CASE NO. _____ (CAPITAL CASE) (18A654)

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,
Petitioner,

v.

DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Dated: February 15, 2019

QUESTION PRESENTED

CAPITAL CASE

Petitioner presented a federal district court with allegations and evidence that counsel had been ineffective at sentencing on the basis of facts and legal theories that he had not presented previously in state court. If Petitioner presented new "claims" in federal court, he would have the opportunity to show cause and prejudice for any default under *Martinez v. Ryan*, 566 U.S. 1 (2012). On the other hand, if he simply presented new "evidence" to supplement the claims of ineffectiveness that the state court previously had adjudicated on the merits, the federal court could not consider that evidence under *Cullen v. Pinholster*, 563 U.S. 170 (2011).

Pinholster did not specify how habeas courts should determine whether petitioners have proffered new claims or new evidence in support of previously-adjudicated claims. Lower courts trying to draw that distinction have approached their task with varying fidelity to this Court's pre-*Pinholster* precedent, which holds that a federal proffer in support of a claim makes that claim a "new" one, subject to the doctrine of procedural default, if it "fundamentally alter[s]" a claim made in state court. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The question presented is:

Where is the boundary between "new claims," whose default federal habeas courts may excuse, and "new facts," which federal habeas courts may not consider under *Cullen v. Pinholster* when applying 28 U.S.C. § 2254(d)?

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The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix, App. 001,[1] and is reported as *Rhines v. Young*, 899 F.3d 482 (8th Cir. 2018).

The opinion of the United States District Court for the District of South Dakota denying the motion to amend is unreported and appears in the appendix. App. 027. The opinion of that court denying the petition for writ of habeas corpus appears in the appendix, App. 055, and is unofficially reported as *Rhines v. Young*, No. 5:00-CV-05020-KES, 2016 WL 615421 (D.S.D. Feb. 16, 2016).

JURISDICTION

The Court of Appeals denied relief on August 3, 2018, and denied a timely petition for rehearing on October 1, 2018. App. 187. On December 19, 2018, Justice Gorsuch extended Mr. Rhines's time to petition for certiorari to February 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

[1] "App." refers to the appendix to this petition for certiorari. "CTA App." and "CTA Add." refer to Petitioner's appendix and addendum, respectively, in support of his brief in the Court of Appeals for the Eighth Circuit.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

28 U.S.C. § 2254 provides in relevant part:

> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> **(b)(1)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> > **(A)** the applicant has exhausted the remedies available in the courts of the State; or
> >
> > **(B)(i)** there is an absence of available State corrective process; or
> >
> > **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> **(2)** An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> **(3)** A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> **(c)** An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Charles Rhines is a death-sentenced prisoner in South Dakota. The lawyers who represented him, from pretrial preparation through federal habeas proceedings, repeatedly missed opportunities to conduct an adequate mitigation investigation. The extraordinary repetition of those missed opportunities distinguishes the history of his case.

Mr. Rhines was arrested in King County, Washington, in June 1992 and charged with killing Donnivan Schaeffer earlier that year during a botched burglary of a doughnut store in Rapid City, South Dakota. In two taped statements given shortly after his arrest, Mr. Rhines admitted virtually all the essential facts of the crime, including the timing, manner, and motive for the killing. He offered to plead guilty in exchange for a life sentence. CTA App. 624. The State spurned the offer and elected to pursue the death penalty. CTA App. 624–25.

In August 1992, the trial court appointed three attorneys to represent Mr. Rhines: private attorneys Joseph Butler and Wayne Gilbert, and Michael Stonefield, who worked for the local public defender's office. Mr. Butler and Mr. Gilbert were primarily civil lawyers with little criminal and no capital experience. Mr. Stonefield, who also had no capital experience, was initially supposed to focus

his efforts on investigative tasks, as directed by Mr. Butler and Mr. Gilbert. CTA App. 589. However, after one brief trip to Seattle to investigate Mr. Rhines's statements to police, Mr. Stonefield realized that no one was performing much of the core pre-trial legal work, such as drafting a motion to suppress Mr. Rhines's statements and preparing jury instructions. CTA App. 1565 at ¶ 7. He then shifted his attention away from investigation to these tasks. CTA App. 1566 at ¶ 9.

As a result, no one took responsibility for developing a sentencing mitigation case. CTA App. 1565 at ¶ 4; CTA App. 1566 at ¶ 10. No member of the defense team traveled to McLaughlin, South Dakota, Mr. Rhines's hometown. None spoke with Mr. Rhines's associates from his days in the military or his prior periods of incarceration. CTA App. 1567 at ¶ 21. None interviewed Mr. Rhines's mother. CTA App. 1567 at ¶ 19. The attorneys did not discuss or even consider hiring a mitigation specialist. CTA App. 1567 at ¶ 14. They hired a psychiatrist to evaluate Mr. Rhines for competency to stand trial and his mental state at the time of the crime, but did not ask the expert to consider mitigation or evaluate Mr. Rhines for other forms of brain dysfunction. Counsel did not provide the expert with any background information obtained from Mr. Rhines's sisters or any school, military, or incarceration records. CTA App. 1566 at ¶ 16; CTA App. 1567 at ¶ 17. The entire pre-trial mitigation investigation consisted of conversations with Mr. Rhines's three siblings.

With no real dispute about the facts of the case, the jury found Mr. Rhines guilty of first-degree murder and third-degree burglary on January 22, 1993. The

case proceeded to the sentencing phase the following week, beginning on January 25, 1993. The prosecution incorporated the guilt phase evidence and rested. CTA App. 468–69. The defense presented its case for life through only two witnesses, Mr. Rhines's sisters, Elizabeth Young and Jennifer Abney. Their testimony, including cross-examination, spanned a total of twenty-eight transcript pages, and described Mr. Rhines as a loner who struggled in school and had difficulty conforming socially in the small town where the three siblings, along with their older brother, grew up. CTA App. 469–96. Charles's parents gave him permission to enter the Army at age seventeen, over his sisters' objections. CTA App. 475–77; CTA App. 484–89. When he returned from the military, he was withdrawn and uncommunicative. CTA App. 490.

After this brief testimony, the State, over defense objection, offered victim impact evidence from Peggy Schaeffer, the deceased's mother. CTA App. 499–500. The jurors then began their deliberations on the afternoon of January 25. The following morning, they sent a three-page letter to the judge that asked a series of questions about the prison conditions Mr. Rhines would face if sentenced to life. Multiple questions, including inquiries about his ability to mingle with and influence younger prisoners or have "conjugal" visits, focused on his identity as a gay man. CTA App. 1562. The trial court advised counsel that it would instruct the jury that "[a]ll the information I can give you is set forth in the jury instructions," and rejected a defense request that the court tell the jury not to speculate. CTA

App. 576–77. After about eight more hours of deliberation, the jury reached its verdict sentencing Mr. Rhines to death. CTA App. 580.

On appeal, the South Dakota Supreme Court affirmed the conviction and sentence. CTA Add. 276. This Court denied certiorari. *Rhines v. South Dakota*, 519 U.S. 1013 (1996).

In December 1996, Mr. Rhines moved for state habeas relief. His appointed counsel, Michael W. Hanson, represented Mr. Rhines for approximately three years. During that time, he did not use or consider using a mitigation specialist, and spoke only to Mr. Rhines's brother and two of his teachers. CTA App. 1507–08; CTA App. 1571 at ¶¶ 2–4. He did not engage any mental health professionals. CTA App. 1571 at ¶ 5. He filed a petition that generally challenged trial counsel's failure "to call witnesses who lived in Rapid City to provide mitigation evidence" or "investigate defendant's background to provide effective mitigation." App. 190; App. 196; *Rhines v. Weber*, Civ. No. 96-1070 (S.D. Cir. Ct. Oct. 8, 1998).

At an evidentiary hearing in April 1998, the only witnesses were the three trial attorneys: Joseph Butler, Wayne Gilbert, and Michael Stonefield. CTA App. 1571 at ¶ 6. After the hearing, the parties took the deposition of Michael Butler, an attorney expert hired by the defense to assess the performance of trial counsel. Mr. Butler testified that there was "no question in [his] mind that [an] inadequate amount of investigation was done with respect to mitigation in this case." CTA App. 773. He testified that he could not match his strong opinion regarding trial counsel's deficient penalty-phase performance with any opinion at all regarding the resulting

prejudice because, despite Mr. Butler's advice to do so, Mr. Hanson also had not undertaken any mitigation investigation or offered any mitigating evidence. CTA App. 777–78.

The state habeas court denied relief in October 1998. App. 188; App. 190; App. 196. The South Dakota Supreme Court affirmed. CTA Add. 303.

Mr. Rhines filed a federal habeas petition in February 2000. The petition raised three general claims of ineffective assistance at the penalty phase, alleging that trial counsel conducted no "true mitigation investigation," made a "tepid presentation" of mitigating evidence which included a failure to call three named witnesses, and failed to consult a mitigation expert. App. 258–59. During the course of the habeas proceedings, numerous attorneys took on Mr. Rhines's representation and then withdrew for various reasons. None of them undertook any significant mitigation investigation.

Mr. Rhines sought and obtained a stay from the district court to allow exhaustion of unexhausted remedies in state court. The respondent appealed this ruling, and ultimately this Court upheld the "stay-and-abeyance" procedure the district court had employed. *See* CTA App. 1054; *Rhines v. Weber*, 544 U.S. 269, 279 (2005) ("*Rhines I*"). On remand, the district court ruled that use of the stay-and-abeyance procedure was warranted because Mr. Rhines had shown good cause to allow exhaustion of the penalty phase ineffectiveness claims, among others. App. 269; App. 277. Mr. Rhines returned to state court, where he had filed a second state habeas petition in 2002 following the district court's initial stay order, and filed an

amended state habeas petition in December 2005. The amended petition raised the same general claims of ineffective assistance of counsel—tepid presentation, failure to call three named witnesses, and failure to consult a mitigation specialist—but did not otherwise allege what evidence a constitutionally adequate investigation would have disclosed. App. 203. For the most part, the case remained dormant awaiting the outcome of lethal-injection litigation in another case.

In December 2009, attorneys from the Federal Public Defender's Office for the Districts of South Dakota and North Dakota were appointed to represent Mr. Rhines in state court. By their own admission, these attorneys never conducted an adequate fact or mitigation investigation. CTA App. 1282. They never followed up on findings from an educational psychologist that required neuropsychological evaluation. CTA App. 1119.

In September 2012, without conducting an evidentiary hearing, the state habeas court ruled that Mr. Rhines had failed to demonstrate that his trial attorneys had rendered ineffective assistance at the penalty phase, and that the general ineffective assistance claim was "precluded by res judicata" because the first state habeas court had already rejected that claim. App. 221.[2] The court

[2] In the course of its ruling, the court improperly resolved contested factual questions, and relied on multiple affidavits secured by the State from witnesses who never testified and often recounted hearsay. For example, the court quoted extensively from an affidavit by one of Mr. Rhines's trial counsel, Wayne Gilbert, which contradicted both his own testimony and the testimony of another trial counsel, Michael Stonefield, at the first state habeas hearing. The state court improperly accepted Mr. Gilbert's later affidavit version without holding an evidentiary hearing and without resolving the contradictions between his affidavit

eventually denied relief on all claims. The South Dakota Supreme Court declined to grant a certificate of probable cause. CTA Add. 349. This Court denied certiorari. *Rhines v. Weber*, 134 S. Ct. 1002 (2014).

At the completion of Mr. Rhines's state habeas proceedings, the district court lifted the stay of his federal action. The Federal Public Defender Office continued to represent Mr. Rhines in the federal habeas proceedings, along with appointed counsel Charles Rogers. In April 2015, Mr. Rogers withdrew from representation and was replaced by attorney Carol Camp. CTA App. 1097–98. Only with Ms. Camp's appointment did one of Mr. Rhines's counsel, for the first time in the twenty-three-year history of the case, begin to undertake an adequate mitigation investigation.

Mr. Rhines moved the district court for a "stay" (in effect, a six-month extension of time to investigate and amend) to allow Ms. Camp to investigate potential claims made available by this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Those cases allow a federal habeas court to recognize "cause" to excuse the procedural default of certain claims in state court based on the ineffective assistance of initial state-post-

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and his own testimony or that of Mr. Stonefield at the first habeas hearing. App. 216-18. The state court opinion, written without full or fair fact-finding, included clear factual errors. For example, the court indicated that Mr. Rhines received a "less than honorable" discharge from the Army, App. 215, when in fact his military discharge certificate shows that he was discharged "under honorable conditions." *See* Ex. 18, Br. in Supp. of Resp't's Mot. for Summ. J., at 16, *Rhines v. Young*, No. 5:00-05020-KES, ECF No. 215-18 (D.S.D. Sept. 5, 2013).

conviction counsel. The district court denied the motion in August 2015 but did not rule on the merits of the habeas petition for another six months. CTA Add. 134. Mr. Rhines moved to amend his petition to include new claims in October 2015. CTA App. 1106.

The new claims were substantial, with detailed evidentiary support. Ms. Camp presented the affidavits and qualifications of mitigation specialist Mary K. Poirier, CTA App. 1131; CTA App. 1263, psychologist Robert D. Shaffer, Ph.D., CTA App. 1213; CTA App. 1269, and mitigation expert Russell Stetler, CTA App. 1219; CTA App. 1273, with supporting exhibits. Ms. Poirier's affidavit and the supporting records described evidence that Mr. Rhines suffers from organic brain damage. His school performance was catastrophically poor. His sisters remembered that he was chronically unable to pay attention and complete tasks. They described him as a loner who often said impulsively weird or shocking things that made other children avoid him. He earned only a D average in the seventh grade, and dropped out of high school at the end of the ninth grade after failing most of his courses. After taking a year off, he attempted high school again while living with his sister and her husband, a teacher, in a nearby town. He dropped out again after one semester. CTA App. 1156–58; CTA App. 1175–77.

Dr. Shaffer, a clinical psychologist, reviewed (among other records) the reports of Mr. Rhines's previous evaluations.[3] He noted a wide discrepancy between

[3] Ms. Camp sought permission for Dr. Shaffer to evaluate Mr. Rhines in person, but the district court denied the application. Pet'rs Am. Mot. for Expert's Access to

Mr. Rhines's strong verbal abilities and his weakness in perceptual organization skills, an indicator of brain damage that should have been explored through neuropsychological testing. Such testing had never been performed. Accounts of Mr. Rhines's behavior revealed disinhibition of his emotional and aggressive impulses and other indicators of brain damage, including an unusual thought processing style, smell sensitivity, and compulsion to eat paper. His exposure to pesticides and lead, childhood blood poisoning, and drug addiction as a young adult all could have contributed to his brain impairment. CTA App. 1214–17.

Counsel also proffered evidence of Mr. Rhines's military service. He enlisted in the Army at age seventeen and lived throughout the time of his service with the stress of keeping his sexual orientation concealed. He served at Fort Carson, Colorado, and in the demilitarized zone in Korea. He was "trained in hand to hand combat and taught to react instantly to immobilize and kill an antagonist." CTA App. 1217. While he was in Korea, a confrontation with North Korea nearly caused a war. All troops were on high alert, and the teenage Charles was terrified that he would be killed. CTA App. 1158–61; CTA App. 1217. Drug abuse was rampant in the military, and Mr. Rhines became heavily addicted. He was discharged "under honorable conditions" after receiving several misconducts, and sent home a few months before his tour of duty ended. CTA App. 1159.

Conduct Evaluation, *Rhines v. Young*, No. 5:00-05020-KES, ECF No. 313-1 (D.S.D. Mar. 9, 2016); Mem Op. & Order, ECF No. 334 (D.S.D. Apr. 12, 2016).

Counsel also proffered evidence of Mr. Rhines's toxin exposure. His father, who worked in a grain elevator, would come home covered in residue from the pesticides and fertilizers he used in his work, his hands and arms stained purple. Furthermore, the family lived in an area plagued by water quality problems. CTA App. 1151–52.

Finally, Ms. Camp proffered the affidavit of Russell Stetler, who provided an account of the prevailing professional norms for capital mitigation investigation at the time of trial and Mr. Rhines's first state habeas proceedings. CTA App. 1219–22; CTA App. 1227–49. Mr. Stetler found the performance of both trial and first state habeas counsel deficient. CTA App. 1249–62.

Despite this detailed proffer, the district court refused to hear these claims or provide Mr. Rhines the opportunity to demonstrate prejudice. The Court denied the motion to amend, App. 027; App. 033, and granted summary judgment to the respondent on all claims on February 16, 2016, App. 055. Ms. Camp later withdrew as counsel, and the district court appointed the Federal Community Defender for the Eastern District of Pennsylvania to replace her. Order Granting Mot. to Withdraw, *Rhines v. Young*, No. 5:00-05020-KES, ECF No. 354 (D.S.D. July 29, 2016); Order Appointing Counsel, ECF No. 355 (D.S.D. July 29, 2016).

Mr. Rhines appealed to the Court of Appeals for the Eighth Circuit, which affirmed the denial of habeas corpus relief on August 3, 2018. App. 001, *Rhines v. Young*, 899 F.3d 482 (8th Cir. 2018). The court ruled that the general ineffectiveness claims—alleging failure to conduct an adequate mitigation

investigation, tepid mitigation presentation, and failure to consult a mitigation specialist—had been exhausted in the first and second state habeas proceedings. App. 010. It upheld the district court's denial of Mr. Rhines's motion to amend his petition, ruling that the new claims—alleging failure to investigate and present evidence of toxin exposure, brain damage, and military experience—were "no more than variations on the penalty phase IAC claims already presented in state court" and that they "merely provided additional evidentiary support for his claim that was already presented and adjudicated in the state court proceedings." App. 018 (citation and quotation omitted). The court denied rehearing on October 1, 2018. App. 187.

Mr. Rhines is challenging two other orders of the district court in separate actions.

(1) The district court denied a separate motion to amend the habeas petition, which sought to add statements of three jurors describing anti-gay stereotyping and animus in penalty phase deliberations and a juror bias and misconduct claim based on those newly admissible statements. The Court of Appeals denied Mr. Rhines's application for a certificate of appealability and petition for rehearing. App. 246. Mr. Rhines has petitioned for certiorari to challenge that ruling, and Justice Gorsuch has extended his time to file that petition to February 15, 2019, under Application No. 18A612.

(2) The district court denied a motion for expert access to evaluate Mr. Rhines in preparation for a potential application for executive clemency. Mr. Rhines

appealed that order, and the appeal is awaiting argument and decision in the Eighth Circuit under Docket No. 18-2376.

REASONS FOR GRANTING THE WRIT

I. Where To Draw The Line Between "New Facts" And "New Claims" Is An Important Question That Has Divided The Circuits Attempting To Apply *Cullen v. Pinholster*.

A. Introduction

This case involves an important federal habeas corpus question that this Court and its individual members have noted, but not squarely addressed: where is the line that separates new *facts* offered in support of a claim adjudicated in state court from a new *claim* that has never received a state court merits determination? On one side of the line, *Cullen v. Pinholster*, 563 U.S. 170 (2011), held that new "evidence introduced in federal court" ordinarily has no bearing on federal habeas review of a claim adjudicated on the merits in state court, and that a petitioner must satisfy the statutory test "on the record that was before that state court." *Id.* at 185. On the other side of the line, *Martinez v. Ryan*, 566 U.S. 1 (2012), held that a procedurally defaulted claim never raised in state court may receive federal habeas review, despite the default, if the inadequate assistance of initial state post-conviction counsel provides "cause" to excuse the default. *Id.* at 9.

Long before *Martinez*, this Court announced a test to enable a federal habeas court to determine whether facts a petitioner proffers for the first time in federal court in support of a claim, after having presented a similar claim without those facts in state court, make the federal claim a "new" and "unexhausted" one. A court

must ask whether new evidence "fundamentally alter[s]" the original claim. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). In this case, the Court of Appeals for the Eighth Circuit sidestepped the test and treated Mr. Rhines's new claims as merely new evidentiary proffers in support of the same general claims the state court had decided on the merits.

Mr. Rhines's new federal habeas claims—that his trial counsel were ineffective for failing to investigate and present evidence of his childhood exposure to toxins, brain damage, and military experience and trauma—bear little resemblance to the claims raised in his state habeas proceeding. In state court, Mr. Rhines's counsel offered no specifics describing what counsel should have investigated and offered no evidence of any prejudice. His new claims, raised for the first time in federal court, detailed the specific areas trial counsel should have investigated and explained the reasons competent counsel would have investigated those areas. In addition, his federal habeas counsel proffered evidence of prejudice by presenting evidence from a neuropsychologist (Dr. Shaffer) and a mitigation investigator detailing the evidence that could have been discovered if trial counsel had looked. This showing was not a mere variation of the previously unsupported state court claim of general ineffectiveness, nor was it simply additional evidence supporting such a claim. Rather, the new claims raised in federal court fundamentally altered the state court claims.

Because of the Eighth Circuit's ruling, however, these claims have reached this Court without ever receiving merits review in any court below. This Court

should grant a writ of certiorari to ensure that Petitioner's claims, and similar claims in other habeas cases, receive a meaningful opportunity for such consideration on the merits at least once.

B. Marking The Boundary Between "New Claims" and *Pinholster* "New Facts" Is Important.

The opinions in *Pinholster* noted, but did not decide, the problem of distinguishing new facts from new claims. In her dissent, Justice Sotomayor described a hypothetical situation in which a petitioner attempted to litigate a *Brady*[4] claim in state court but did not discover certain supporting evidence until the case reached federal court. She observed that:

> The majority's interpretation of § 2254(d)(1) thus suggests the anomalous result that petitioners with new claims based on newly obtained evidence can obtain federal habeas relief if they can show cause and prejudice for their default but petitioners with newly obtained evidence supporting a claim adjudicated on the merits in state court cannot obtain federal habeas relief if they cannot first satisfy § 2254(d)(1) without the new evidence.

Pinholster, 563 U.S. at 215 (Sotomayor, J., dissenting). Justice Thomas, for the majority, responded to these observations:

> Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements may well present a new claim.

Id. at 186 n.10 (internal references omitted).[5]

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[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

[5] Elsewhere, the majority opinion noted the State's argument that some of the evidence Pinholster had presented at the federal evidentiary hearing had fundamentally changed his claim and rendered it unadjudicated. Pinholster

After *Martinez,* the line between new evidence and new claims took on added importance because new claims never raised in state court could potentially receive merits review if initial state post-conviction counsel's ineffectiveness provides "cause" to excuse their default. The litigants debated the relationship between *Pinholster* and *Martinez* in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), but the Court ultimately resolved the case on other grounds. The Court granted certiorari to decide what showing a petitioner must make to receive expert funds in a capital case. *Id.* at 1085. The warden argued that the Court need not even address that issue because the petitioner had sought the funds to investigate a potential *Martinez* argument. According to the warden, both 28 U.S.C. § 2254(e)(2) and *Pinholster*'s bar on federal courts' consideration of new evidence operated to preclude the development of new evidence to support a *Martinez* argument, and therefore funds to investigate should be unavailable. *See* Br. for Resp't, *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (No. 16-6796), 2017 WL 3713058, at *38–39 (Aug. 1, 2017). The Court ruled that the Court of Appeals had applied the wrong standard to the funding question, and remanded the case, leaving the *Martinez* and § 2254(e)(2) questions for resolution by the lower courts. *See Ayestas,* 138 S. Ct. at 1095.

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contended that he had simply presented evidence in federal court that supported the same claim adjudicated in state court. 563 U.S. at 187 n.11. The majority concluded that it need not resolve the dispute because Pinholster would not prevail even if his position were correct. *Id.*

Similarly, in *Gallow v. Cooper*, 570 U.S. 933, 133 S. Ct. 2730 (Mem.) (2013), Justice Breyer, joined by Justice Sotomayor, wrote respecting the denial of certiorari in a case implicating the boundary between *Martinez* and *Pinholster*. Initial state post-conviction counsel had filed a "claim" later raised in the federal habeas petition, but had provided "virtually no evidentiary support" in state court. *See Gallow,* 133 S. Ct. at 2730–31 (Breyer, J., statement respecting the denial of the petition for writ of certiorari). Justice Breyer questioned whether this presentation in state court amounted to the equivalent of not raising the claim at all. *Id.* at 2731.

> The ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim. For that reason, the Fifth Circuit should not necessarily have found that it could not consider the affidavit and testimony supporting Gallow's claim because of *Cullen v. Pinholster*, 563 U.S. ——, 131 S. Ct. 1388, 179 L.Ed.2d 557 (2011).

Id. Justice Breyer observed, however, that "no United States Court of Appeals has clearly adopted a position that might give Gallow relief." *Id.*; *see also Ryan v. Gonzales*, 568 U.S. 57, 76 n.17 (2013) (indicating that *Pinholster* did not explain distinction).

Lower courts have noted that this Court has not explained how to distinguish "new evidence" from "new claims."[6] The exhaustion doctrine provides

[6] *See Hanna v. Ishee*, 694 F.3d 596, 606 (6th Cir. 2012); *Gonzalez v. Wong*, 667 F.3d 965, 979–80 (9th Cir. 2011); *Stokley v. Ryan*, 659 F.3d 802, 807–09 (9th Cir. 2011); *Howell v. Fisher*, No. 3:15-CV-105-DMB, 2015 WL 7018466, at *2 (N.D. Miss. Nov. 12, 2015).

an appropriate and well-understood test. In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the petitioner proffered statistics in federal habeas review that he had not proffered in state court in support of his grand jury composition claim. The warden argued that the new evidence "altered" the claim and required exhaustion in state court before the federal court could consider it. *Id.* at 257. The Court rejected the argument, stressing the policy reasons for requiring habeas petitioners to exhaust state remedies. Exhaustion gives state courts a "meaningful opportunity to consider" claims by "fairly presenting" them before federal courts will intervene. *Id.* at 257–58. The district court's expansion of the record to include the new statistical evidence did not "undermin[e] the policies of the exhaustion requirement" because the additional evidence did not "fundamentally alter the legal claim already considered by the state courts[.]" *Id.* at 258–60.

Lower courts applying *Hillery* have asked whether the federal claim rests on the "same factual grounds and legal theories" as those presented in state court, *see Forest v. Delo*, 52 F.3d 716, 719 (8th Cir. 1995), whether the petitioner has "fairly present[ed] to the state court both the operative facts and the controlling legal principles associated with each claim," *see Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004), or whether, on the other hand, the federal claim places the case "in a significantly stronger evidentiary posture" than it had in state court, *see Barrientes v. Johnson*, 221 F.3d 741,761–62 (5th Cir. 2000) (citing *Brown v. Estelle*, 701 F.2d 494, 495–96 (5th Cir. 1983)).

This Court has not employed the *Hillery* "fundamentally alters" test since its decision in that case. The test requires respect for state courts in federal habeas litigation, affording the states notice and opportunity to enforce the federal Constitution on their own terms, free of federal interference. Employing this test in deciding *Martinez*-based claims, just as in habeas cases generally, would ensure that federal habeas courts ask the appropriate question—whether the petitioner fairly presented the claim to the state courts—before going on to consider whether to excuse any default that resulted.

Lower courts have not, however, applied *Hillery* in a consistent manner in determining whether a habeas petitioner who has invoked *Martinez* seeks to present a new claim or new evidence.

C. The Circuits Have Taken Inconsistent Approaches.

One circuit has faithfully applied *Hillery* in the wake of *Martinez*, but at least three others have not.

In *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), the petitioner argued in the Arizona courts that his sentencing counsel had failed to investigate his background or direct the work of the court-appointed psychologist. *Id.* at 1317. In the federal habeas court, he argued that counsel was ineffective for failing to uncover and present his Fetal Alcohol Syndrome and organic brain damage in mitigation. *Id.* On appeal from the district court's denial of relief on the ground that the claim was procedurally barred, a majority of the Ninth Circuit, sitting en banc, agreed that Dickens had failed to exhaust remedies for the claim because the new

factual allegations "fundamentally alter[ed]" the claim the state courts had considered. *Id.* at 1318 (citing *Hillery*, 474 U.S. at 260). The evidence of specific conditions placed the case in a "significantly different" and "substantially improved" evidentiary posture. *Id.* The Arizona courts, accordingly, had not had a fair opportunity to rule on the altered claim, and the district court correctly held it procedurally barred. *Id.*

The Ninth Circuit remanded, however, to allow the district court to decide whether *Martinez* could provide "cause" to excuse the default of the "newly enhanced" ineffective assistance claim. *Id.* at 1320. It rejected the warden's argument that *Pinholster* barred it from considering the new claim. Although the Arizona courts had addressed a "similar" claim, the new allegations and evidence fundamentally altered it. *Id.* The state court's merits rulings on other ineffectiveness claims were irrelevant; habeas courts must evaluate procedural default "on a claim-by-claim basis." *Id.* at 1321. Moreover, because the *Martinez* argument was not a "claim for relief," the limitations on federal hearings in 28 U.S.C. § 2254(e)(2) did not apply. *Id.*; *see also McLaughlin v. Laxalt*, 665 F. App'x 590, 591–93 (9th Cir. 2016) (unpublished) (new witness statement evidence "bears on both the strength of the voluntary intoxication defense and . . . deficient performance to such an extent that it 'fundamentally alters' the claim"); *Detrich v. Ryan*, 740 F.3d 1237, 1248 (9th Cir. 2013) (en banc) (plurality opinion) (fact that state court ruled on some trial ineffectiveness claims does not preclude *Martinez* excuse for "new" claims).

Other circuits have treated general or factually unsupported ineffective assistance claims in state court as sufficient to exhaust remedies for, and preclude *Martinez*-related review of, specific claims in federal habeas court. For example, in *Escamilla v. Stephens*, 749 F.3d 380, 394–95 (5th Cir. 2014), the court denied an application for a certificate of appealability, ruling that, because the state court had decided a general ineffective assistance of trial counsel claim based on trial counsel's failure to "investigate and present mitigating evidence," the federal habeas court could not consider a proffer of mere "additional evidentiary support." *Id.* at 395.

> [O]nce a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court.

Id. (citations omitted); *see also Ward v. Stephens*, 777 F.3d 250, 257 (5th Cir. 2015) (petitioner may not use *Martinez* to "bootstrap factual development in federal court"), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *Runnels v. Davis*, 746 F. App'x 308, 316 n.2 (5th Cir. 2018) (unpublished) (rejecting *Martinez* argument because claim was nothing more than "fleshed-out version[]" of old claim).

The lenient view of exhaustion embodied in *Escamilla* contradicts the Fifth Circuit's own pre-*Martinez* practice. *See, e.g., Kunkle v. Dretke*, 352 F.3d 980, 986–88 (5th Cir. 2003) (conclusory affidavit from trial counsel in state court indicating there was abundant mitigating evidence did not exhaust remedies for federal

habeas claim that counsel was ineffective for not uncovering and presenting evidence of parental mental illness and abuse, or report of treating expert).

The Sixth Circuit took a similar approach in *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013). The petitioner had argued in state court only that counsel did not spend enough time preparing his expert and that the expert gave damaging testimony as a result. *See* Br. on Behalf of Def.-Appellant, *State v. Moore*, No. 96-2204, 1997 WL 33709551, at *43–*46 (Ohio Mar. 24, 1997). Like the court in *Escamilla*, the *Moore* court treated this general ineffectiveness claim as sufficient for exhaustion purposes. In the Sixth Circuit's view, it precluded any *Martinez* analysis respecting a new, specific claim in federal court based on the depositions of trial counsel and their mitigation specialist and psychologist. *Moore*, 708 F.3d at 779–80. The court did not even discuss whether the new evidence "fundamentally altered" the original state court claim, but treated Moore's argument as an effort to circumvent *Pinholster*:

> Second, and relatedly, Moore is not asking that we afford a *Martinez*-like review of a procedurally defaulted claim, but rather that we turn *Martinez* into a route to circumvent *Pinholster.* Moore's argument is not merely that *Martinez* permits us to review the merits of his claim; we already do that below, albeit through the lens of AEDPA deference, and *Martinez* is irrelevant to that analysis. Instead, he argues that we should remand to allow *factual development* of his allegation that *collateral* counsel was ineffective, and then, if collateral counsel is found ineffective on that newly developed record, permit that record to inform his ultimate claim for relief regarding whether *trial* counsel was ineffective. In other words, he wants this Court to grant him permission to obtain new facts to challenge the Ohio Supreme Court's rejection of his ineffective assistance of trial counsel claim. As explained above, though, *Pinholster* plainly bans such an attempt to obtain review of the

> merits of claims presented in state court in light of facts that were not presented in state court. *Martinez* does not alter that conclusion.

Moore, 708 F.3d at 785. As in the Fifth Circuit, the Sixth Circuit's application of exhaustion doctrine in *Moore* contradicts its own pre-*Martinez* practice. *See, e.g., Landrum v. Mitchell*, 625 F.3d 905, 918 (6th Cir. 2010) (finding claim defaulted although petitioner raised ineffective assistance of trial counsel claim in post-conviction petition because he did not allege failure to introduce specific witness's testimony in the guilt phase); *Brandon v. Stone*, 226 F. App'x 458, 460 (6th Cir. 2007) (unpublished) (finding claim defaulted although petitioner had raised ineffective assistance claims in state court falling into "broad categories" of deficient communication, investigation, advocacy, and advice because he had not raised claim presented in federal court—that counsel failed to convey plea offers).

The Fourth Circuit also employed a similar analysis in *Gray v. Zook*, 806 F.3d 783 (4th Cir. 2015), where the petitioner offered new evidence, including affidavits from a psychologist and neuropharmacologist. The court held that the evidence perhaps "strengthened" the state court claim that trial counsel "should have done more" to support an intoxication defense, but without fundamentally altering it. *Id.* at 799. The district court, it held, therefore properly dismissed Gray's *Martinez* argument. *Id.* As in the Fifth and Sixth Circuits, the court contradicted its own pre-*Martinez* practice. *See, e.g.*, *Bowie v. Branker*, 512 F.3d 112, 122 (4th Cir. 2008) (finding claim of prejudice at penalty phase defaulted where state court claim alleging that counsel's deficient performance respecting admission of witness's

statement prejudiced petitioner at guilt phase did not put state on notice of claim of prejudice at penalty phase); *Moses v. Branker*, No. 06-8, 2007 WL 3083548, at *3 (4th Cir. Oct. 23, 2007) (unpublished) (state court claim that trial counsel should have called two additional witnesses to offer mitigating evidence did not exhaust remedies for federal claim based on detailed affidavits from seventeen mitigating witnesses, which "fundamentally alter[ed]" state claim).

As discussed below, the Eighth Circuit's decision in petitioner Rhines's case deepened the disarray of the circuits in their treatment of *Martinez* arguments.

D. Conclusion

Federal habeas courts need clear guidance on how to draw the line between "new claims" and "new evidence" when a habeas petitioner advances both evidence that fundamentally alters an "old claim" and an argument to overcome procedural default. *Martinez* heightened that need, but did not purport to change how courts determine whether a claim is subject to the law of procedural default or whether a state court has adjudicated the claim on the merits. Drawing the line appropriately may have critical importance for petitioners, whose ability to obtain any federal review of a claim may hang in the balance. It may have equal importance for the states, whose interests the exhaustion doctrine respects, "allow[ing]" them, if they choose, "to decide the merits of the claim *first*." Randy Hertz and James S. Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 23.1 (2018). For these reasons, and those below, the Court should grant a writ of certiorari.

II. Petitioner's Case Provides A Good Vehicle For Resolving The Question Presented.

A. The Ruling Below Squarely Addressed The Question.

Mr. Rhines argued in the Eighth Circuit that the district court had denied him a fair opportunity to develop his new ineffective-assistance claims, which challenged trial counsel's failure to investigate and present evidence of his toxin exposure, brain damage, and military experience. *See* Br. of Appellant at 22, 24–28, *Rhines v. Young*, 899 F.3d 482 (8th Cir. 2018) (No. 16-3360). The state courts had never decided these claims; state habeas counsel had never raised them. Citing *Martinez*, Mr. Rhines argued that the ineffective assistance of his first state habeas counsel should provide "cause" to excuse any default. *Id.* at 29–34. He argued that the new claims fundamentally altered the undeveloped state court claims. *Id.* at 36–37. The Court of Appeals rejected the *Martinez* argument, treating the new claims as a new evidentiary proffer in support of claims that had already received merits adjudication:

> We also conclude that the district court properly determined that the "new" claims Rhines seeks to raise in a second amended petition would be precluded by *Pinholster*. Rhines raised now-exhausted penalty phase IAC claims that were rejected by the South Dakota courts on the merits. The "new" claims Rhines identifies are no more than variations on the penalty phase IAC claims already presented in state court. They "merely provide[ ] additional evidentiary support for his claim that was already presented and adjudicated in the state court proceedings. Thus, *Martinez* is inapplicable." *Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014).

App. 018; *Rhines*, 899 F.3d at 493–95.

The general ineffectiveness claims raised by Mr. Rhines's state habeas counsel said nothing about trial counsel's failure to investigate and present evidence of toxin exposure, brain damage, or military experience. The claims' general formulation deprived the state court of a fair opportunity to decide the new claims, which constituted fundamentally altered forms of the original state claims. Under the Circuit's pre-*Martinez* practice, the court would have ruled the new claims defaulted. *See, e.g.*, *Hall v. Luebbers*, 296 F.3d 685, 694 (8th Cir. 2002) (state court claim asserted that trial counsel had failed to challenge witness's competency through medical records; prisoner therefore defaulted federal habeas claim that counsel had failed to use the medical records to impeach the witness); *Clark v. Groose*, 16 F.3d 960, 964 & n.6 (8th Cir. 1994) (new "claim" defaulted because petitioner never specifically argued, in state court, ineffectiveness claim based on "new evidence" concerning victim's Family Services interview).

This case accordingly offers this Court a good vehicle to demonstrate how lower courts must apply *Hillery* to determine whether a habeas petitioner has advanced a new claim whose default could be excused under *Martinez*, or has merely proffered new evidence in support of a claim the state courts adjudicated on the merits.

B. The Ruling Below Otherwise Relied On Mischaracterizations Of The Issues.

The Court of Appeals articulated two other grounds for its ruling, but both avoided the issues actually presented.

1. The state court's "res judicata" ruling did not apply to the new claims.

First, the panel, relying on the second state habeas court's "res judicata" ruling, indicated that the state courts would rule that the new claims "would be procedurally barred under South Dakota law." App. 010, 018; *see* App. 221. In fact, that "res judicata" ruling, along with the first and second state habeas petitions, the federal habeas petition, and the federal habeas court's order granting stay and abeyance, all addressed, raised, or cited virtually identical, general claims and did not address the new claims at all.

Mr. Rhines's first state habeas counsel argued that trial counsel had failed to prepare a case in mitigation,[7] without enumerating any specific deficiencies and without conducting any investigation or making any demonstration of prejudice.[8]

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[7] As described by the state habeas court, the only claims of trial counsel ineffectiveness at the penalty phase challenged: the "failure of the lawyers to call witnesses who lived in Rapid City to provide mitigation evidence"; trial counsel's argument to the jury that he supported the death penalty; and trial counsel's "failure to investigate defendant's background to provide effective mitigation." *See* App. 190, 196; *Rhines v. Weber*, Civ. No. 96-1070 (S.D. Cir. Ct. Oct. 8, 1998); *see also Rhines v. Weber*, 608 N.W.2d 303, 313 (S.D. 2000) (summarily upholding state habeas court's ruling).

[8] State habeas counsel's own attorney expert dramatically described the undeveloped, general ineffective assistance claim raised in the state court. He

App. 190; App. 196. The state court ruled that "there is no evidence to support the belief that there were any other [mitigation] witnesses available," or that "any further efforts would have been fruitful." App. 190; App. 196.

Federal habeas counsel advanced similar claims, again arguing generally that trial counsel had failed to prepare a case in mitigation, without enumerating any specific deficiencies, conducting a mitigation investigation, or demonstrating prejudice.[9] App. 258–59; *see* First Am. Pet. For Writ of Habeas Corpus and Statement of Exhaustion at 12–13, *Rhines v. Young*, No. 5:00-05020-KES, ECF No. 73 (D.S.D. Nov. 20, 2000) (enumerating claims in first order granting stay and abeyance). The petition made no claims respecting failure to investigate toxin exposure, brain damage, or military background.

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testified that counsel had left him unprepared to establish prejudice by demonstrating what an adequate investigation for trial would have showed:

> A. My opinion is the work should have been done. And then to sit here and say what might have been is nothing but rank speculation. I think it's inappropriate to even be here speculating until the work's done in the first place. The work still hasn't been done at this point as we sit here now. So, sure, I'm speculating. I don't know why I'm, you know, even here speculating to begin with. It ought to be done. It still isn't done. That's my opinion.

Dep. of Michael Butler at 43, *Rhines v. Weber*, No. 97-1070 (S.D. Cir. Pennington Co. June 5, 1998), *reproduced in* CTA App. 780.

[9] The petition alleged that trial counsel had provided ineffective assistance because of "the absence of any true mitigation investigation"; "the tepid presentation of evidence during the penalty phase," including the failure to contact or call three named witnesses; and the failure to request, hire, or consult with a "mitigation consultant or expert." App. 258–59. The petition raised other claims not relevant here.

After this Court decided *Rhines I*, the district court identified the claims that warranted a stay and abeyance, which were the same as those advanced in the habeas petition.[10] The court ruled that the ineffective assistance of first state habeas counsel, who had never developed these claims, provided "good cause" to justify the stay. App. 269; App. 277; *Rhines v. Weber*, 408 F. Supp. 2d 844, 848, 850–51 (D.S.D. 2005).

On return to state court, Mr. Rhines's counsel filed a second state habeas petition that again presented the same general claims authorized by the earlier stay-and-abeyance order.[11] The second state habeas court, recognizing the identity between the failure-to-investigate claims presented in the first and second habeas petitions, held that the claims were barred as "res judicata" because the first state habeas court had already rejected them. App. 221.[12]

The claims the second state habeas court dismissed as "res judicata" were fundamentally different from the new claims concerning toxin exposure, brain damage, and military experience. The state courts never had a fair opportunity to

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[10] The court identified the claims that counsel made a "tepid" presentation of mitigating evidence, failed to call three witnesses, and failed to consult a mitigation specialist, indicating that the last claim included a general claim of failure to investigate mitigating evidence. App. 277; App. 278–79.

[11] As described by the second state habeas court, Mr. Rhines presented a general claim that counsel were ineffective for the "tepid presentation of evidence during the penalty phase," failure to call three named mitigation witnesses, and failure to consult a mitigation consultant or expert. App. 203.

[12] The court also summarized evidence presented by the State and, relying on that evidence, alternatively rejected the claim on the merits. App. 221.

adjudicate the new claims on the merits. The federal habeas courts should accordingly have treated them as new claims subject to procedural default, which the habeas courts could excuse if Mr. Rhines could satisfy *Martinez.*

2. Mr. Rhines did not seek a second *Rhines* stay and abeyance.

The Eighth Circuit's final reason for denying relief, its perception that Mr. Rhines's motion to amend his habeas petition constituted a dilatory abuse of the standards this Court set forth in *Rhines I*, also rested on a misconstruction of Mr. Rhines's argument.

In *Rhines I*, the Court held that:

> it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

544 U.S. at 278. The Court recognized that, without such a mechanism, some petitioners might never receive *any* review of their federal claims. *Id.* at 275.

The motion at issue in this appeal was a motion to amend the petition in the district court, not a motion for stay and abeyance.[13] According to the Eighth Circuit, however, Mr. Rhines had requested a "new, unlimited stay," at odds with the "limited circumstances" this Court first identified in *Rhines I*. App. 017, *Rhines v. Young*, 899 F.3d at 494 (citing *Rhines I*, 544 U.S. at 276). In its view, Mr. Rhines

[13] An earlier motion for a "stay," which actually sought an extension of time to file an amendment, was denied, as was a motion to reconsider that ruling. App. 030. Mr. Rhines did not challenge those rulings on appeal.

was engaging in "dilatory" tactics and attempting to establish "the alleged ineffectiveness of prior federal habeas counsel." *Id.*

Mr. Rhines, however, asked neither the Court of Appeals nor the district court for application of the stay-and-abeyance procedure, and was not attempting to advance a freestanding claim that federal habeas counsel were ineffective. He sought an opportunity to demonstrate why the district court should allow an amendment in the exercise of its discretion. Far from flouting this Court's decision in *Rhines I*, his application in the district court sought to vindicate this Court's intent to provide petitioners one fair opportunity for federal review of their claims.

C. The Proffered Reasons For Allowing The Amendment Required An Inquiry, But Never Received Any.

After the district court lifted the stay of the federal habeas proceedings, *see Rhines*, No. 5:00-CV-05020-KES, 2016 WL 615421, at *4, Mr. Rhines asked the court to allow an amendment to include the new claims on the ground that the Federal Public Defender Office for the Districts of South Dakota and North Dakota had never performed the necessary investigation, and separately alleged a conflict of interest because the Federal Defender himself had a personal relationship with the victim's parents.[14] The Federal Defender candidly admitted that an adequate

[14] A contemporaneous newspaper account describing testimony before the legislature by both the victim's parents and Federal Defender Fulton, opposing abolition of the death penalty, lends support to the conflict of interest. *See* CTA App. 1528, Kevin Woster, *Death Penalty Foes Lose Fight, Senate Judiciary Committee rejects move to abolish capital punishment*, Argus Leader, Jan. 27, 1994, at A1, A5 (quoting victim's parents and Fulton opposing abolition); *see also* CTA App. 1530, Terry Woster, *Senate Panel Polishes State Execution Law*, Argus

investigation, which would have uncovered the new claims sooner, had never been performed.[15] CTA App. 1286–92, 1318. The district court never inquired about the Federal Defender's admission or the potential conflict of interest, and denied the amendment. The court concluded that Mr. Rhines was merely proffering new evidence in support of a claim that had already received a merits ruling, and that *Pinholster* barred it from considering the new evidence. App. 044–051.

As discussed above, the Eighth Circuit upheld this ruling. App. 018, *Rhines v. Young*, 899 F.3d at 495. It never addressed Mr. Rhines's argument that the district court abused its discretion by denying the amendment without inquiring into federal habeas counsel's conflict-burdened failure to investigate. *See* Br. of Appellant at 41–49, *Rhines v. Young*, 899 F.3d 482 (8th Cir. 2018) (No. 16-3360),.

Mr. Rhines should have the opportunity to show the district court why it should allow the amendment. This Court should grant certiorari to give him that opportunity after addressing the important question presented in Point I.

Leader, Feb. 13, 2007, at 4 (quoting Fulton as lobbyist for Governor's office); CTA App. 1531, Terry Woster, *Gov. Rounds names lawyer chief of staff,* Argus Leader, September 27, 2007, at 8 (noting that Fulton "represented the governor's office last session when lawmakers changed state death penalty laws").

[15] Not only did the Federal Defender admit the lack of investigation in a signed pleading, but the docket suggests that the Federal Defender's predecessor counsel also performed no background investigation, let alone any investigation into mental health or military service. Counsel initially retained an investigator who interviewed two guilt-phase witnesses in 2000, but his CJA-31 invoices reflect no penalty-phase or mental-health-related investigation. CTA App. 1623–30. The federal district court docket reflects no further investigation or expert work reimbursed through CJA invoices during more than a decade of subsequent federal habeas proceedings.

CONCLUSION

For these reasons, the Court should grant this petition for a writ of certiorari.

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