No. _____

IN THE

Supreme Court of the United States

Timothy Wayne Kemp,

Petitioner

v.

Dexter Payne, Director,

Arkansas Department of Corrections

Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

Question Presented No. 1

The district court found that the jury would have spared Kemp's life had it known the full circumstances of his "horrible" upbringing. The Eighth Circuit did not disagree. Yet that court found trial counsel's mitigation investigation—the sum total of which consisted of four witness interviews and collection of a set of school records—to be "thorough." In finding that counsel's performance was constitutionally sufficient, the Eighth Circuit ignored voluminous evidence showing that the mitigation investigation fell short of prevailing professional standards during the 1990s, when this case was tried. The question presented is:

Must a court consider prevailing professional norms when determining whether a life history investigation was "thorough"?

Question Presented No. 2

Was an appeal warranted on the district court's procedural rulings which faulted Kemp for the late development of his *Brady*/*Napue* claims when the State had hidden the necessary facts in a "work product" file first disclosed through discovery in federal habeas?

LIST OF PARTIES

The caption contains the names of all parties. Dexter Payne is substituted for Wendy Kelley as the Respondent pursuant to Supreme Court Rule 35(3).

LIST OF RELATED PROCEEDINGS

State v. Kemp, No. CR 1993-2903 (Pulaski Cty.) (Dec. 5, 1994) (trial).

Kemp v. State, No. CR 95-549 (Ark.) (Apr. 22, 1996) (direct appeal).

State v. Kemp, No. CR 1993-2903 (Pulaski Cty.) (Nov. 5, 1997) (re-sentencing).

Kemp v. State, No. CR 98-463 (Ark.) (Nov. 19, 1998) (direct appeal).

Kemp v. State, No. CR 1993-2903 (Pulaski Cty.) (Oct. 23, 1999) (state postconviction).

Kemp v. State, No. CR 00-482 (Ark.) (Nov. 29, 2001) (rev'd more specific findings).

Kemp v. State, No. CR 1993-2903 (Pulaski Cty.) (Jan. 23, 2002) (state postconviction).

Kemp v. State, No. 00-482 (Ark.) (May 16, 2002) (state postconviction).

Kemp v. State, No. CR 1993-2903 (Pulaski Cty.) (Sept. 30, 2008) (state postconviction).

Kemp v. State, No. CR 09-77 (Ark.) (Dec. 17, 2009) (state postconviction).

Kemp v. State, No. CR 00-482 (Ark.) (Apr. 1, 2010) (denying motion to recall the mandate).

Kemp v. State, No. CR 95-549 (Ark.) (Sept. 30, 2010) (denying *coram nobis*).

Kemp v. Kelley, No. 5:03-cv-55 (E.D. Ark.) (Oct. 6, 2015) (habeas).

Kemp v. Kelley, No. 15-3849 (8th Cir.) (May 16, 2019) (habeas appeal).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Timothy Wayne Kemp respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order of the Court of Appeals affirming dismissal of the habeas petition is reported at 924 F.3d 489 (8th Cir. 2019). (App. A.) The order of the Court of Appeals denying the motion to expand the certificate of appealability is unreported. (App. D.) The order of the district court dismissing the habeas petition is unreported. (App. B.) The order of the Court of Appeals denying rehearing is unreported. (App. C.) Arkansas Supreme Court opinions referred to by the lower federal courts are: *Kemp v. State*, 919 S.W.2d 943 (1996) (App. E); *Kemp v. State*, 983 S.W.2d 383 (1998) (App. F); *Kemp v. State*, 74 S.W.3d 224 (2002) (App. G).

JURISDICTION

The Court of Appeals issued its opinion on May 16, 2019. (App. A.) It denied a timely motion for panel and *en banc* rehearing on August 28, 2019. (App. C.) On November 6, 2019, Justice Gorsuch extended the time to file this Petition until January 27, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend VI:

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

U.S. Const. amend VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend XIV:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(e)(2):

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim . . .

INTRODUCTION

Kemp would not have been sentenced to die if his lawyer had done more investigation. The district court so found and the Eighth Circuit left that finding undisturbed. Despite a change in the law to allow for investigatory expenses, Kemp's lawyer did not even ask the court for money to pay for an investigator or a mitigation specialist. Kemp's lawyer went it alone, and his investigation was meager—he spoke to Kemp's mother, his boss, an aunt, and a childhood friend.

Other than a set of school records, he got no documents. Though the district court held that the true story of Kemp's upbringing was one of "constant abuse–physical, psychological, and emotional," the wan sentencing presentation allowed the prosecutor to argue that Kemp "had it so much better than most." Despite the stark difference between what could have been presented and what the jury actually heard, the Eighth Circuit found that the investigation was "thorough."

The investigation did not live up to prevailing professional norms, which by 1994 reflected that capital defense was a team endeavor. The Eighth Circuit's misapplication of the investigation requirement doomed the remainder of its *Strickland* analysis. After finding there was no "absolute requirement" that counsel use an investigator, it counted his legal duties as one of the reasons he could forgo further investigation. And the court forgave counsel for failing to realize that what he thought was a "learning disability" was actually a fetal alcohol spectrum disorder, because his "thorough" investigation didn't reveal that Kemp's mother was an alcoholic. The Eighth Circuit takes deference to counsel past the limits of the Sixth Amendment. A virtually identical investigation was called "incomplete and misleading" by another circuit (*Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008)) but the Eighth Circuit found counsel's investigation "satisfied his *Strickland* obligation." Certiorari should be granted to reaffirm *Strickland*'s holding that performance is to be considered in light of prevailing professional norms and *Wiggins*'s holding that a thorough investigation seeks to uncover all reasonably available mitigating evidence.

STATEMENT OF THE CASE

Tim Kemp was arrested on four counts of capital murder after he drunkenly shot four people at a trailer after a confrontation on October 4, 1993. Further facts of the incident relevant to the second question presented are discussed *infra*.

Appointment of counsel and investigation

"strap it on and go"

Jeff Rosenzweig, a solo practitioner who had, among his regular practice, six other capital clients, was appointed as lead counsel. Judy Rudd was assigned as second chair. Rosenzweig thought Rudd would be working extensively on the case, but "she was not available anywhere near as much as [he] had hoped." (R. 644.)[1] Other than her time in trial, Rudd spent about 50 hours on the case. (Ex. 135 at 17–18). Rosenzweig testified he did nearly all the work on the case. (R. 644.)

Rosenzweig's dominion extended to investigation as well. In 1991, the Arkansas Supreme Court invalidated the state's cap on fees and expenses in criminal cases. *Arnold v. Kemp*, 813 S.W.2d 770 (1991). The case arose after two attorneys refused to go forward in a capital case without adequate funds "with which to hire the necessary expert and investigatory assistance." *Id.* at 771. The Arkansas Supreme Court invalidated the cap on expenses as incompatible with "the realities of contemporary criminal defense practice." *Id.* at 775. Rosenzweig testified that "all through the '80s we had been fighting fee cap." (R. 711.) The Public Defender Act of 1993 provided that private attorneys, like Rosenzweig, were to be paid reasonable

[1] Citations to the various transcripts are as follows: habeas hearing as "R"; trial record as "Tr"; resentencing record as "R'sen"; state postconviction "PCR."

fees and compensation for expenses. Ark. Code Ann. § 16-87-201 (1993). Despite being aware of these sources of funding, he did not ask the court for funds to hire an investigator or a mitigation specialist. (R. 647.) Instead, Rosenzweig asked the local public defender office to borrow a staff investigator but was turned down. (R. 647.) Faced with little to no help from his co-counsel and without an investigator, Rosenzweig testified, "I just sort of attempted to undertake the responsibilities myself" because "I still had sort of a strap-it-on-and go mentality with regard to it" and a "misplaced confidence in my abilities or judgment or capacity to do what I needed to do." (R. 646–47; 712.)

The investigation that Rosenzweig mustered on his own and that the Eighth Circuit found categorically reasonable is described in that court's opinion:

> Rosenzweig testified that he had primarily relied upon Kemp, Lillie [Kemp's mother], and Kemp's aunt Glenavee Walker to gain an understanding of Kemp's social history. Rosenzweig also interviewed a former employer and a childhood friend of Kemp's. Kemp's brother Brad refused to talk to Rosenzweig, despite requests by Rosenzweig and Lillie, telling Rosenzweig that Kemp should die for what he had done. Rosenzweig traveled to Houston, Missouri, to gather Kemp's school records, talk to potential witnesses, and visit the local courthouse. Rosenzweig also conferred with Dr. Moneypenny [a psychologist].

App. A at 11. Multiple other witnesses could have testified regarding Kemp's abusive, traumatic childhood. There were scores of primary documents detailing that his father was mentally ill and terrorized his family. Had counsel done even a cursory investigation into Lillie Kemp, or talked to any member of Lillie's family, he would have learned she was a neglectful parent and a notorious alcoholic who got falling down drunk while pregnant with Kemp.

Mental health investigation

"*insufficient in various ways*"

Rosenzweig moved for his own mental health expert, noting a family history of "mental problems," Kemp's "serious and chronic alcoholism," "serious physical injuries" and "school records indicating a learning disability." (Tr. 95.) Rosenzweig waited until he received the state hospital report to press his motion for an independent expert. The state hospital found Kemp had a substance abuse problem and an unspecified personality disorder. The report touched on Kemp's abusive childhood—including the grim detail (not elicited at trial) that in one episode his father smeared Kemp with blood. (Ex. 105 at 6.) The state hospital report also contained what the Eighth Circuit deemed "hints, though, not red flags" of possible fetal alcohol exposure. As a child Kemp "had weak feet and was somewhat slow in learning to walk. 'He wore special shoes the first few years.'" (Ex. 105 at 7.) The report detailed that Kemp performed poorly in school and spent a year in special education. (Ex. 105 at 85, 87.) Kemp explained to the examiner, "I had a problem with people. I was kind of slow, not really into book learning." (Ex. 105 at 7.) The examiner's notes continued: "He and his mother both stated he made below-average grades. His mother explained, 'He was smart. He could learn things well, but overnight he would forget what he had learned.' The patient agrees that he has always had a problem with his memory." *Id.* The report also "hinted" of problems with Kemp's current mental state and adaptive abilities. He "failed numerous attempts to repeat 4 digits in reverse." (Ex. 105 at 88.) At 33, he lived with his

mother and had worked but often "borrowed money from [her] to get to work." (Ex. 105 at 9.) He reported, "'I ain't got a dime, just what Mom gives me.'" *Id.*

Renewing his request for an independent expert, Rosenzweig characterized the state hospital exam as "insufficient in various ways." (Tr. 131.) Rosenzweig described the inquiry as lacking because the state hospital did not talk to Kemp's family members other than "a brief telephone discussion with Defendant's mother" and did not examine "other medical and legal records relating to Kemp." *Id.* Counsel argued there were "non-statutory mitigators" of "family history and intrafamily psychological dynamics, which were developed at best only cursorily by the State Hospital examination. A fuller discussion with various members of the Kemp family is necessary in order to fully establish the mitigating intrafamily dynamics." (Tr. 134.)

Having identified these deficiencies, Rosenzweig failed to cure them once he had his own expert, Dr. Moneypenny. Rosenzweig did not give Dr. Moneypenny "other medical and legal records" but instead provided only the state hospital file, a criminal-history report, and some of Kemp's school records. (R. 271.) As far as other family members, Moneypenny only spoke to Kemp's mother—by phone, on the first day of trial, for less than an hour. (Ex. 104 at 63; R. 271.) He did not speak to any other family members or read statements from other family members. (R. 753; 271.) Like the state hospital, Moneypenny diagnosed Kemp with an unspecified personality disorder.

Penalty phase presentation

"he had it so much better than most"

The trial began on November 28, 1994. In opening statements, Rosenzweig conceded Kemp killed the four victims. (Tr. 1294.) The defense presented no witnesses in the guilt phase. (R. 768.) Kemp was convicted of four counts of capital murder. (Tr. 1771–72.) At the sentencing phase, Rosenzweig presented three witnesses: Kemp's mother, Lillie, his former boss Vernon Driskill, and Dr. Moneypenny. Lillie discussed her husband's abuse but, as the district court found, "didn't tell the whole story." (App. B at 7.) Driskill testified that Kemp was a good worker with spotty attendance who quit without explanation. (Tr. 1878–80.) His testimony takes up three transcript pages. Dr. Moneypenny testified that Kemp had an unspecified personality disorder and linked its development to a history of abuse. Though Kemp told Dr. Moneypenny of specific instances of abuse (i.e. being beaten with a dog chain at 3 a.m. or smeared with his father's blood), Dr. Moneypenny did not testify to those. There was no mention of Kemp's "learning disability."

In closing, the prosecutor argued that the mitigation case made Kemp *more* culpable because his childhood was better than most and he had no excuse:

> My heart goes out to Lillie Kemp. It truly does. She's not responsible for the actions of this defendant. And my heart does go out to her. But, ladies and gentlemen, he had it so much better than most. He had a mother who loved him, who did her best to take care of him and to protect him. And she told you that she meant for him to know that he loved her — that she loved him, that she tried to make him know, that she thought he knew that. She was always there for him when she could be. She had much more than a lot of people. You see, he's worse than most people because he has no excuse.

(Tr. 1947–48.) The jury returned four death sentences.

Resentencing

"a rerun"

Three of the four death sentences were overturned by the state supreme court. *Kemp v. State*, 919 S.W.2d 943 (1996). The state announced it would seek to reinstate the three death sentences and Kemp was again represented by Rosenzweig. In the eight months before the resentencing, Rosenzweig spent a little more than a standard work-week on the case, logging 44.5 hours. (R. 819, 831; Ex. 135 at 33.) He again did not request funds to hire an investigator or a mitigation specialist. (R. 826-828.) Rudd was replaced by Willard Proctor, who billed 32.5 hours pretrial on the case.

At the habeas hearing Rosenzweig explained he "figured we were sort of stuck with what we had" (R. 820) and viewed the proceeding as a "rerun" of the trial (R. 834–836). Other than serendipitously running into the officer who took Kemp's statement after his arrest, Rosenzweig talked to no new witnesses and gathered no records. He again presented Lillie Kemp and Dr. Moneypenny. Driskill's testimony was read into the record. At the habeas hearing, Kemp's standard of care expert testified that the resentencing was "one of the shortest mitigation presentations I've ever seen." (R. 1341.) True to first airing, Kemp was re-sentenced to death in the "rerun."

State Postconviction

"I don't know where it's going"

Kemp sought postconviction relief under Arkansas Rule of Criminal Procedure 37.5. He was represented by Sam Heuer. Heuer did not retain an investigator or a mitigation specialist. (Ex. 17 at 1.) He did no investigation. *Id*. Instead, he called

Rosenzweig and asked what issues to raise. *Id.* He did not ask the same question of his client. *Id.* Heuer filed a nine-page petition for relief (two pages of which were the certificate of service, the verification, and a notary stamp). (PCR 22–30.) The morning of the hearing, Kemp pressed Heuer to amend the petition to include a claim of ineffective assistance of counsel "for failure to investigate and pursue leads." (PCR 45–46.) Regarding the additional claim, Heuer stated, "I don't know where it's going." *Id.* There is no dispute that Heuer rendered ineffective assistance of counsel and that Kemp's ineffective assistance of counsel claims were defaulted at the initial stage of postconviction review. App. A at 13–14.

Habeas proceedings

"*a horrible story*"

Following *Trevino v. Thaler*, 569 U.S. 413 (2013), the district court held an eight-day hearing to determine whether Kemp's defaulted claims of ineffective assistance of trial counsel were "substantial." The district court heard from Kemp's trial counsel regarding his performance. The court also heard evidence of Kemp's abusive childhood and his fetal alcohol spectrum disorder (FASD) and post-traumatic stress disorder diagnoses. In sum, the district court found that the expanded evidence was "significantly more compelling than what was presented at either the first trial or the resentencing trial." App. B at 30. The district court found that had the jury heard the expanded case Kemp probably would have been sentenced to life rather than death. *Id.* at 6.

The court found that the evidence presented at habeas told "a horrible story":

> Kemp's childhood was marked by constant abuse—physical, psychological, and emotional. This abuse was both more affecting and

> more severe than presented during either sentencing proceeding. One of Kemp's cousins aptly described Verlon as "like Satan alive" when he was drinking. Hearing Record, 541. He got drunk almost every weekend. After he was disabled, Verlon drank every day, starting before noon. Petitioner's Exhibit at 11, 1-2; Exhibit 12 at 1-2. Kemp's older brother said their father was a "monster." Petitioner's Exhibit 12 at 5.
>
> Lillie's 2003 affidavit provides a much clearer and more detailed picture of Kemp's horrific childhood than any of her testimony. She explained Verlon's constant abuse and threats, the isolation from outsiders, and the fearful chaos that permeated the household. Lillie said that Kemp drank alcohol when he was a "little boy" because "it was the only way to survive the hell we lived in." Petitioner's Exhibit 15 at 6. She recounted telling Kemp to "keep his eyes on his daddy all the time, to make sure his daddy didn't try and kill me or one of them." Petitioner's Exhibit 15 at 9. Brad said that Lillie was "just as much to blame" as Verlon. She drank and fought with him, enduring regular abuse. She once ran off with Verlon, leaving the boys to shift for themselves for three weeks. Petitioner's Exhibit 11 at 3.

App. B at 31.

Experts testified that Kemp had partial fetal alcohol syndrome and post-traumatic stress disorder due to his abusive childhood. Multiple sources confirmed that Lillie drank while pregnant with Kemp. Kemp's aunt Ruth Boyd testified at the habeas hearing she remembered specifically when Lillie was pregnant with Tim Kemp because Ruth was pregnant at the same time. She recalled that Verlon and Lillie came to visit at her house "shortly before our babies were born" and Lillie acted like she was drunk and she smelled of alcohol. (R. 571–72). Janet Sewell, Kemp's maternal cousin, related that "[w]hen Aunt Lillie was pregnant with Tim, she was still drinking. I remember my grandmother telling my mother one day that Lillie was still drinking that old beer. My grandmother said she was worried that Aunt Lillie's drinking would hurt the baby." (Ex. 145 at 1). According to an expert

the drinking described by these witnesses, "consistent drinking, day to day, including drinking of falling down drunk . . . is exactly the kind of alcohol use that would produce an FASD." (R. 179.)

Kemp has the facial features—a thin upper lip, flat midface, and small eyes—that are diagnostic of an FASD. According to one expert, Kemp's childhood photo is "a classic fetal alcohol spectrum disorder picture." (R. 1176.) Kemp's performance on neuropsychological tests showed several deficits indicative of an FASD. His adaptive functioning skills were that of a seven-year-old-child. (R. 358.) He "failed in just about every adult domain." (R. 330.) The most significant risk factor for poor life outcomes for persons with FASD is abuse. (R. 336.) Kemp's childhood "guaranteed PTSD." (R. 348.) The district court found that the experts "linked Kemp's fetal alcohol exposure and post-traumatic stress syndrome diagnoses to his actions on the night of the shooting. These experts described, with thoroughness, how the PTSD exacerbated the poor functioning of Kemp's alcohol-damaged brain." (App. B at 31–32.)

On the question of deficient performance, Kemp presented evidence of the professional norms that prevailed during his trial and resentencing. He introduced 18 professional journal publications or training materials from before or during Rosenzweig's representation. He presented the testimony of Sean O'Brien, a law professor and experienced capital defense attorney. The district court found O'Brien's testimony was "admissible evidence on what a reasonable capital defense attorney would have done in 1994 and 1997." App. B at 33. Finally, Kemp offered

the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty cases [hereinafter 1989 ABA Guidelines] as evidence of the norms at the time of Kemp's trial and resentencing. (Available at www.ambar.org/1989Guidelines; Ex. 126.) Evidence at the habeas hearing also included documents and testimony establishing that capital defense attorneys at the time of Kemp's trial knew of FASD. The district court found that "[f]etal alcohol exposure was in the air as a possible mitigator" and that "lead trial counsel attended the 1991 NAACP Legal Defense Fund Airlie Conference, which included a plenary session on this developing defense." App. B at 37–38.

Despite finding that further investigation would have uncovered evidence that would have saved Kemp's life, the district court found that Kemp's lawyer was not unreasonable for failing to find it. The district court found that "[n]one of the surrounding circumstances would have alerted a reasonable lawyer that more investigation" was needed. App. B at 7. The district court dismissed the habeas petition and granted a certificate of appealability on issues related to counsel's mitigation investigation. *Id.* at 46–47.

The opinion below

"thorough in the then-extant circumstances"

A panel of the Eighth Circuit held that, as a matter of law, counsel's investigation was thorough and reasonable. The court acknowledged Kemp's evidence that prevailing professional norms called for, and state law allowed, counsel to use an investigator or a mitigation specialist. App. A at 15. However, the court found there are no "hard-edged rules," that professional guidelines are "only

guides," and that there was "no absolute requirement" for counsel to hire an investigator or a mitigation specialist. The court found that Rosenzweig's investigation was "thorough in the then-extant circumstances." App. A at 17. The court reasoned that Rosenzweig could be excused from seeking more evidence because of the "burden of preparing a defense in a quadruple-murder trial." App. A at 16–17.

As to whether Rosenzweig was ineffective for failing to discover that his client suffered from a FASD, the court found that Rosenzweig had "hints, though, not red flags" about fetal alcohol exposure and he lacked "any solid indication that Lillie drank alcohol heavily while pregnant." App. A at 18.

Regarding the resentencing, the Eighth Circuit found that counsel reasonably "relied on his knowledge of Kemp's case and the investigation that he had completed prior to the first trial." App. A at 12.

The *Brady/Napue* Claims

"I never seen no gun"

Kemp claimed that his convictions and sentences were secured through prosecutorial misconduct—the prosecutor hid evidence which supported his claim of self-defense and failed to correct false testimony on the same point. In discovery authorized by the federal court, Kemp found a witness statement in the prosecutor's "work-product" file that one of the victims intended to "scare" Kemp with a gun. The district court dismissed the claim without a hearing finding that Kemp couldn't show he was unable to bring the claim earlier or that the facts would have changed

the outcome of his case. App. B at 25. The Eighth Circuit denied a certificate of appealability. App. D.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's opinion contradicts this court's precedent and the opinions of other circuits.

This Court has held unequivocally that a death penalty case requires a thorough investigation into the life history of the defendant. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Porter v. McCollum*, 558 U.S. 30, 39 (2009). The Court has also held that counsel's performance is measured for reasonableness "under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Moreover, the Court has articulated that "counsel's function" is "elaborated in prevailing professional norms." *Id.* at 690.

In determining that Rosenzweig acted reasonably, the Eighth Circuit held that prevailing professional norms required one thing: a "thorough investigation." App. A at 16. The court rejected any elaboration of this requirement through professional standards. Citing this Court's authority, it held that professional standards cannot account for "the range of legitimate decisions regarding how best to represent a criminal defendant," that there are "few hard-edged rules," and that professional guidelines are only "guides." App. A at 15–16 (quoting *Strickland*, 466 U.S. at 688–89, *Rompilla v. Beard*, 545 U.S. 374, 381 (2005)). The court rejected Kemp's unrebutted evidence elaborating the professional norms for conducting a life history investigation in the 1990s. In doing so, it deviated from the authority of this Court and that of its sister circuits.

a. This court and other courts calibrate attorney performance to prevailing professional norms.

The Eighth Circuit held that prevailing professional norms required a "thorough" investigation but had no relevance in evaluating the particulars of that investigation. This Court and many circuit courts use professional standards to evaluate whether counsel's investigation was sufficiently thorough.

Strickland provides that to establish ineffective assistance of counsel, a defendant must show that his "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. In *Wiggins*, the Court held that in "assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms' which includes a context-dependent consideration as seen 'from counsel's perspective at the time.'" 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688–89). In evaluating whether counsel's investigation was sufficient, the Court considered the professional standards that prevailed in 1989. *Id.* at 524. Specifically, the Court considered that standard practice in the jurisdiction "included preparation of a social history report" and that the Public Defender's office "made funds available for the retention of a forensic social worker" but "counsel chose not to commission such report." *Id.* The Court looked at the ABA Guidelines to help define the scope of the necessary investigation—"efforts to discover *all reasonably available* mitigating evidence." *Id.* at 524 (citing 11.4.1 of the 1989 ABA Guidelines). And the Court looked at the ABA Guidelines for topics the attorney should consider investigating. *Id.* at 524 (citing 11.8.6, which lists "medical history, educational history,

employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences").

In *Rompilla*, this Court cited a succession of ABA Guidelines to support its holding that counsel's investigation should have included a search for a court file on the defendant's prior conviction. The Court held that published standards make it more than "common sense" that counsel "must obtain information that the State has and will use against the defendant." 545 U.S. 374, 387 & n.7 (2005). The Court explained that the 1989 ABA Guidelines "applied the clear requirements for investigation set forth in the earlier Standards" and detailed the applicable Guidelines related to investigation of information in the possession of the prosecution or law enforcement. *Id.* at n.7. Likewise in *Williams v. Taylor*, this Court cited 49 pages of the ABA criminal justice standards to support its finding that "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. 362, 397 (2000) (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980)).

Though *Bobby v. Van Hook*, 558 U.S. 4, 7–8 (2009), provided that the ABA Guidelines are not "inexorable commands," the Court reaffirmed that professional standards are relevant so long as they "describe the professional norms prevailing when the representation took place." The Court criticized the Sixth Circuit's use of guidelines published well after trial but reasoned that timely standards could serve as "evidence of what reasonably diligent attorneys would do." *Id.* at 8. The Court went on to compare counsel's investigation to the standards in existence at the time

of the trial: "The ABA Standards prevailing at the time called for Van Hook's counsel to cover several broad categories of mitigating evidence, see 1 ABA Standards 4-4.1, comment, at 4–55, which they did." *Id.* at 11.

The relevance of professional standards was reaffirmed by *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010), where the Court explained that *Strickland*'s "first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community." The Court found that the ABA Guidelines "may be valuable measures of the prevailing professional norms of effective representation," particularly where those norms speak to a specific function such as "the intersection of modern criminal prosecutions and immigration law." *Id.* at 367.

The Court's precedents makes clear that prevailing professional norms do more than just require a "thorough investigation." They also inform the scope and content of that investigation. And as the Court explained in *Padilla*, norms specific to a unique defense function—such as developing mitigation evidence—is valuable to the Court's evaluation of counsel's performance.

Other circuits have used professional norms in just this way. The Tenth Circuit has held that in determining whether counsel conducted a reasonable investigation "courts must first look to the ABA guidelines, which serve as reference points for what is acceptable preparation for the mitigation phase of a capital case." *Littlejohn v. Trammell*, 704 F.3d 817, 860 (10th Cir. 2013); *accord Harris v. Sharp*, 941 F.3d 962, 976–77 (10th Cir. 2019). Similarly, the Ninth Circuit has held that while "the nature and scope of a given investigation will vary based on the circumstances of

the case, the 'proper measure' of the adequacy of an attorney's investigation is 'reasonableness under prevailing professional norms.'" *Andrews v. Davis*, 944 F.3d 1092, 1109 (9th Cir. 2019). In assessing the investigation, the Ninth Circuit has looked to "ABA standards in effect at the time" (*id.*), as well as testimony from "experienced capital defense attorneys." *Avena v. Chappell*, 932 F.3d 1237, 1249 (9th Cir. 2019).

The Ninth Circuit also interprets prevailing professional norms to require certain inquiries in a mitigation investigation: "counsel *must* inquire into a defendant's social background, family abuse, mental impairment, physical health history, and substance abuse history; obtain and examine mental and physical health records, school records, and criminal records; consult with appropriate medical experts; and pursue relevant leads." *Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015) (emphasis added, internal quotation omitted). The Fourth Circuit has likewise accounted for prevailing professional norms in determining whether counsel unreasonably failed to develop FASD as mitigation. In doing so, the Court considered the ABA Guidelines that spoke to the issue, case law pointing to FASD as mitigation, and counsel's testimony that he was aware of FASD as possible mitigation. *Williams v. Stirling*, 914 F.3d 302, 313–14 (4th Cir. 2019).

By unmooring the definition of "thorough" from prevailing professional norms, the Eighth Circuit invites arbitrary enforcement of the critical right to counsel. This Court should grant certiorari to clarify that *Strickland*'s call for an "objective

standard" extends to evaluating counsel's investigation and requires consideration of prevailing professional norms.

b. Counsel's investigation fell below prevailing professional norms.

In line with this Court's guidance that a court must consider "objective standards," Kemp presented multi-faceted evidence showing that Rosenzweig failed to conduct a reasonable investigation based on the norms that prevailed in 1994 and 1997. The evidence established that the end goal of the life history investigation was to "develop a comprehensive understanding of the individual's life." (Ex. 116 at 1, Jeff Blum, "Investigation in a Capital Case: Telling the Client's Story," The Champion, 1985.) The investigation was "extremely time consuming" and would take "several months." (Ex. 101 at 10 (quoting Alabama Capital Representation Resource Center, Alabama Capital Defense Trial Manual 538 (2d. Ed. 1992).) Such an extensive investigation "is simply too big" for one person and one that lawyers rarely have the skills or the time to perform. (R. 1231, 1243.) The 1989 ABA Guidelines stated that "supporting services" are "required for effective defense representation at every stage of the proceedings, including the sentencing phase." 1989 ABA Guideline 8.1, Ex. 126 at 69. The commentary to the guidelines explained that those supporting services included "personnel skilled in social work and related disciplines" and that counsel "cannot adequately perform" the "thorough investigation of the defendant's life history and background" "without the assistance of investigators and other assistants." (1989 ABA Guidelines at 70.)

To develop this "comprehensive understanding" the team needed to undertake a wide-ranging search for witnesses and documents. Investigation should occur

anywhere the client lived and include a search for court and other records. (R. 1296.) A 1989 article described the investigative effort as "constructed from many interviews with the defendant, numerous relatives, friends, school officials, etc. It can take hundreds of hours of investigation." (Ex. 117 at 1.) Interviews with family members were to be conducted "in person, face to face, one on one." (R. 1292.) If the first attempt was unsuccessful, the team was to "keep at it" and "make multiple attempts." (R. 1293.)

Norms called for a "comprehensive" "search for documents" regarding not only the client but the client's parents, grandparents, children, and siblings. (Ex. 101 at 9.) Practitioners were instructed to find "any piece of paper you think may exist." *Id.* (quoting Alabama Capital Defense Trial Manual *supra* at 28). The record search needed to include family records because "[m]edical records of the client's parents may demonstrate 'evidence of a parent's breakdown, alcoholism, or hospitalization for abuse' that are 'essential to the case.'" (Ex. 101 (Report of Sean O'Brien) (quoting Alabama Capital Representation Resource Center, Alabama Capital Defense Trial Manual 34 (1992)).

Prevailing professional norms also advised that a reliable mental health evaluation depended on a complete social history supported by documentary evidence. (Ex. 118 at 1.) A 1990 article explained that a mental health evaluation that relied upon information "from the client and discussions with one or two family members" would be "unreliable" and "inadequate." (Ex. 119 at 3.) Instead, a mental health professional needed "as much information as possible regarding a client's

social and medical history," including "all available records for both the client and significant members of his family" such as "birth records" "prior psychiatric [records] for client or any family members" and "[f]amily court records for parents and client." *Id.*

These standards are not so specific that they "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. Rather, these broad principles about the resources necessary and the scope of the inquiry lay the foundation for counsel to discover "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524. Counsel's performance fell short in every regard.

The Eighth Circuit acknowledged Kemp's evidence that norms "called for 'a fully staffed defense team [with] two lawyers and an investigator and a mitigation specialists.'" App. A at 15 (citing Appellant's Brief). It noted Kemp's citation to *Arnold v. Kemp*, which guaranteed necessary expenses for an investigation. The court also acknowledged the expert testimony of Sean O'Brien and the ABA Guidelines, which detail that "counsel cannot adequately perform the necessary background investigation without the assistance of investigators and others." *Id.* But the court rejected the standard, holding that "there was no absolute requirement that counsel hire—or seek funds to hire—an investigator or mitigation specialist." App. A at 16. The court's opinion failed to recognize that not only did the standards call for an investigator, Rosenzweig obviously thought he needed an

investigator. He asked to borrow one. But when the public defender office said it would not lend him one, he didn't take the obvious next step of asking the court.

The court's opinion did not parse the other ways in which counsel's performance varied from professional norms, but they are legion. While practice standards instructed counsel to conduct extensive witness interviews, he did only four. When Kemp's brother declined to be interviewed, he didn't take obvious next steps—such as talking to Kemp's brother in person rather than on the phone or trying other siblings such as Kemp's half-sisters or step-siblings. Likewise, when Aunt Glenavee was not a viable witness, counsel didn't seek out other relatives, even when he had eight months to do so before resentencing.

And while practice standards instructed to him do a wide search for records, Rosenzweig got only a set of school records. He admitted in habeas "if there are records that were available and they help, I didn't find them. I didn't get them." (R. 688.) Counsel didn't even gather Kemp's birth certificate. That document showed that Kemp's mother had a previous child born dead—a red flag for maternal alcohol abuse. (Ex. 20; R. 402.) Counsel did not travel to Illinois where Kemp was born and spent the first 10 years of his life and had many relatives. (R. 721–22, 724, 835.) A records search there would have uncovered that his mother filed an emergency divorce petition when Kemp was six months old because Verlon had "repeatedly assaulted" and "repeatedly threatened to kill" her. (Ex. 51 at 5.) A minimally-adequate investigation also would have revealed that Kemp's father was arrested for public intoxication while visiting a newborn Kemp in the hospital. Though

counsel apparently spent one day looking for records in Missouri, he failed to find psychiatric records showing that Verlon had threatened to kill himself and his family or family court records deeming Verlon an unfit parent.

Nor did Rosenzweig perform any investigation into Lillie Kemp. A records search in the Pulaski County courthouse—the very courthouse where Kemp was tried—would have uncovered a DWI conviction. (Ex. 83.) Had counsel *investigated* Lillie, rather than just talked to Lillie, he would have found overwhelming evidence that she was a severe alcoholic who drank while pregnant with Kemp.

Counsel was aware of the need to provide a mental health examiner with comprehensive background information but failed to do it. Gallingly, he chastised the state hospital for not talking to Kemp's family (other than his mother) and for not examining other records. (Tr. 131.) He called the state hospital's approach "insufficient." But then *he* did the exact same thing. His mental health expert talked only to Kemp's mother and used the same documents that Rosenzweig said were insufficient, the only addition being a set of school records. Clearly, these failures were not evident only in hindsight. As in *Hinton v. Alabama*, 571 U.S. 263, 275 (2014), they were something that "*he himself* deemed inadequate." The decision calling this effort "thorough" strips the word of its meaning.

c. Counsel's investigation was not reasonable or reasonably limited.

The fundamental holding of *Strickland* is that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690–91. The Eighth Circuit found that Rosenzweig's investigation was reasonable and also that any failure to further

investigate was reasonable. But counsel's investigation neither lived up to this Court's definition of reasonable nor did he reasonably limit his investigation.

Wiggins holds that in a death penalty case a life history investigation should continue absent indications that more investigation will be "counterproductive" or "fruitless." *Wiggins*, 539 U.S. at 525. Counsel's life history investigation is unreasonable if he "acquired only rudimentary knowledge of [his client's] history from a narrow set of sources." *Id.* at 525. But the Eighth Circuit held that Rosenzweig's investigation was reasonable because he "learned of Verlon's abuse from Kemp himself, as well as from his mother." App. A at 16. Two sources is almost as "narrow" as it gets. And in fact the jury heard from only one source—Kemp's mother, who, as the district court found, "didn't tell the whole story." App. B. at 7. Instead of a comprehensive understanding of Kemp's life, counsel had "*some* information"—precisely what the Court in *Wiggins* said was not enough. *Id.* at 527. An investigation is unreasonable when it produces one family history witness and no documentary evidence when "compelling evidence" of "a deep family history of poverty and mental illness" and a "routine of trauma" (App. B at 26) was "reasonably available," *Wiggins*, 539 U.S. at 524.

The Eighth Circuit distorted *Wiggins* in another way. It supplanted the Court's instruction that an investigation should continue absent indications that more investigation will be "counterproductive" or "fruitless," *Wiggins*, 539 U.S. at 525, with the guidance that unless an investigation pays early returns it may be reasonably stopped. The court forgave Rosenzweig's failure to "discover a potential

diagnosis of partial fetal-alcohol disorder" because he had no "solid indication that Lillie drank alcohol heavily while pregnant." *Id.* at 17–18. The court held that there were "hints" but not "red flags." App. A at 18. The court didn't elucidate the difference between a "hint" and a "red flag," but the distinction would be irrelevant had counsel done the investigation prevailing norms called for.

Counsel's investigation could not be relied up to raise any "red flags" about fetal alcohol exposure. Kemp presented evidence that capital defense attorneys were on the lookout for FASD years before his trial.[2] But Rosenzweig's cursory investigation didn't cover maternal drinking. According to an affidavit signed by Lillie Kemp, Rosenzweig never asked her whether she drank while pregnant. (Ex. 15 at 12.) Rosenzweig wasn't sure whether he asked but "clearly didn't pick up on it." (R. 677–79.) Counsel didn't interview available witnesses who would have confirmed that Lillie was a lifelong drinker who kept on drinking through her pregnancies.[3]

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[2] *E.g.*, R. 1272 (O'Brien testifying that a capital defense attorneys were familiar with FASD in 1994); R. 1070–71 (testimony of Dr. Woods that he was seeing FASD in his forensic cases in the 1990s); Ex. 119 at 4 ("Many clients had mothers who drank alcohol or used drugs during their pregnancies, now well recognized as a cause of permanent and devastating mental disabilities in the developing fetus."); Ex. 112 1993 Mitigation Workbook regarding Fetal Alcohol Syndrome; Ex. 114 "Investigating Capital Cases in the Nineties" (instructing counsel to investigate alcohol or substance abuse during pregnancy). *See also Miller v. State*, 942 S.W.2d 825, 827–29 (Ark. 1997) (Arkansas trial team requesting, in 1995, an examination for brain damage caused by in utero alcohol exposure).

[3] *See, e.g.*, Ex. 3 at 5 (Cleasta Douglas: "Lillie was a drinker and kept drinking right through her pregnancy with Brad and Tim. She got falling down drunk. She drank whiskey, wine, and beer."); R. 330 (Steve Barton: Lillie "probably drank seven days a week" "a fifth or more a day"); Ex. 8 at 1 (Sarah Kemp: "Lillie was some drinker. When Tim was about thirteen years old, Lillie would make Brad and Tim drive her to the store so she could buy her liquor. She would go in and buy the

The court's distinction between "hints" and "flags" is flawed for another reason. The court forgives Rosenzweig because he wasn't aware Lillie drank while she was pregnant. But there are two ways to alert to any condition—symptoms or causation. If you see a person with a cast on their leg, you don't need to know they were in a skiing accident to understand their leg is broken. Counsel was indisputably aware of Kemp's symptoms—he thought they were a "learning disability." (Tr. 83.) But he made no attempts to discover the extent or the cause of this disability. A reasonable lawyer in the 1990s who thought that his client had a learning disability would have investigated it. And a reasonable lawyer in the 1990s would have uncovered that his client's mother had a well-known drinking problem. A reasonable lawyer knowing both things would have put two and two together and investigated FASD. This investigation, evaluated under *objective standards*, was constitutionally inadequate.

And counsel's investigation wasn't limited because he made a reasonable decision to stop investigating or because he had to focus on more important efforts. Without a basis in the record, the Eighth Circuit stretched to find a justification for counsel's failure to do more. The court held that, considering "the circumstances of the investigation" and "Rosenzweig's perspective in 1994 and 1997," "it was not unreasonable of him to forgo seeking out further sources." App. A at 17. The court cited *Van Hook* to hold that Rosenzweig reasonably decided "not to interview more

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liquor but they would have to do the driving because she was always too drunk to drive.").

distant family members." App. A at 17. But there is no evidence he ever made any decision to limit his investigation. Rather, he explained at the hearing, "I was probably overwhelmed sort of overwhelmed and sort of triaged my way out of not doing certain things, just figuring other things were—you know, I had a certain number of hours in the day and other cases and not getting – not getting – essentially didn't have any help . . . I did not make a decision, oh, I'm going to do a half-hearted investigation." R. 690–91. *Van Hook* instructs that counsel may reasonably believe further investigation will only turn up cumulative evidence. 558 U.S. at 11. But with only Kemp's mother to testify about family history, counsel didn't have corroboration (or even the "whole story"), much less accumulation.

The Eighth Circuit noted that Rosenzweig needed to prepare "a defense in a quadruple murder trial." App. A at 17. However, the court's forgiveness of counsel's failure to expand his investigation because of pressing legal duties is inconsonant with its holding that counsel reasonably could opt to do the investigation himself. In *Hinton*, the Court held that counsel is unreasonable when he fails to "understand the resources that state law made available to him." 571 U.S. at 275. State law provided resources for Rosenzweig to pay a person to investigate while he attended to those legal duties. While the Eighth Circuit rejected professional standards because they could not "take account of the variety of circumstances faced by defense counsel," the professional norms adequately anticipated that the necessary investigation could not be accomplished by one person. What's more, the Court identified no particular efforts that took him away from investigation. Any case will

require legal efforts and in this one Rosenzweig conceded guilt and presented no witnesses in the guilt phase. That it was a quadruple murder case, rather than lessening the need for a mitigation investigation, gave him "every incentive to make [his] mitigation case seem as strong as possible." *Wiggins*, 539 U.S. at 532. Certainly he had "every incentive" and no "burden" once resentencing was set—yet counsel did nothing different.

The Eighth Circuit's forgiveness of counsel's performance because his slipshod investigation gave him "*some* information" and raised no "flags" not only creates a dangerous precedent, it paves the way for the execution of an impaired person with the adaptive skills of a seven-year-old child.

II. This case presents an ideal vehicle in which to assess the important question of adequate performance and prevent arbitrary enforcement of the right to counsel.

The consideration of the "character and record of the individual offender" is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The obligation to thoroughly investigate the life history of a client facing the death penalty, as recognized in *Wiggins*, animates the right to an individualized sentence. But unless courts are held to objective standards of what that investigation entails, the rights will be arbitrarily enforced. In this case it meant very little and two juries sentenced Kemp to die without understanding his unique "frailties." *Id.* at 304.

Many cases where a deficient investigation is alleged may be resolved with a finding that counsel's errors worked no harm. But here we know more diligent work would have made a difference. The Eighth Circuit did not disturb the district court's

ruling that the result of Kemp's trial would have been different had trial counsel done more. App. A at 14. The justice system relies on competent counsel to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *See Powell v. Alabama*, 287 U.S. 45, 68–69 (1932). The full story of Kemp's abusive childhood and his psychological vulnerabilities would have caused at least one juror to insist on a life sentence. App. B at 6. The district court was "pull[ed]" by, but ultimately rejected, the conclusion that "especially with a person's life in the balance . . . a new trial on sentencing is the best way to make sure of a just result under the law." *Id.* at 7. Review should be granted in line with this Court's fundamental holding in *Strickland* that the "ultimate focus" in an ineffective assistance of counsel query is "whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696.

The "pull" to correct the injustice in this case is heightened when one considers that the same case would have won relief in another judicial circuit. In *Williams*, 542 F.3d 1326, the Eleventh Circuit found a nearly identical effort deficient. Counsel there used a defense psychologist, a presentencing investigation, and the client's mother. The court found that by relying entirely on Williams's mother "trial counsel obtained an incomplete and misleading understanding of Williams's life history." *Id.* at 1340. Rather than congratulating trial counsel for "capably present[ing] the evidence of childhood abuse" through the mother (App. A at 16), the

Eleventh Circuit held that counsel should have interviewed other family members "who could corroborate the evidence of abuse and speak to the resulting impact on Williams." *Williams*, 542 F.3d at 1340. And while the Eighth Circuit was satisfied that Rosenzweig put on a couple of witnesses, the Tenth Circuit has rejected the notion that it is enough that "counsel did *something*" but he is expected to conduct a "full investigation" and "pursue reasonable leads." *Littlejohn*, 704 F.3d at 860 (internal quotations omitted).

Though the Court has spoken before on what is required of counsel in a capital case, the question is a vital one often confronted by the lower courts. Ineffective assistance of counsel claims are "far and away the most frequently raised claim in habeas corpus litigation." Emily Hughes, *Investigating Gideon's Legacy in the U.S. Courts of Appeals*, 122 Yale L.J. 2376, 2384 (2013) (quoting Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C.L. Rev. 425, 438 (2011)). In the wake of *Martinez v. Ryan*, 566 U.S. 1, 12 (2012) and *Trevino*, 569 U.S. 413, which opened a narrow equitable exception, more claims, like this one, will be considered by the federal courts *de novo*. However, without objective standards for what constitutes a "thorough" or "reasonable" investigation, the right to counsel and an individual sentence will be arbitrarily enforced. Such guidance is important not just for fair adjudication of ineffective assistance of counsel claims but also to inform the countless jurisdictions, courts, and attorneys charged with funding, staffing and leading capital defense teams. *See* Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 Wash. U.L. Rev. 581, 630 (2012) (qualitative study of

mitigation finding that "inconsistent understandings of what constitutes thorough mitigation investigation will continue to contribute to the arbitrariness with which defendants receive the death penalty").

III. Kemp's *Brady*/*Napue* claims warranted an appeal.

There is no dispute that Kemp shot and killed four people on the evening of October 4, 1993. However, there is a real dispute over whether Kemp was provoked or threatened before the shooting. Both parties agree that Kemp and his girlfriend Becky Mahoney were visiting the trailer of David Wayne Helton. Sonny Phegley, Cheryl Phegley and Richard Falls were also visiting. Both parties agree that Kemp wanted to leave and Becky did not. Here the stories diverge. The prosecution claimed that an angry Kemp drove home to his mother's house, got and loaded his gun, returned and parked a distance away from the trailer, snuck up to the door, and then shot and killed Helton, the Phegleys, and Falls.

According to Kemp, and as he told investigators shortly after his arrest, after Mahoney would not leave with him, he drove around the block and came back to see whether she was waiting outside. She was not, but Helton and at least Sonny Phegley were and an altercation began. Mr. Kemp stated that "all of em' jumped on me" "pushing me around . . . threatening me . . . scaring me." He continued that "they had been threatening me and shit that they would kill me, beat my ass, take my truck . . . and that's when . . . Sonny, went in the house and got a damn gun." He explained that the threats continued so he grabbed his gun—which had been in his truck all day. Kemp continued, "Wayne [Helton] backed up in the damn door, you know, and they still, you know, and Sonny still had the damn gun, he was

threatening me with a gun. And Wayne grabbed, tried to grab my gun and push me around, throw me around in the door and that's when I started shooting." Helton and Sonny Phegley were found side by side near the door of the trailer with a pistol between them. Falls and Cheryl Phegley were found dead in the kitchen and bedroom respectively. Mahoney hid in a closet and called 911.

Before trial, the prosecuting attorney interviewed Mahoney and kept notes from the interview in a file titled "work-product." The notes include the statement: "They were all standing around talking about the incident. Wayne showed Becky a pistol that he had + said he would use it to scare Tim." The prosecutor's office maintained an open file which the defense attorney could access. But the "work-product" file was not in the "open" file and was not turned over to the defense.[4] Despite having access to the "open" file, Kemp's attorney formally requested exculpatory material. Again, the complete file was not disclosed. Defense counsel attempted to interview Mahoney but an employee of the prosecuting attorney's office told Mahoney she did not have to speak with him.

At trial, contrary to her undisclosed statement, Mahoney denied seeing a gun at the trailer. She testified:

Defense Counsel:	And you say that Tim went out by himself?
Mahoney:	Tim left by himself.
Defense Counsel:	Did you see a gun at that time?
Mahoney:	No, sir.

[4] The prosecution also failed to disclose information in the "victim assistance" file that Mahoney was being treated in a psychiatric ward during trial and that a victim's family member complained that items, including a gun, were removed from the crime scene. Kemp also alleged that the prosecution failed to disclose forensic test results showing elevated gunshot residue on the hands of three of the victims.

Defense Counsel:	Did you ever see a gun?
Mahoney:	No, sir.
Defense Counsel:	You didn't see a pistol at any time?
Mahoney:	I don't remember.
Defense Counsel:	You don't remember. You don't remember if someone pulled a pistol on him?
Mahoney:	No, sir.
Defense Counsel:	Okay. You just didn't see one?
Mahoney:	Nobody pulled a pistol on him.
Defense Counsel:	Okay. You didn't see a pistol at all. Is that right? Is that what you're saying?
Mahoney:	Yes, sir.

(Tr. 1415.) Mahoney's testimony at resentencing was more emphatic.

Defense Counsel:	Okay. Did you see a gun? Did you see any of them with a gun?
Mahoney:	No, sir.
Defense Counsel:	Okay. If there was a gun there, you wouldn't be surprised to see it there in the pictures though, would you?
Mahoney:	I didn't – I never did see no gun.
Defense Counsel:	You never saw a gun?
Mahoney:	No, sir.
Defense Counsel:	But you're not denying that someone had a gun there. Is that right?
Mahoney:	I never seen no gun.

(R'sen. 914-915.) The prosecution did not alert the court or the defense that Mahoney had testified falsely. Instead, the prosecution argued at trial that Kemp was a calculating killer who "slaughter[ed]" four "unsuspecting" persons with "no opportunity to defend themselves." (Tr. 1287.) Defense counsel tried, with weak support, to argue that Kemp believed he was acting in self-defense. (Tr. 1952.) At the resentencing, the prosecutor characterized Kemp's claim of self-defense as a "pack of lies" and "crazy lies." (R'sen. 1167, 1190.) The prosecutor dismissed the self-

defense mitigator: "Did he believe he was acting in self-defense? I'm not going to spend any time on that. There's no evidence of that whatsoever." (R'sen. 1190.)

Despite multiple requests, Kemp never received a complete copy of the prosecutor's file until he was granted discovery in federal habeas. There he received the never-before-disclosed notes taken by the prosecuting attorney detailing the pre-trial interview with Mahoney. In a deposition in habeas, the prosecutor admitted she did not turn over her interview notes to the defense.

The district court refused to hold a hearing on these claims. It found that the claims were procedurally defaulted and that Kemp failed to establish 1) that he was unable to develop the new facts in state court despite diligent efforts to do so and 2) that the new facts would change the outcome of the case. App. B at 25. The district court denied leave to exhaust the new facts in state court, finding that the claims were "plainly meritless" under *Rhines v. Webber*, 544 U.S. 269, 277 (2005). *Id.* Without issuing an opinion, the Eighth Circuit declined to expand the certificate of appealability ("COA") to include the claims. App. D.

28 U.S.C. § 2253(c) allows a COA to issue when the applicant has made a "substantial showing of the denial of a constitutional right." The showing is made if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the denial rests on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the

petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* The 'debatable among jurists of reason' standard is a very low barrier to issuing a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Kemp's claims chinned the bar.

"Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75 (2012). Under *Napue v. Illinois*, 360 U.S. 264, 272 (1959), a conviction obtained by the knowing use of false evidence violates the Fourteenth Amendment and relief is warranted if the evidence "may have had an effect on the outcome of the trial." Had Mahoney testified truthfully, it would have supported Kemp's claim that he shot only after being threatened with a gun. Mahoney's testimony permitted the prosecutor to argue that Kemp was lying, which damaged him both at guilt and penalty. Truthful testimony from Mahoney would have "put the case in such a different light as to undermine confidence in the verdict," *Kyles v. Whitley*, 514 U.S. 419, 435, and "could have affected" the judgments, *United States v. Agurs*, 427 U.S. 97, 103 (1976).

The district court held that Kemp wasn't entitled to a hearing because he had not "established that he was unable to develop the new facts about alleged prosecutorial misconduct in state court despite diligent efforts to do so." App. B at 25. The court held that the claims were inexcusably procedurally defaulted and lacked sufficient merit to warrant a *Rhines* stay. *Id. Strickler v. Greene*, 527 U.S.

263, 283–84 (1999), establishes that the state's concealment of exculpatory witness interviews and its simultaneous representation that its file was "open" is cause to excuse a default. *Williams v. Taylor* establishes that 2254(e)(2) does not bar fact development in habeas when "the prosecution concealed the facts" necessary to bring the claim in state court. 529 U.S. 420, 434 (2000). The claims state a colorable violation of a constitutional right and the procedural rulings are debatable. The Court should summarily reverse the denial of a certificate of appealability. In the alternative, the Court should grant certiorari to allow plenary consideration of these important claims.

CONCLUSION

For the foregoing reasons, certiorari should be granted to prevent the execution of death sentences that would not have been entered but for counsel's careless performance and the prosecutor's misconduct.

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