitted during mitigation, and thus in turn, what state habeas counsel should have submitted to show that trial counsel was ineffective, because the federal habeas court took the unusual step of allowing the record to be developed before ruling on whether the additional evidence could be considered. *See* Pet. 24-25. That discovery shows that Smith has severe frontal lobe damage, which "profoundly impaired" his executive functioning and behavior regulation. It also shows that Smith's father suffered from depression and paranoia, and was discharged from the military for "psychosis [and] mental deficiency," with the mental age of an eight-year-old. Pet. 26. That evidence is compelling, and very likely would have led to a different outcome here. *See* Pet. 25-26 (citing cases from this Court holding that counsel was ineffective for failing to investigate and present this kind of mitigating evidence). And as the petition explained, this is the rare case where there will be any record at all in this regard, because now that the Sixth Circuit's rule is settled, federal courts will simply deny petitioners any chance to supplement the record. This case is thus the

perfect vehicle for the Court to address the important question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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