**CASE NO. 18-8030 (CAPITAL CASE)**

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

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CHARLES RUSSELL RHINES,
*Petitioner,*

v.

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

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

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# REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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Dated: March 22, 2019

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## INTRODUCTION

Petitioner Rhines seeks certiorari on one narrow question: where is the boundary between "new claims" and "new facts" for federal habeas courts seeking to apply exhaustion and procedural default precedent, as in *Martinez v. Ryan*, 566 U.S. 1 (2012), and deference to state-court adjudications on the merits, as set out in *Cullen v. Pinholster*, 563 U.S. 170 (2011)? Pet. i.[1] The question presented arises in the context of Mr. Rhines's motion to amend his petition to include three new claims, that his counsel were ineffective for failing to investigate and present evidence of his childhood exposure to toxins, brain damage, and military experience and trauma.

The BIO repeatedly strays from that issue and from the relevant facts, while failing to join issue on some of Mr. Rhines's arguments. This Court should reject the State's arguments in opposition and grant the petition for certiorari.

## REPLY TO COUNTER-STATEMENT OF QUESTIONS PRESENTED

Mr. Rhines objects to the State's second question presented. He does not seek review on the ground that, or anywhere argue that, "the *Martinez* exception applies to the alleged ineffectiveness of . . . counsel in Rhines' second or successive collateral review proceedings." *See infra* at 8.

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[1] "Pet." refers to the petition for certiorari in this matter, Docket No. 18-8030. "BIO" refers to the brief in opposition in this matter. "CTA App." refers to Petitioner's appendix in support of his brief in the Court of Appeals for the Eighth Circuit. Petitioner has filed a separate petition for certiorari on a separate, although related, matter under Docket No. 18-8029.

## REPLY TO COUNTER-STATEMENT OF THE CASE

The State bases its factual recitation primarily on affidavits it proffered in support of its motion for summary judgment on the second state habeas petition, which the state habeas court granted on the papers without conducting an evidentiary hearing. The summary judgment ruling resolved only general ineffective assistance claims without addressing or exhausting remedies for the new claims at issue in this petition. It decided numerous contested factual questions in favor of the State, often on the basis of hearsay, and contained demonstrable factual errors.

Most of the State's factual contentions would be relevant only to the district court, if at all, and only if (1) this Court granted certiorari, (2) it ruled in Mr. Rhines's favor, and (3) the district court allowed him to amend his petition to include his new ineffective assistance claims. Because the district court considered itself bound by *Pinholster* in its 2016 ruling, it had no need to resolve the factual disputes between the parties. Although resolving the parties' factual disputes is also unnecessary for this Court's review of the question presented, Mr. Rhines is prepared to contest the State's account of the facts. He specifically objects to the following pertinent assertions:

- That counsel "investigated all customary sources of mitigating evidence." BIO 2. An affidavit by trial counsel Michael Stonefield contradicts this assertion. He explains that no member of the defense team had the responsibility of undertaking a mitigation investigation

and that the team did not develop an adequate plan to ensure that one took place. CTA App. 1566.

- That counsel "secured" Mr. Rhines's military record. BIO 3. They received a portion of his military record in discovery from the State.
- That psychiatrist D.J. Kennelly conducted "a complete psychiatric, psychosocial, and psychological workup." BIO 5. Mr. Stonefield's affidavit also contradicts this assertion. He explains that the defense team obtained a mental health evaluation solely to assess competency and criminal responsibility, not to explore sentencing mitigation. CTA App. 1566. Dr. Kennelly did not receive background materials and did not interview family members or other witnesses. CTA App. 1567. The defense team did not compile a social history or interview Mr. Rhines's mother, and conducted only very limited interviews with his siblings. CTA App. 1568–71. A clinical social worker, Steve Dresbach, met with Mr. Rhines only once, and did not conduct any independent investigation. Dr. Kennelly never saw or considered the report of the psychologist, Dr. Arbes, before writing his own. CTA App. 1606.
- That Dr. Kennelly's unexplained "screening for neurological evaluation" contained "no indicators" of "organic brain injury." BIO 5–6. Dr. Kennelly's report does not indicate what type of screen he administered or whether it assessed nerve function or brain function. CTA App. 1602. The pretrial report of Dr. Arbes (which Dr. Kennelly never saw) indicated that his testing showed signs of some cognitive

disorder. CTA App. 1608. Yet trial counsel never followed up on those findings. Dr. Shaffer, the neuropsychologist whose report Mr. Rhines proffered in support of the motion to amend in 2015, reviewed all previous expert reports, including Dr. Kennelly's and Dr. Arbes's, and found ample evidence of organic brain damage. CTA App. 1213, 1214.

- That counsel curtailed their investigation as part of a strategy to "exploit[] and preserv[e] two monumental defense victories," in securing pretrial orders excluding Mr. Rhines's prior felony convictions and non-statutory aggravating factors. BIO 7—8. The trial court made the first of those rulings only days before jury selection and the second during trial, long after counsel should have conducted a thorough investigation. CTA App. 222–23, 1627.

Mr. Rhines objects to the inclusion of argument and commentary on the report of Dr. Ertz, and the State's views on the strategic disadvantages of using the report at trial, in its Statement of the Case. BIO 13–16, 18. Mr. Rhines addresses Dr. Ertz's tangential relevance to the question presented in this petition *infra* at 8 n.3.

## ARGUMENT

### 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*.

Petitioner Rhines argues that the question presented is an important one that this Court, and its individual members, have noted but have not decided. Pet. 16–20. The State does not attempt to argue otherwise.

The State instead attempts to establish that there is no genuine circuit split on the issue. BIO 19. Mr. Rhines points to cases from the Fourth, Fifth, and Sixth Circuits (and the opinion in his own case from the Eighth Circuit) in which courts ruled that general claims of ineffective assistance adjudicated in state post-conviction courts were "the same" as specific claims advanced in federal habeas. In each instance, the Court of Appeals held that the state court already had ruled on the merits of the claim and that *Martinez* was accordingly unavailable as a potential basis to provide "cause" to excuse procedural default. Pet. 20–25. The State summarizes the rulings in each of these cases, but does not address a key point: that in those circuits, practice has changed, with courts concluding that remedies were exhausted where they previously would have found them unexhausted or a claim defaulted. The Ninth Circuit, however, has continued its pre-*Martinez* practice.

Both sides cite *Vasquez v. Hillery*, 474 U.S. 254 (1986), which established that the test of whether newly pled facts can be considered in federal habeas without running afoul of the exhaustion requirement is whether they would "fundamentally alter" the claim previously presented in state court. The State recognizes that "courts characterize or define 'fundamentally altered' variously," but insists "this is more a matter of form than substance." BIO 24. On the contrary, the examples in both Mr. Rhines's petition and the BIO demonstrate substantive differences: some circuits have treated federal and state court claims as "the same" when they would have treated them as "fundamentally altered," before *Martinez*,

while the Ninth Circuit has not altered its pre-*Martinez* practice. *See* Pet. 20–25; BIO 20–24.

The State mentions several district court opinions concluding that *Martinez* was inapplicable, but in those cases the claims presented in state court were specific enough to exhaust remedies for the later-presented federal claims. BIO 23–25. For example, in *Jones v. Ryan*, No. CV-01-00384-PHX-SRB, 2018 WL 236517, *7 (D. Ariz. May 24, 2018), the court held that a federal habeas petition did not "fundamentally alter" a state court claim because the latter specifically alleged counsel's ineffectiveness for employing an expert untrained in neuropsychology, who failed to uncover "neurological disorders and organic mental illnesses." Similarly, *Witter v. Baker*, No. 2:01–CV–1034–RCJ–CWH, 2015 WL 2082894, *8 (D. Nev. May 4, 2015), held that a federal claim did not "fundamentally alter" a claim made in state court because the latter specifically alleged counsel's ineffectiveness for not uncovering petitioner's fetal alcohol exposure or rebutting petitioner's gang activity. Likewise, in *Waddy v. Robinson*, No. 3:98–cv–084, 2013 WL 3087294, at *2 (S.D. Ohio June 18, 2013), the court denied a stay to exhaust new facts in support of an *Atkins v. Virginia*, 536 U.S. 304 (2002), claim because the state court had already allowed thorough litigation of the *Atkins* claim with a full evidentiary hearing. *See Waddy v. Robinson*, No. 3:98–cv–084, 2013 WL 1898837 at *1 (S.D. Ohio May 7, 2013).[2]

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[2] The State also cites *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007) (BIO 24), but that case pre-dates *Martinez* and cannot serve as an example of whether that Circuit has changed its practice.

The State maintains that "the portion of the *Vasquez* rule permitting a petitioner to introduce new facts to support federal review of a state claim—so long as those new facts did not 'fundamentally alter' the nature of the state claim—did not survive the enactment of the AEDPA and *Pinholster*." BIO 25; *but see Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (en banc) ("*Pinholster* does not affect cases like *Vasquez*."). This Court has not so held, and has not employed the *Vasquez v. Hillery* "fundamentally altered" test since its decision in that case. How lower courts should apply that test after *Pinholster* and *Martinez* is a question the Court should answer.

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

Mr. Rhines argues that his case provides a good vehicle because the Eighth Circuit squarely addressed the question presented. Pet. 26–32. If this Court rules in his favor, he can demonstrate on remand to the district court the substantial reasons it should permit him to amend his petition with the new claims. Pet. 32–33. In its response, the State either mischaracterizes his claims or anticipates post-amendment issues that the district court should decide if and when this Court rules favorably on the narrow question before it.

The State argues that "Rhines' first state habeas corpus counsel's performance was reviewed by his second state/federal counsel who added a new claim of ineffective mitigation investigation that allegedly had been overlooked." BIO 23. On the contrary, the same—nearly verbatim—general claims of ineffective assistance appeared in the first state habeas petition, the federal habeas petition,

the district court's order granting a stay and holding the case in abeyance, and the second state habeas petition. Pet. 28–30 & nn.7, 9–11. Neither counsel nor any court has ever reviewed the new claims at issue here, which challenge counsel's ineffectiveness for failing to investigate and present evidence of Mr. Rhines's toxin exposure, brain damage, and military experience and trauma.

The State next argues that *Martinez* does not excuse a default grounded in the ineffective assistance of appellate counsel, and that Mr. Rhines cannot base his *Martinez* argument on the ineffective assistance of his second state habeas counsel. BIO 26–28 (citing *Banks v. Workman*, 692 F.3d 1133, 1147–48 (10th Cir. 2012) (declining to expand *Martinez* to allow ineffectiveness of direct appeal counsel to excuse default); *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) (declining to expand *Martinez* to allow ineffectiveness of post-conviction appellate counsel to excuse default)). Mr. Rhines, however, does not seek to expand *Martinez*. The default he seeks to excuse in reliance on *Martinez* is that of his initial state habeas counsel. He argues only that the district court had discretion to consider the conduct of his prior counsel in deciding whether to grant his motion to amend the petition.[3]

The State jumps ahead to address issues the district court would have to decide, on a fully developed factual record, if it allowed the amendment. According

[3] For example, the district court would have to determine the importance of the Federal Defender's consultation with Dr. Ertz, who did not have the benefit of an adequate background investigation or complete his cognitive testing. BIO 27 n.3; *see* CTA App. 1611–15.

to the State, Mr. Rhines cannot establish that his trial counsel or his post-conviction counsel performed deficiently or that he suffered prejudice. BIO 31–33, 34, 28–31.

The State's principal legal argument on the merits, which relies heavily on this Court's decisions in *Strickland v. Washington*, 466 U.S. 688 (1984), *Burger v. Kemp*, 483 U.S. 776 (1987), and *Darden v. Wainwright*, 477 U.S. 168 (1986), is that a trial attorney's tactical decisions require deference from a court reviewing an ineffective assistance claim. BIO 31–33. Those cases can contribute only that general principle to a substantive analysis of Mr. Rhines's new claims. The State does not discuss other precedents of this Court that have examined counsel's strategy in light of what reasonable investigation and preparation would have disclosed. *See, e.g., Wiggins v. Smith,* 539 U.S. 510, 522 (2003) (explaining that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background' " (quoting *Williams v. Taylor,* 529 U.S. 362, 396 (2000); alteration in original)). The district court will be in a position to adjudicate Mr. Rhines's claims on the basis of all the applicable law if this Court rules in Mr. Rhines's favor.

The State also advances a number of premature factual arguments on the merits. Mr. Rhines does not contend in this Court that he has proven that his trial counsel was ineffective, or proven that the inadequate representation of his first state habeas counsel excuses the default of his new claims. Nevertheless, the record suggests that he is well prepared to demonstrate every element of his claims and

every element of a *Martinez* basis to prove "cause" to excuse procedural default, if he receives the opportunity to do so.

*Trial counsel's ineffectiveness.* The State maintains that trial counsel obtained a "psychiatric and psychological evaluation" before trial (BIO 33), but the record shows that counsel never asked the psychiatrist to develop mitigating evidence, never provided him with any background information, and never gave him a copy of a psychologist's report that would have provided the psychiatrist with red flags and prompted testing for brain damage. CTA App. 1566–67, 1602–08. Counsel's demonstrated failure to pursue an investigation of Mr. Rhines's potential toxin exposure and brain damage distinguishes this case from *Gentry v. Sinclair*, 705 F.3d 884, 899–900 (9th Cir. 2013) (BIO 34), where the petitioner presented no evidence at all to establish whether an authorized evaluation ever occurred or why counsel never presented the expert.

Furthermore, according to the State, trial counsel "would not have risked opening the door on the state's differential diagnosis of sociopathy" by presenting the undiscovered evidence of toxin exposure and brain damage. BIO 32. The State does not cite, and the record does not reflect, any indication that counsel ever made such a strategic judgment. In any case, as described above, this Court has repeatedly recognized that strategic judgments unsupported by reasonable investigation are in themselves unreasonable. Trial counsel's deficient investigation and lack of strategic basis also distinguish this case from *Worthington v. Roper*, 631 F.3d 487, 493, 503 (8th Cir. 2011) (BIO 33), in which the diagnosis of trial counsel's own well-prepared expert was damaging and counsel explicitly testified that he had

made a strategic judgment not to use the expert's testimony, and *DeYoung v. Schofield*, 609 F.3d 1260, 1288–89 (11th Cir. 2010) (BIO 34), in which trial counsel also made an explicit strategic judgment after determining that the testimony of their well-prepared expert would not be helpful.

*First state habeas counsel's ineffectiveness.* The State maintains that "the logic of the *Strickland/Burger/Darden* line of cases applies with equal force in the *Pinholster/Martinez* context." BIO 34. To support this proposition, it cites only *Carter v. Mitchell (I)*, No. 1:98-cv-853, 2013 WL 1828950, at *3 (S.D. Ohio May 1 2013), and *Carter v. Mitchell (II)*, No. 1:98-cv-853, 2013 WL 3147948 (June 19, 2013) (BIO 34), in which a district court denied a motion to admit an expanded body of evidence concerning *trial* counsel's ineffectiveness, and declined to order a stay and hold that case in abeyance. The *Carter* court did not mention *Martinez* or evaluate state habeas counsel's performance. The State inaccurately asserts that Mr. Rhines, like Carter, seeks a stay (BIO 35), when, in fact, all he seeks from this Court is an opportunity to persuade the district court to allow him to amend his petition.

*Prejudice.*[4] The State maintains that the new claims are not "substantial" because Mr. Rhines cannot prove any specific mental health disorder. It disparages

[4] The State argues that, to establish "cause and prejudice" to excuse a procedural default, as in *Martinez*, a petitioner must make a stronger showing of prejudice than *Strickland* requires to prove ineffective assistance of counsel. BIO 31–32 (citing *United States v. Frady*, 456 U.S. 152, 165–68 (1982), and *Zinzer v. Iowa*, 60 F.3d 1296, 1299 n.7 (8th Circ. 1995)). The proper burden of proof under *Martinez* is a question the district court must decide in the first instance. This Court need not address it.

the new claims as "wildly speculative," and then proceeds to speculate, without recourse to any expert opinion of its own, that Mr. Rhines's siblings would suffer from the same defect, or "other homicidal psychopaths [would] have emerged from McLaughlin," if the town's air or water had been contaminated. BIO 28–30. Relying on an unexplained indication by trial counsel's psychiatrist that a "neurological screen" was negative, the state leaps to the conclusion that any toxin exposure "did not manifest itself as any form of brain disorder or deficit in any adult testing." BIO 29. The State does not mention that Mr. Rhines proffered both a detailed social history report, which included several potential sources of toxin exposure (like his father's unprotected work with pesticides), and a detailed report by a neuropsychologist, which described multiple indicia of brain damage that called for a full battery of neuropsychological tests. Pet. 10–12. Nor does the State mention that it successfully opposed an in-person evaluation of Mr. Rhines by the neuropsychologist. Pet. 10 n.3.

The State relies on *Gonzalez v. Wong*, 667 F.3d 965, 991–92 (9th Cir. 2011), which held that counsel was not ineffective for failing to investigate a possible mental impairment, because the only facts that would have put him on notice were Gonzalez's illiteracy and childhood illness. BIO 29–30. Mr. Rhines is prepared to prove that his trial and initial state habeas counsel, in contrast, failed to conduct the reasonable background investigation and consultation with experts that would have provided ample notice of the need to follow up.

Mr. Rhines is also well prepared to show his entitlement to relief on his third new claim by showing that that trial and state habeas counsel's failure to

investigate and present evidence of his military experience and trauma deprived him of the effective assistance of counsel and excused default of the claim. Trial counsel received some of Mr. Rhines's military records from the State in discovery and accordingly knew that his time in the army was troubled, but never investigated further. State habeas counsel was aware of the same records but did nothing about them. The social history proffered with the motion to amend described Mr. Rhines's enlistment at age seventeen, the stress of serving in the military as a closeted gay man, his service at the demilitarized zone in Korea, and his discharge under honorable conditions. Mr. Rhines can show that there is a reasonable probability that this evidence alone would have caused at least one juror to vote for life. Pet. 11; *see Porter v. McCollum*, 558 U.S. 30, 43 (2009). The State does not mention this new claim at all.

This Court is "'a court of review, not of first view[.]'" *McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790, 1801 (2017) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)) (directing lower courts to decide in first instance whether deprivation of independent advice of mental health expert had substantial and injurious effect on outcome). The Court can and should grant review to address the narrow question whether the district court had discretion to allow Mr. Rhines to amend his petition with his new claims. It should leave other factual and legal questions for the district court to resolve if this Court rules in Mr. Rhines's favor, as it should, for the reasons above and in his initial petition.

## CONCLUSION

For these reasons and those in the initial petition for certiorari, the Court should grant the petition.

Respectfully submitted,


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