No. 19-7476

In the Supreme Court of the United States

TIMOTHY WAYNE KEMP,
Petitioner,

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the court of appeals correctly applied *Strickland v. Washington*, 466 U.S. 668 (1984), and *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam), to determine that Petitioner, who does not dispute that he murdered four people, received effective assistance of trial counsel.

(2) Whether jurists of reason could debate the district court's conclusion that Petitioner sought to develop facts that would make no difference to the outcome of his unexhausted claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959).

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INTRODUCTION

On October 4, 1993, a Monday, Tim Kemp and his girlfriend, Becky Mahoney, spent the day together, drinking beer. Pet. App. A2. During this "day of drinking heavily and partying," Pet. App. B3, Kemp and Becky stopped by Wayne Helton's trailer, Pet. App. A2. While at Helton's trailer, Kemp and Becky "drank more beer and danced" with Helton and three others, Bubba Falls, Sonny Phegley, and Sonny's daughter, Cheryl. *Id.* The party at Helton's trailer would culminate in an "anger-fueled fusillade." *Id.* Kemp would kill everyone but Becky. *Id.*

Kemp does not now and has not ever denied that he committed these four murders. Pet. 32; *see* Pet. App. B3 ("No one has ever really disputed that Kemp killed four people."). He claims only that his trial counsel, who was and remains an accomplished Arkansas capital-defense attorney, should have presented more mitigation evidence during sentencing. But the district court found that trial counsel's investigation and mitigation strategy were reasonable. So it dismissed Kemp's petition for a writ of habeas corpus. The court of appeals affirmed. Because the courts below correctly applied this Court's precedent, just as every court of appeals would, this Court should deny Kemp's petition for a writ of certiorari.

STATEMENT

1. The chain of events that ended in Kemp's quadruple murder began in a fit of jealousy. At some point during the party at Helton's trailer, Kemp noticed that "Becky and [Helton] had been paying attention to each other." Pet. App. B3. Kemp and Becky then "fussed about whether it was time to leave." *Id.* The conflict escalated, and Becky refused to leave with Kemp. Pet. App. A2. The others sided with

Becky, encouraging her to stay and Kemp to leave. *Id.*; Pet. App. B3. Cheryl Phegley asked Kemp multiple times to leave the party, and he finally did. Pet. App. A2. But before he did, according to Becky, "'he hollered and said I'll be sorry for not leaving.'" Pet. App. B3.

This was no idle threat. Kemp first drove around for a bit, "either around the area, or back to his mother's house, where he and Becky lived." Pet. App. B4. But he then headed back to the party at Helton's trailer with his .22-caliber rifle. Pet. App. A2; Pet. App. B4. Kemp's "truck was loud, with a recognizable sound." Pet. App. B4. So he "parked down the road behind the store and walked up through the woods about 50 yards to the porch of the trailer." Pet. App. E5. Kemp knocked on the front door. Pet. App. A2.

When Helton opened it, Kemp started shooting. Pet. App. B4; *see* Pet. App. A2; Pet. App. E5. Kemp shot Helton four times at close range without warning. And Kemp apparently kept shooting even after Helton had fallen to the floor. Each of Helton's four wounds—two in the chest, one in the forehead, and one in the face—sufficed to kill him. Pet. App E5. The wounds to Helton's forehead and face "exhibited evidence of close-range firing." Pet. App. E6. Kemp nearly touched Helton's lips as he fired his rifle, holding it at most one-half inch from Helton's mouth. *Id.* Not only that, "the trajectory of" Helton's forehead "wound was consistent with Helton being on his back when the bullet was delivered." *Id.* Kemp told a friend later that same night that "Helton hit the ground 'like a sack of taters.'" Pet. App. B4.

With Helton on the floor, Kemp kept shooting. Pet. App. A2. He first killed Sonny Phegley and Bubba Falls. Pet. App. B4. Kemp did not even know Falls's name. *See* Pet. App. E5. He would later say that Falls was "'just in the wrong place at the wrong time.'" Pet. App. A3. Kemp then turned his attention to Sonny's daughter, Cheryl. Pet. App. B4. At this point, Kemp had already wounded Cheryl in one of his initial volleys. Pet. App. E5. But she had "crawled down the hallway trying to get away." Pet. App. A3. Kemp found Cheryl in the hallway, "screaming, 'Oh God, she was gonna die.'" Pet. App. B4. As Kemp continued shooting Cheryl, he announced, "'Yes, she was going to die.'" *Id.*; *see* Pet. App. A3. All told, Kemp shot Cheryl five times. Pet. App. E5.

Kemp then began to search the trailer for his girlfriend, Becky. Pet. App. B4. Unknown to Kemp, Becky had run to a bedroom and hidden in a closet. Pet. App. E5. When he couldn't find her, he left—but not without hearing "some of the victims 'gasping for breath.'" Pet. App. B4. Becky left the closet once the shooting stopped and called 911. Pet. App. A3. While on the phone, Becky heard the distinctive sound of Kemp's truck starting up. Pet. App. A3; Pet. App. E5.

Kemp drove to the house of his friend Bill Stuckey. Pet. App. A3. After confessing to the four murders, Kemp asked Stuckey for "gas money to leave town." Pet. App. B4; *see* Pet. App. A3. Not long afterwards, the police arrested Kemp at Stuckey's house. Pet. App. B4. In Kemp's truck, they found a box of .22-caliber Remington shells that matched the spent shell casings they had already found with the bodies of

Kemp's four victims. Pet. App. A3. And at Kemp's mother's house, they found a .22-caliber Ruger semi-automatic rifle. *Id.*

Shortly after Kemp's arrest, he escaped from county jail. *Id.* A month later, he was apprehended in Texas. *Id.* In February 1994, Kemp was charged with four counts of capital murder. *Id.*

2. Jeff Rosenzweig, then and now a well-known member of the Arkansas capital-defense bar, was appointed to represent Kemp. *Id.*

As early as the 1970s and '80s, "Rosenzweig was emerging as [Arkansas's] chief death penalty litigator, at one point serving as president of the state's criminal defense lawyers association and adjunct professor of law at the University of Arkansas at Little Rock." Mark I. Pinsky, *JUSTICE: Will Clinton Again Oppose Executions? Old Pal Says Maybe*, L.A. Times (Jan. 31, 1995), https://lat.ms/2Tn6Q4j. By the time of Kemp's charges, Rosenzweig had been representing capital defendants for 15 years and had tried multiple capital-murder cases over that period. Tr. 877-78.[1] Around that same time, the *Los Angeles Times* referred to Rosenzweig as "Arkansas's best-known anti-death penalty crusader." Pinsky, *supra*, https://lat.ms/2Tn6Q4j. Indeed, the year before his appointment to represent Kemp, Rosenzweig helped to draft the Arkansas Public Defender Act. Tr. 879-80; *see* 1993 Ark. Laws Act 1193, sec. 11(d)(1) (creating Arkansas Public Defender Commission, which, among other responsibilities, "establish[es] policies and standards for the public defender system throughout

[1] Citations designated "Tr." are to the transcript of the evidentiary hearing held by the district court below.

the state"), *current version codified at* Ark. Code Ann. 16-87-203(a)(1); *see also* Ark. Code Ann. 16-87-201 through -215.

On Rosenzweig's motion, Judy Rudd was appointed as his co-counsel. Pet. App. A3. And from the time of Rosenzweig's appointment to represent Kemp in February 1994 until Kemp's trial just after Thanksgiving that year, Kemp's was Rosenzweig's only capital-murder trial. Tr. 881. As Rosenzweig modestly put it during the district court's evidentiary hearing, "I felt I was as experienced as anyone else they could have gotten at that time." Tr. 883.

Rather than trying to rebut the clear evidence that Kemp murdered four people, Rosenzweig instead focused his investigation on Kemp's mental health and upbringing. *See* Pet. App. A4-5; Pet. App. B4-5. To trigger the State's duty under state law to evaluate Kemp at the Arkansas State Hospital, Rosenzweig gave notice that he intended to rely on "a defense of not guilty by reason of mental disease or defect." Pet. App. A4; *see Hardaway v. State*, 906 S.W.2d 288, 290 (Ark. 1995) (describing state-law effect of such notice under now-repealed Ark. Code Ann. 5-2-305); *cf.* Ark. Code Ann. 5-2-328 (current version of relevant law). Although the Arkansas State Hospital found that Kemp was competent to stand trial and possessed a 90 IQ, it also "diagnosed [him] with alcohol abuse, alcohol dependence, cannabis abuse, and personality disorder, not otherwise specified." Pet. App. A4. So Rosenzweig requested and obtained a court-appointed psychologist for the defense, Dr. James Moneypenny.

Id. Expanding on the Arkansas State Hospital's diagnosis, "Dr. Moneypenny diagnosed Kemp with alcohol abuse and personality disorder with prominent antisocial features." *Id.*

Rosenzweig's investigation also turned up considerable evidence of Kemp's violent past. When the State disclosed in discovery that it would present penalty-phase evidence that Kemp had committed prior violent felonies, Rosenzweig pressed for the state trial court to order disclosure. *Id.*; *see* Pet. App. B44-45. Kemp's history of violence mostly involved Becky. Twice in late 1986, Kemp struck Becky in the face—on one occasion, breaking her nose; on the other, opening a cut near her eye that it took five stitches to fix. Pet. App. A4. At some point after those 1986 incidents, Kemp again broke Becky's nose. *Id.* Around the time of his quadruple murder, Kemp threatened to kill Becky and his mother as he pulled a gun on them. *Id.* And just two weeks before he killed four people related to an argument with Becky, Kemp dragged another woman alongside his car as he angrily drove away from Becky. *Id.*; Pet. App. B45.

Rosenzweig moved for a continuance or to exclude this evidence. Pet. App. A4. The state trial court ruled that the State could not introduce evidence of Kemp's prior violent felonies because it "had not prosecuted Kemp for any of the offenses." *Id.* This ruling was wrong. *See* Pet. App. B44 (citing Ark. R. Evid. 404(b)). But it was an important strategic victory for Rosenzweig. *See* Pet. App. B44-45 ("The last thing the jury needed to hear was that, on other occasions, Kemp had broken Becky's nose, pulled a gun on Becky and [his mother], and dragged another woman alongside a

vehicle as he drove away angry from an argument with Becky."). So he "[d]ecid[ed] to move forward with trial, rather than risk reconsideration and reversal of this victory." Pet. App. B44.

3. At trial, "Kemp's lawyers essentially conceded guilt, focusing instead on what degree of murder, and what punishment, fit the crimes." Pet. App. B4.

Rosenzweig "pursued a theory of imperfect self-defense." Pet. App. A5. He told the jury "that Kemp had overreacted to what he perceived to be a threat because he was intoxicated and suffered from alcoholism and a personality disorder." *Id.* Consistent with that theory, Becky testified about the large amount of beer that she and Kemp drank on the day of the murders. *Id.* Bill Stuckey—the friend to whom Kemp fled after the murders for gas money to leave town—also testified that Kemp drank heavily the day of the murders. *Id.* Additionally, Stuckey testified that Kemp said that night the four victims had threatened him. *Id.*

The district court summarized Rosenzweig's strategy well: "The defense theory was that a heavily intoxicated person, whose personality had been misshapen by an abusive and violent upbringing, overreacted and lashed out in imperfect self-defense." Pet. App. B5. Kemp's imperfect-self-defense theory notwithstanding, the jury found him guilty on all four capital-murder counts. Pet. App. A5.

Rosenzweig's co-counsel took the lead on Kemp's mitigation case and focused particularly on Kemp's "'abusive childhood.'" Pet. App. A6. The evidence of childhood abuse came mostly from the testimony of Kemp's mother, Lillie. Lillie testified that Kemp's father, Verlon, "was a mean alcoholic, who seemed to hate Kemp." *Id.* The

abuse began when Kemp was an infant. Verlon would spank Kemp for crying or "pick him up and just shake him good." *Id.* It intensified as Kemp grew. Verlon regularly whipped Kemp and Kemp's brother with a belt for making noise. *Id.* And once, when Kemp was a teenager, Lillie testified that Verlon choked him "'until he turned blue and [Kemp] almost quit breathing.'" *Id.* (alteration in original). Despite Lillie's pleas "'to turn him loose,'" Verlon "'just kept on'" choking him. *Id.* He only let go when Lillie "'laid his head open'"—"'hit him right over the head'" with a Pepsi bottle. *Id.* Lillie testified that Verlon had even expressly threatened to kill Kemp. *Id.*

During the penalty phase of Kemp's trial, Rosenzweig's co-counsel also put on expert psychological testimony about the effects that Verlon's abuse had on Kemp. Pet. App. A6-7. Dr. Moneypenny told the jury that Kemp "manifested a personality disorder with prominent antisocial features." Pet. App. A6. That disorder, according to Dr. Moneypenny, made Kemp unable to manage his impulses, heightened his sense of danger, and led him to be overly sensitive to perceived threats. Pet. App. A6-7. And Dr. Moneypenny explicitly tied Kemp's disorder to his childhood abuse. Pet. App. A7.

Despite hearing of Kemp's tragic upbringing and its lasting effects on him, the jury unanimously sentenced him to death for each of his four murders. *Id.* The jury unanimously found that two mitigating circumstances existed: "that Kemp had grown up in an environment of abuse and neglect and that his father had provided an example of extreme violent reactions to situations." *Id.* But the jury also unanimously found both of the State's chosen aggravating circumstances: that "Kemp

knowingly created a great risk of death to a person other than the victim," and that Kemp committed capital murder "for the purpose of avoiding or preventing arrest." Pet. App. A5, 7. Because it found that those aggravating circumstances outweighed the mitigating circumstances, the jury sentenced Kemp to death for each of the four murders.

On direct appeal, the Arkansas Supreme Court affirmed all four convictions and also the death sentence for Bubba Falls's murder. Pet. App. E13. But it vacated the other three death sentences because it concluded there was insufficient evidence to prove the "avoiding arrest" aggravating circumstance. *Id.*

At resentencing on the three vacated death sentences, the State relied only on the "risk of death to another person" aggravating circumstance, which Rosenzweig conceded to the jury. Pet. App. A7-8. And the mitigation case "was similar to that from the original trial." Pet. App. A8. Although the court below characterized the second mitigation case as "less effective," at least one juror found that each of three mitigating circumstances existed: that Kemp suffered "extreme mental or emotional disturbance," that he could "be a productive member of society in prison," and that he "grew up in an environment of abuse and alcoholism." *Id.* Nevertheless, the jury again sentenced Kemp to death for murdering Wayne Helton, Sonny Phegley, and Sonny's daughter, Cheryl. *Id.* On appeal, the Arkansas Supreme Court affirmed all three death sentences. Pet. App. F1-2.

Kemp obtained new counsel, who filed a petition for postconviction relief under the Arkansas Rules of Criminal Procedure. Pet. App. A8. Relying entirely on

Rosenzweig's advice about which claims to pursue, postconviction counsel did not claim that Rosenzweig's mitigation investigation was constitutionally inadequate. *Id.* The state trial court denied Kemp's petition for postconviction relief, and the Arkansas Supreme Court affirmed. Pet. App. G3.

4. Represented by the Federal Public Defender's office, Kemp filed a petition for a writ of habeas corpus in 2003 in the district court below. Pet. App. A9. Two years later, the district court stayed Kemp's petition so that he could exhaust his state-court remedies. *See Kemp v. State*, 2009 Ark. 631, at 2, 2009 WL 4876473, at *1. After four years of state-court litigation about Kemp's successive petition for state postconviction relief, the Arkansas Supreme Court dismissed it on state-law jurisdictional grounds. *Id.* at 6-7, 2009 WL 4876473, at *4.

In 2010, Kemp brought a slew of claims in an amended federal habeas petition. Pet. App. A9; *see* Pet. App. B48-51 (outlining Kemp's 17 habeas claims, some separated into as many as 12 subclaims). Most importantly for this Court's consideration, Kemp argued "that he was denied effective assistance of trial counsel based on Rosenzweig's failure to adequately investigate and present mitigating evidence related to childhood abuse, fetal-alcohol exposure, and post-traumatic stress disorder." Pet. App. A9. Before this Court's decision in *Trevino v. Thaler*, 569 U.S. 413 (2013), the district court concluded in a 2012 order that Kemp had procedurally defaulted his ineffective-assistance-of-trial-counsel claims. *See* Pet. App. B2. In light of *Trevino*, however, the district court vacated portions of its 2012 order regarding Kemp's procedural default and granted a hearing "on Kemp's claims of ineffective assistance of

trial counsel arising from alleged mental illness, organic brain damage, and childhood trauma." *Id.*

"After a decade's worth of work by many good lawyers" with the Federal Public Defender's office, Pet. App. B45, the district court held an evidentiary hearing that lasted for eight days, during which it heard testimony from 13 witnesses and received 145 exhibits, Pet. App. A10. The evidence provided additional detail on the two primary mitigation themes presented during the penalty phase of Kemp's trials: that he experienced terrible abuse throughout his early life at the hands of his father, Verlon; and that as a result, Kemp suffered from mental-health conditions that impaired his ability to control his behavior. *Id.* The additional evidence about Kemp's childhood abuse came both from extended family members and from documentary evidence. *Id.* And the Federal Public Defender put on the testimony of three different expert witnesses to develop his behavioral-control issues. *Id.* These experts diagnosed him, decades after his crimes, with partial fetal-alcohol disorder and post-traumatic stress disorder. Pet. App. A10-11.

Aside from expanding on the trial evidence of Verlon's abuse and Kemp's mental health, the testimony at the district court's hearing also detailed the investigation performed by Kemp's lead trial counsel, Jeff Rosenzweig. *See* Pet. App. A11-12. In light of the inescapable evidence of Kemp's guilt, Rosenzweig strategically focused on a mitigation case. Pet. App. A11. Relevant Arkansas law and the evidence led

Rosenzweig to argue to the jury that Kemp, "a heavily intoxicated person, whose personality had been misshapen by an abusive and violent upbringing, overreacted and lashed out in imperfect self-defense." Pet. App. B5.

To support this argument, Rosenzweig testified that he primarily relied on Kemp himself, Kemp's mother, Lillie, and Kemp's aunt. Pet. App. A11. But Rosenzweig did more than just speak with Kemp and two immediately accessible relatives. He also spoke with Kemp's employer and with a childhood friend of Kemp, who was familiar with Verlon's abuse. *Id.*; Pet. App. B35. And both Rosenzweig and Lillie repeatedly tried to get Kemp's brother to help, but he refused, insisting "that Kemp should die for what he had done." Pet. App. A11; *see* Pet. App. B35 ("[Kemp's brother] was unequivocal, telling counsel that he 'wanted Tim Kemp to die.'"). Rosenzweig even traveled out of state to Houston, Missouri, "to gather Kemp's school records, talk to potential witnesses, and visit the local courthouse." Pet. App. A11; *see* Pet. App. B35.

Kemp's history created problems for Rosenzweig in presenting his mitigation case. For one thing, Rosenzweig carefully avoided "open[ing] the door to the state's presentation of evidence regarding [Kemp's] escape" from jail after his arrest for these four murders. Pet. App. A11-12. If the jury heard about Kemp's escape, "Rosenzweig believed [it] would be disastrous to the defense." Pet. App. A12. This strategic choice led Rosenzweig not to call Kemp's aunt as a mitigation witness because she "had helped Kemp after his escape from jail." Pet. App. A11. For another thing, Kemp's history of violence against women made Rosenzweig tread carefully when talking about Kemp's background. Pet. App. A12.

Despite these potential pitfalls, the mitigation case at Kemp's trial was "convincing," according to the district court below. Pet. App. B36. It included evidence that Verlon "had been an alcoholic who had physically and emotionally abused his wife and children." Pet. App. A11; *see* Pet. App. B36 (emphasizing that "[t]he first jury unanimously found the mitigating circumstance that Kemp grew up in an environment of abuse and alcoholism"). "Rosenzweig also learned that although Kemp was an alcoholic, he had been a good worker." Pet. App. A11. A key piece of this mitigation case was the testimony of Dr. Moneypenny, the psychologist retained as an expert witness for Kemp's defense, with whom Rosenzweig shared the results of his investigation. *See id.*; Pet. App. B36. Dr. Moneypenny diagnosed Kemp with "a personality disorder with prominent antisocial features," which "is often a coping mechanism for individuals who have been abused." Pet. App. A6-7. And he told the jury this abuse-triggered disorder led Kemp to murder the four victims. Pet. App. A7.

Considering Rosenzweig's investigation, the district court below found no deficient performance. *See* Pet. App. B30-45. After a decade-long investigation, the federal public defender's office argued to the district court that the trial evidence "should have alerted [Kemp's] lawyer to the possibility of a fetal alcohol effects (or partial fetal alcohol syndrome) diagnosis." Pet. App. B37. But Rosenzweig's investigation brought forth evidence of alcohol abuse only by Kemp and Verlon—not Kemp's mother, Lillie. *See* Pet. App. A11 (recounting that Rosenzweig "did not get the impression that Lillie had been a heavy drinker, nor did he 'pick up on any fetal alcohol issues'"). The investigation "contained hints" of Lillie's alcohol abuse—"not red flags"

about fetal alcohol exposure. Pet. App. B37. At the time of Rosenzweig's investigation, there was no "solid indication that Lillie drank alcohol heavily while pregnant." *Id.* "There just wasn't enough evidence to show that Kemp's lawyers failed to act on a potential fetal alcohol effects (or partial fetal alcohol syndrome) diagnosis." *Id.*

Regarding new evidence suggesting that Kemp suffered from posttraumatic stress disorder, the district court found that, even "[w]ithout the diagnosis or label, the essence of PTSD was put before the juries in Dr. Moneypenny's testimony as well as the abuse evidence." Pet. App. B39; *see* Pet. App. B38-40 (summarizing the evidence supporting this finding). Indeed, at both of Kemp's trials "[o]ne or more jurors . . . found that Kemp committed the murders 'under extreme mental or emotional disturbance.'" Pet. App. B39-40.

As a result, the district court concluded that Rosenzweig could have reasonably concluded at the time of trial that any additional mitigation evidence would "'be only cumulative, and the search for it distractive from more important duties.'" Pet. App. B40 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam)). Convinced that "a decade's worth of work by many good lawyers" had indeed uncovered important "proof about Kemp's extremely troubled background and significant mental challenges," the district court thought this proof would have convinced at least one juror to sentence Kemp to life for each of the four murders he indisputably committed. Pet. App. B45.

The district court never explained why it thought Kemp's troubled background would have outweighed in that hypothetical juror's mind "the undisputed, powerful,

and sad story of what happened that night." Pet. App. B5. Consider just the murder of Cheryl Phegley. Kemp did not deny to either jury that "he followed Cheryl down the hall, and shot her five times, telling her that she was going to die." Pet. App. B28. The district court simply asserted that evidence of "mitigation based on organic brain damage and PTSD" would have led a juror to vote for a life sentence. Pet. App. B29. It did not detail why this "expanded mitigation case" would have made any difference. *Id.* Indeed, the district court itself remarked that Kemp's four murders all "bear the hallmarks of premeditation and deliberation." Pet. App. B28.

Regardless of the district court's inexplicable prejudice ruling, however, it ruled that Kemp's trial counsel "performed adequately, not deficiently." Pet. App. B6. Adhering to the requirement that it "must evaluate performance . . . without 'the distorting effects of hindsight,'" the district court refused to presume that trial counsel fell below what the Constitution requires simply because a large team of lawyers could—over the course of ten years or more—dig up additional evidence supporting Kemp's mitigation case. Pet. App. B34 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)); *see* Pet. App. B6-7, 45. The district court dismissed Kemp's petition for a writ of habeas corpus. Pet. App. B46-47.

The district court granted Kemp a certificate of appealability on three issues, all related to whether his trial counsel's performance was constitutionally deficient. *See* Pet. App. B46-47. First, "[w]as Kemp's lawyers' work constitutionally defective in not investigating fetal-alcohol exposure, or in not presenting facts about this issue in mit-

igation?" Pet App. B47. Second, "[w]as Kemp's lawyers' work constitutionally defective in not investigating Kemp's childhood abuse further, or in not presenting more abuse evidence in mitigation?" *Id.* And third, "[w]as Kemp's lawyers' work constitutionally defective in not investigating post-traumatic stress disorder, or in not presenting facts about this issue in mitigation?" *Id.* As the Eighth Circuit noted, "[t]he certificate of appealability addresse[d] only deficient performance" and not prejudice. Pet. App. A14.

The district court did not grant a certificate of appealability for Kemp's many other claims. Only a handful are relevant here. These claims relate to vague allegations of prosecutorial misconduct. *See* Pet. 32-37 (arguing that this Court should summarily reverse the refusal to grant a certificate of appealability on these claims). As the district court made clear, however, these claims are procedurally defaulted, and Kemp did not show the prejudice required to overcome his default. *See* Pet. App. B23-25. Kemp failed to "establish[] that he was unable to develop the new facts about alleged prosecutorial misconduct in state court despite diligent efforts to do." Pet. App. B25. Not only that, the district court found that the facts of these claims "wouldn't change the outcome of the case." *Id.*

5. Kemp appealed the district court's judgment to the Eighth Circuit. *See* Pet. App. A1. Soon after appealing, Kemp asked the court of appeals to expand the certificate of appealability to include many of his claims unrelated to trial counsel's miti-

gation investigation, including his prosecutorial-misconduct claims. *See* Mot. to Expand the Cert. of Appealability, *Kemp v. Kelley*, No. 15-3849 (8th Cir. Jan. 12, 2016), ECF#4355115 at 10-48. The Eighth Circuit denied Kemp's motion. Pet. App. D1.

Per the terms of the district court's certificate of appealability, therefore, the Eighth Circuit considered only whether Rosenzweig's performance fell below the constitutional standard in *Strickland*. *See* Pet. App. A19 (declining to exercise discretion to address issues outside certificate of appealability). More precisely, because it was "undisputed that the constitutional claim at issue here [was] procedurally defaulted" by Kemp during his state postconviction proceedings, the court of appeals considered whether Kemp could take advantage of the "narrow exception" to procedural default this Court announced in *Trevino* and *Martinez v. Ryan*, 566 U.S. 1 (2012). Pet. App. A13. Whether Kemp could take advantage of that narrow exception turned on "whether [he] had presented a substantial claim of ineffective assistance of trial counsel." Pet. App. A14. The crux of Kemp's ineffective-assistance claim is "whether trial counsel was constitutionally ineffective for failing to adequately investigate and present mitigating evidence related to childhood abuse, fetal-alcohol exposure, and post-traumatic stress disorder." *Id.* Agreeing with the district court that Kemp had not established that this claim was substantial, the Eighth Circuit affirmed the dismissal of Kemp's petition. Pet. App. A19.

The Eighth Circuit reviewed de novo Kemp's ineffective-assistance claim and adhered to this Court's consistent guidance to consider trial counsel's performance under a "highly deferential" standard. Pet. App. A14 (citing *Strickland*, 466 U.S. at

689). Accordingly, it measured the reasonableness of Rosenzweig's representation "under the prevailing professional norms at the time of [his] performance." *Id.* (citing *Bobby*, 558 U.S. at 7). "[M]ak[ing] every effort 'to eliminate the distorting effects of hindsight,'" *id.* (quoting *Strickland*, 466 U.S. at 689), the Eighth Circuit held that Rosenzweig's performance was not constitutionally deficient, Pet. App. A19.

Because the Eighth Circuit held that "Rosenzweig's investigation into Kemp's background" was reasonable, it rejected his ineffective-assistance claim. Pet. App. A16. Both Kemp and his mother, Lillie, detailed for Rosenzweig how Verlon had abused Kemp. *Id.* Rosenzweig also "spoke with Kemp's childhood friend who knew of Verlon's abuse," and with Kemp's aunt. *Id.* Kemp's brother certainly "'would have been an excellent source' of information on Kemp's tumultuous childhood," but Rosenzweig could not get Kemp's brother to help. *Id.* (quoting Pet. App. B40).

The Eighth Circuit also held that Rosenzweig performed reasonably at Kemp's trial and resentencing. *See* Pet. App. A16-17. To defend Kemp, unquestionably guilty of quadruple murder, Rosenzweig attempted "to reduce the penalties to anything less than death sentences." Pet. App. A17. As an important first step, Rosenzweig "effectively kept from both juries evidence regarding Kemp's escape from prison and his prior violent felonies." *Id.* To keep that evidence out ,Rosenzweig made the strategic decision "that Lillie's testimony would adequately describe Kemp's life history." Pet. App. A16. Rosenzweig might have supplemented Lillie's testimony with that of Kemp's aunt, but he chose not to call her "for fear of opening the door to evidence of Kemp's escape from jail." *Id.* Although he focused on Lillie's testimony, he did not

leave the jury to draw its own conclusions based on her testimony. He put on Dr. Moneypenny, who gave an expert opinion about "the adverse mental health effect of Kemp's violence-filled childhood" that "better explain[ed]" Kemp's background "to the jury." *Id.*

Considered "in light of the circumstances that [Rosenzweig] was faced with at the time" of Kemp's trials, the Eighth Circuit could "[]not say that his performance fell below constitutional requirements." Pet. App. A19. In light of all the detail that resulted from current counsel's ten-year-long investigation, the Eighth Circuit noted the temptation to "suggest that Rosenzweig should have interviewed more witnesses and sought additional documents." Pet. App. A17. But based on the evidence Rosenzweig had in hand at the time of Kemp's trials, "it was not unreasonable of him to forgo seeking out further sources." *Id.* In fact, the evidence presented in the district court below simply "confirmed Lillie's description of Verlon Kemp as an especially mean child-hating, pain-inflicting alcoholic." Pet. App. A19.

Having held that Rosenzweig's investigation was reasonable, the Eighth Circuit rejected Kemp's attempt to create a new rule that would render it per se deficient performance because he did not hire "an investigator or mitigation specialist." Pet. App. A15. To support this rule, Kemp asked the Eighth Circuit to constitutionalize the American Bar Association's guidelines for counsel in capital cases. *See id.* But the Eighth Circuit pointed out that this Court "has emphasized that such sources serve only as guides." Pet. App. A16 (citing *Strickland*, 466 U.S. at 688). It refused

to expand *Strickland* to "require[] that counsel hire—or seek funds to hire—an investigator or mitigation specialist." *Id.* Rosenzweig's only duty was to complete a thorough investigation. *Id.* (citing *Terry Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Because Rosenzweig's investigation was thorough, "his decision to complete the investigation himself was reasonable." *Id.*

Like the district court, the Eighth Circuit rejected Kemp's ineffective-assistance claim. Pet. App. A19. It then denied his petition for rehearing en banc. Pet. App. C1. Then Kemp timely filed his petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. As any other court of appeals would have, the Eighth Circuit correctly determined that trial counsel's performance was not deficient.

Asked by Kemp to review the investigation performed by his trial counsel, the Eighth Circuit properly "judge[d] the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see* Pet. App. A14. Under that standard, the Eighth Circuit determined that Kemp's ineffective-assistance claim did not have "some merit." *Martinez v. Ryan*, 566 U.S. 1, 14 (2012); *see* Pet. App. A12-19. Because Kemp thus had not presented "'a substantial claim'" for ineffective assistance of trial counsel, he could not take advantage of this Court's "narrow exception" allowing certain procedurally defaulted ineffective-assistance claims to proceed in federal court. *Trevino v. Thaler*, 569 U.S. 413, 428-29 (2013) (quoting *Martinez*, 566 U.S. at 17). Therefore, the Eighth Circuit correctly applied this Court's precedent and affirmed the dismissal of Kemp's petition for a writ of habeas corpus. Pet. App. A19.

And Kemp's contrary claim notwithstanding, no other court of appeals would have held that he has presented a substantial ineffective-assistance claim. This Court should deny his petition for a writ of certiorari.

A. The court of appeals correctly applied this Court's decisions regarding ineffective assistance of trial counsel.

As the courts below acknowledged, Kemp's trial counsel faced an unenviable task: defending a man who even now admits that he left a house party in a rage, got a gun, and returned to murder four people, one of them a wounded woman attempting to escape from him. Pet. 32; *see* Pet. App. B3 ("No one has ever really disputed that Kemp killed four people."). To try and mitigate the undisputed facts of Kemp's quadruple murder, Jeff Rosenzweig, lead trial counsel, strategically focused on developing a mitigation case based on Kemp's background. In particular, Rosenzweig investigated the abuse that Kemp had suffered at his father's hands. *See* Pet. App. A4-5; Pet. App. B3-5. During both sentencing proceedings, Rosenzweig with co-counsel presented to the jury evidence of that abuse and its lasting psychological effects on Kemp. *See* Pet. App. A16-19. Rosenzweig's investigation was thorough and his strategic choices were reasonable, which is all that *Strickland* requires. *See* 466 U.S. at 687-91.

To undermine that conclusion, Kemp faults the court of appeals for failing to use the American Bar Association's guidelines for capital counsel as "a checklist for judicial evaluation of [Rosenzweig's] performance." *Id.* at 688; *see* Pet. 16-24. But this Court has been unmistakably clear that treating any "particular set of detailed rules" as binding on defense counsel "would interfere with the constitutionally protected

independence of counsel." *Strickland*, 466 U.S. at 688-89; *see Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (per curiam) (reversing court of appeals decision that treated ABA's guidelines "as inexorable commands"). Because the Eighth Circuit properly applied *Strickland* and correctly held that Rosenzweig's performance was reasonable, this Court should deny Kemp's petition for certiorari.

1. Unlike trial counsel that this Court has held transgressed *Strickland*, Rosenzweig followed all the obvious leads while investigating Kemp's background for potential mitigation evidence. *Cf. Bobby*, 558 U.S. at 11 (discussing cases where ineffective counsel "failed to act while potentially powerful mitigating evidence stared them in the face").

To develop the mitigation case, Rosenzweig primarily relied on Kemp, his mother, Lillie, and his aunt. Pet. App. A11. But Rosenzweig did not exclusively rely on them. He also spoke with Kemp's former employer and with a childhood friend of Kemp who was familiar with the abuse Kemp had suffered as a child. Pet. App. A11, 16; Pet. App B35. Rosenzweig repeatedly sought help from Kemp's brother, going to his house and telephoning him. Pet. App. B35. Making no progress, he "asked Lillie to intervene." *Id.* But Kemp's brother "still refused to cooperate" and told Rosenzweig "that he 'wanted Tim Kemp to die.'" *Id.* In addition to the work Rosenzweig did to collect mitigation evidence locally, he traveled outside Arkansas to Houston, Missouri, where he "gather[ed] Kemp's school records, talk[ed] to potential witnesses, and visit[ed] the local courthouse." Pet. App. A11.

Through this investigation, Rosenzweig learned much about Kemp's background, although not all of it was helpful to Kemp's mitigation case. On the helpful (albeit tragic) side, Rosenzweig learned that Kemp's father, Verlon, "had been an alcoholic who had physically and emotionally abused his wife and children." Pet. App. A11. And he learned "that although Kemp was an alcoholic, he had been a good worker." *Id.* But on the not-so-helpful side, Rosenzweig learned that Kemp's aunt—on whom Rosenzweig had relied to understand Kemp's background—"had helped Kemp after his escape from jail." Pet. App. A12. This ruled out Kemp's aunt as a trial witness, "lest her testimony open the door to the state's presentation of evidence regarding the escape, which Rosenzweig believed would be disastrous to the defense." Pet. App. A11-12.

Rosenzweig learned other, even less helpful details about Kemp's background, the least helpful of all being Kemp's significant history of violent felonies against women. Pet. App. A12. Kemp's prior violent felonies first arose when the State disclosed its intent to present penalty-phase evidence of them. Pet. App. A4. Rosenzweig successfully filed a motion asking the trial court to order the State to disclose the details of those other felonies. *Id.* "[O]n other occasions, Kemp had broken [his girlfriend] Becky's nose, pulled a gun on Becky and Lillie, and dragged another woman alongside a vehicle as he drove away angry from an argument with Becky." Pet. App. B44-45. Realizing this was "[t]he last thing the jury needed to hear," Rosenzweig fought to exclude evidence of Kemp's prior violent felonies. Pet. App.

B44. And he won, although his victory was "based on a legal mistake" committed by the trial court. *Id.*

Rosenzweig's strategic decisionmaking regarding the unhelpful information in Kemp's background typifies the sorts of "strategic choices made after thorough investigation of law and facts relevant to plausible options" that this Court has long said "are virtually unchallengeable." *Strickland*, 466 U.S. at 690. By choosing not to call Kemp's aunt as a witness and by aggressive pretrial motions practice, Rosenzweig "effectively kept from both juries evidence regarding Kemp's escape from prison and his prior violent felonies." Pet. App. A17.

Rosenzweig's handling of Kemp's prior violent felonies stands in particularly sharp contrast to actions by trial counsel in cases where this Court has held that an inadequate investigation amounted to constitutionally deficient performance. Contrast this case with *Rompilla v. Beard*, 545 U.S. 374 (2005), for example. There this Court held that trial counsel "were deficient in failing to examine the court file on Rompilla's prior conviction" for rape and assault because they knew that the State in that case would seek the death penalty based on that conviction. *Id.* at 383. Unlike trial counsel in *Rompilla*, upon learning of the State's intent to rely on Kemp's prior violent felonies, Rosenzweig promptly investigated and then convinced the trial court to exclude evidence about Kemp's prior violent felonies from the jury. *See* Pet. App. B44-45.

This is far from a case where trial counsel "flout[ed] prudence" by failing "to look at a file he kn[ew] the prosecution w[ould] cull for aggravating evidence." *Rompilla*,

545 U.S. at 389. In light of his "reasonable investigation[]," Rosenzweig's judgments were entitled to "a heavy measure of deference" by the court of appeals. *Strickland*, 466 U.S. at 691. The Eighth Circuit correctly applied that standard. Pet. App. A16-19.

2. Rosenzweig leveraged the results of his investigation into Kemp's background by enlisting mental-health professionals to explain the likely long-term effect of a childhood as abusive as Kemp's. These professionals diagnosed Kemp with a personality disorder. And one of them testified to the jury that Kemp's diagnosis, combined with his alcohol use, impaired his ability to control his actions when he murdered the four victims. This Court has held elsewhere that a similar mitigation case satisfied trial counsel's duties under *Strickland*. *See Bobby*, 558 U.S. at 11 (discussing expert testimony that habeas petitioner's "personality disorder and his consumption of drugs and alcohol the day of the crime impaired 'his ability to refrain from the [crime]'" (brackets in original)).

Rosenzweig began by having Kemp examined at the Arkansas State Hospital, which diagnosed Kemp with a "personality disorder, not otherwise specified." Pet. App. A4. Realizing that the Arkansas State Hospital's diagnosis could aid Kemp's mitigation case if further developed, Rosenzweig successfully sought a court-appointed psychologist, Dr. James Moneypenny, to serve as an independent expert for the defense. *Id.* Rosenzweig shared the results of his own investigation with Dr. Moneypenny. *See* Pet. App. A11, 18; Pet. App. B36-39. Not content simply to take Rosenzweig's word, Dr. Moneypenny conducted his own "interviews with Kemp and

Lillie" and reviewed records that Rosenzweig provided to him. Pet. App. B38; *see* Pet. App. A18. Based on this information, Dr. Moneypenny diagnosed Kemp with "a personality disorder with prominent antisocial features," a disorder that Dr. Moneypenny called "a coping mechanism for individuals who had been abused." Pet. App. A6-7.

Rosenzweig and his co-counsel went beyond simply having Kemp diagnosed with a personality disorder arising out of childhood abuse. They also had Dr. Moneypenny connect that diagnosis to Kemp's quadruple murder. According to Dr. Moneypenny, "a person with Kemp's diagnoses has a heightened sense of danger and is sensitive to perceiving threats." Pet. App. A7. And that aspect of Kemp's disorder, Dr. Moneypenny testified, contributed to his murders. *Id.*; *see* Pet. App. B38 (discussing testimony "that Kemp's actions on the night of the shooting were influenced by an antisocial personality disorder and intoxication"). Because of Dr. Moneypenny's testimony, Rosenzweig's co-counsel was able to discuss in closing argument "the relationship between the abuse Kemp had suffered as a child, his alcoholism and personality disorder, and his impaired ability to act in a rational manner." Pet. App. A7.

Rosenzweig and his co-counsel's mitigation strategy worked—to a point. *See* Pet. App. B36 ("Th[e] mitigation evidence came in through Lillie's testimony and Dr. Moneypenny's. And it was convincing."). Although the first jury sentenced Kemp to death for each of the four murders, it unanimously found that he "had grown up in an environment of abuse and neglect and that his father had provided an example of

extreme violent reactions to situations." Pet. App. A7. So when the Arkansas Supreme Court ordered resentencing for three of Kemp's four murders, trial counsel took a similar strategic approach to mitigation. *See* Pet. App. A12. And some members of the resentencing jury found, among other mitigating circumstances, "that Kemp grew up in an environment of abuse and alcoholism." Pet. App. A8; *see* Pet. App. B39-40 (remarking that at both trials "[o]ne or more jurors . . . found that Kemp committed the murders 'under extreme mental or emotional disturbance'").

Leading up to both Kemp's initial trial and his resentencing, Rosenzweig and his co-counsel undertook a reasonable investigation, the results of which they adequately presented to both juries. The mitigation case they put on is similar to the mitigation case in *Bobby*, which this Court held did not amount to deficient performance. Here, as in that case, trial counsel dug up details about Kemp's abusive father and presented those details to the jury. *See Bobby*, 558 U.S. at 10. Additionally, trial counsel obtained expert mental-health testimony diagnosing Kemp with a personality disorder, which is similar to evidence the *Bobby* Court also highlighted. *See id.* at 11. And just like trial counsel in *Bobby*, Kemp's trial counsel elicited further expert testimony explaining to the jury "that his ability to conform his conduct to the requirements of the law was impaired by the individual and combined effects of his mental condition and his intoxication." Pet. App. A7; *see Bobby*, 558 U.S. at 10-11.

Because a similar mitigation case satisfied *Strickland* according to this Court in *Bobby*, the Eighth Circuit properly applied *Strickland* when it affirmed the dismissal of Kemp's habeas petition. To hold otherwise would be to cave to the ever-present

temptation "to conclude that a particular act or omission of counsel was unreasonable" simply because "counsel's defense . . . has proved unsuccessful." *Strickland*, 466 U.S. at 689. Indulging "a strong presumption that counsel's conduct f[ell] within the wide range of reasonable professional assistance," *id.*, the Eighth Circuit correctly applied this Court's decisions to reject Kemp's ineffective-assistance claim, Pet. App. A14-19.

3. "Despite all the mitigating evidence the defense did present," Kemp "fault[s] his counsel for failing to find more." *Bobby*, 558 U.S. at 11. He finds fault with Rosenzweig largely because, according to Kemp's current counsel, Rosenzweig did not check every box required by the American Bar Association's guidelines for capital counsel. *See* Pet. 20-24. But this Court has left no doubt that the ABA's guidelines—or any other private organization's opinions, for that matter—are at most to be treated "merely as evidence of what reasonably diligent attorneys would do," and not "as inexorable commands with which all capital defense counsel must fully comply." *Bobby*, 558 U.S. at 8 (quotation marks omitted); *see Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (reaffirming *Bobby*'s holding that the ABA's guidelines are "not 'inexorable commands'"). Any other rule would "restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689.

In particular, Kemp argues that the Eighth Circuit should have created a novel, per se rule based on the ABA guidelines that trial counsel must in every case hire a team of nonlegal staff to conduct a mitigation investigation. Pet. 20-21. Rejecting this argument, the Eighth Circuit followed this Court's consistent admonishments

against outsourcing judicial determinations of counsel's reasonableness to private organizations like the ABA. *See* Pet. App. A16. More to the point, the Eighth Circuit held based on its application of *Strickland* that "[i]n 1994 and 1997," at the time of Kemp's trial and resentencing, "there was no absolute requirement that counsel hire—or seek funds to hire—an investigator or mitigation specialist." *Id.* Because the Eighth Circuit "conclude[d] that Rosenzweig's investigation into Kemp's background satisfied his *Strickland* obligation," it also concluded, as a corollary, that "his decision to complete the investigation himself was reasonable." *Id.*; *see* Pet. App. B44 ("reject[ing] Kemp's argument that the Constitution requires a large team of lawyers and support personnel in every case"). If the Eighth Circuit had instead adopted Kemp's proposed per se rule, *see* Pet. 20-21, it would have violated this Court's insistence against "rigid requirements for acceptable assistance," *Strickland*, 466 U.S. at 690.

Compounding this analytical flaw in the petition, it also fails to explain why Rosenzweig's investigation didn't satisfy the checklist it lays out. *See* Pet. 23-24. For instance, Rosenzweig interviewed Kemp, Lillie, Kemp's aunt, Kemp's childhood friend, and Kemp's employer. Pet. App. A11; Pet. App. B35. And through those interviews Rosenzweig learned enough detail about Kemp's background that Dr. Moneypenny could diagnose Kemp as an alcoholic with an antisocial personality disorder attributable to that abuse. Pet. App. A4. The petition suggests that those were not the "extensive witness interviews" required by "practice standards." Pet. 23. But it never explains why this is so. Along similar lines, the petition claims Rosenzweig

failed to "do a wide search for records." *Id.* But it does not dispute that "Rosenzweig traveled to Houston, Missouri, to gather Kemp's school records, talk to potential witnesses, and visit the local courthouse." Pet. App. A11. To say that Rosenzweig could have done more to collect records is not to say that Kemp's constitutional rights were violated. *See, e.g.*, Pet. 23 (suggesting Rosenzweig should have also traveled to Illinois). This is "a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.'" *Bobby*, 558 U.S. at 11-12 (quoting *Strickland*, 466 U.S. at 699).

Other criticisms of Rosenzweig's strategic decisions in the petition are simply without factual support. It attacks Rosenzweig's decision, after choosing to forgo using Kemp's aunt at trial, not to present testimony by other relatives. Pet. 23. But the court of appeals below expressly found that "Rosenzweig capably presented the evidence of [Kemp's] childhood abuse through Lillie." Pet. App. A16. By definition, therefore, *Strickland* did not require Rosenzweig to put on testimony by any of Kemp's other relatives. *Cf. Bobby*, 558 U.S. at 11 ("[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties."). And the petition criticizes Rosenzweig for not "talking to Kemp's brother in person," Pet. 23, but the record indisputably demonstrates that Rosenzweig tried to do that—"[h]e went to [the] house" of Kemp's brother—and failed simply because Kemp's brother repeatedly refused to talk to him, Pet. App. B35.

Finally, the petition takes aim at Rosenzweig's supposed failure to "perform any investigation into Lillie Kemp," which it speculates might have led Rosenzweig to consider the possibility of fetal-alcohol exposure in Kemp. Pet. 24. But both the court of appeals and the district court made clear that no information available to Rosenzweig at the time of his investigation should have led him to look into Lillie's own alcohol consumption. Pet. App. A11, 18; Pet. App. B37. Because of that, "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face." *Bobby*, 558 U.S. at 11.

* * *

At bottom, Kemp's criticisms of Rosenzweig's investigation boil down to the claim that Rosenzweig should have found all the same evidence as current counsel. *See, e.g.*, Pet. 23-24, 26-27. But the question is not whether "[h]indsight may suggest that Rosenzweig should have interviewed more witnesses and sought additional documents." Pet. App. A17. From today's vantage point "it is all too easy for a court, examining [Rosenzweig's] defense after it has proved unsuccessful, to conclude that a particular act or omission of [his] was unreasonable." *Strickland*, 466 U.S. at 689. And given that the evidence supporting Kemp's habeas petition only came to light through "a decade's worth of work by many good lawyers," Pet. App. B45, it is especially crucial in this case "to evaluate [Rosenzweig's] conduct from [his] perspective *at the time*," *Strickland*, 466 U.S. at 689 (emphasis added).

Both the court of appeals and the district court controlled for the risk of hindsight bias by focusing on "the circumstances that [Rosenzweig] was faced with at the time."

Pet. App. A19; *see* Pet. App. B7 ("[S]etting aside what we know now, did Kemp's lawyers act so unreasonably and deficiently in the circumstances that the Constitution was violated? The answer to that hard question is, in this Court's opinion, no."). Applying *Strickland*'s "highly deferential" level of judicial scrutiny, both courts below found no merit to Kemp's ineffective-assistance claim. 466 U.S. at 689. They determined that Rosenzweig, an "able and experienced" capital-defense lawyer, "did his job adequately, though imperfectly." Pet. App. B44. Because that is a correct application of *Strickland*'s standard, this Court should deny Kemp's petition for a writ of certiorari.

B. There is no circuit split.

Kemp is not right that he "would have won relief in another judicial circuit." Pet. 30. Faced with a reasonable performance like Rosenzweig's, no court of appeals would have granted relief to Kemp on account of his request to treat the ABA's guidelines for capital counsel as "a checklist for judicial evaluation of attorney performance." *Strickland*, 466 U.S. at 688. To do so would violate this Court's clear teaching that the opinions of private organizations with limited membership like the ABA "are only guides, and not inexorable commands." *Padilla*, 559 U.S. at 367 (quotation marks and citations omitted). The decision below is not "in conflict with the decision of another United States court of appeals," so Kemp's petition should be denied. This Court's Rule 10(a).

Kemp selectively quotes two lines from a single page in an Eleventh Circuit decision to try and manufacture a circuit split. *See* Pet. 3, 30-31 (citing *Williams v. Allen*,

542 F.3d 1326, 1340 (11th Cir. 2008)). But unlike in this case, trial counsel in *Williams* interviewed *only* the petitioner's mother—and not any other witnesses. 542 F.3d at 1339. Although that lone interview turned up evidence of childhood abuse, trial counsel in *Williams* made no effort whatsoever to investigate that abuse. *Id.* at 1340. By contrast, Rosenzweig interviewed both Kemp and Lillie about Kemp's abusive father, Verlon. Pet. App. A11. And Rosenzweig didn't stop there. He also interviewed Kemp's aunt and one former employer, along with a "childhood friend who knew of Verlon's abuse." Pet. App. A16. And Rosenzweig doggedly, albeit unsuccessfully, pursued Kemp's brother for further details on Verlon's abuse. *See* Pet. App. A11. Rosenzweig did what the Eleventh Circuit said trial counsel should have done in *Williams*: He "corroborate[d] the evidence of abuse and" found additional witnesses who could "speak to the resulting impact on" Kemp. 542 F.3d at 1340. Rosenzweig's investigation in no way resembles the investigation the Eleventh Circuit held was ineffective in *Williams*.

Williams also does not support—nor does any other court of appeals decision—Kemp's attempt to override *Strickland*'s reasonableness standard with the ABA's detailed checklist for capital-defense counsel. *See* Pet. 18-19 (citing additional cases). For one thing, *Williams* predates this Court's decision in *Bobby* reaffirming the nonbinding nature of the ABA's guidelines. *Bobby*, 558 U.S. at 8-9. That said, the *Williams* court did not treat the ABA's guidelines as a definitive statement of *Strickland*'s requirements. It focused, much like the court of appeals below, on comparing

trial counsel's performance to the performance of trial counsel as discussed in other judicial decisions. *Compare Williams*, 542 F.3d at 1339-40, *with* Pet. App. A16.

Kemp cites an assortment of decisions from other circuits, but he does not explain why his case would have come out differently in any of those other courts. *See* Pet. 18-19. Most of these decisions stand for uncontroversial, generalized legal propositions, many simply for the idea that federal courts often treat the ABA's guidelines as an analytical tool when considering whether trial counsel's performance was deficient. *See Andrews v. Davis*, 944 F.3d 1092, 1109 (9th Cir. 2019) (referring to them as "evidence" of professional norms); *Littlejohn v. Trammell*, 704 F.3d 817, 860 (10th Cir. 2013) (calling them "'reference points'"); *see also Harris v. Sharp*, 941 F.3d 962, 976-77 (10th Cir. 2019) (relying on the Tenth Circuit's decision in *Littlejohn*); *Avena v. Chappell*, 932 F.3d 1237, 1249 (9th Cir. 2019) (noting, without analysis, that "testimony from three experienced capital defense attorneys" was in the record as evidence of professional norms); *Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015) (remarking as a general matter that capital-defense counsel must investigate a defendant's "'social background'").

Kemp only attempts to make an argument based on one of the other decisions he cites, *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019). *See* Pet. 19. But the facts before the Fourth Circuit there were much different than the facts of Kemp's case. There, trial counsel "testified that he had reports in his files that indicated [the petitioner's mother] drank during her pregnancy," and yet he made no effort to investigate fetal-alcohol exposure. 914 F.3d at 309. That lack of any effort, said the Fourth

Circuit, was deficient performance. *Id.* at 313-16. In this case, by contrast, both the district court and the court of appeals concluded that Rosenzweig had no reason to suspect fetal-alcohol exposure. *See* Pet. App. A11, 18; Pet. App. B37.

Kemp has not shown that the decision below is in conflict with any other court of appeals' decision. Therefore, this Court should deny the petition.

II. The district court correctly refused to issue a certificate of appealability on all of Kemp's other claims.

As already discussed, the district court refused to grant Kemp a certificate of appealability on any of his other claims, and the court of appeals denied his motion to expand the certificate of appealability. *See supra* pp. 15-16. He now asks this Court to summarily reverse—or to take this case on the merits despite—the denial of a certificate of appealability on a claim that he does not dispute was procedurally defaulted. Pet. 35, 37. Kemp also admits, however, the district court found "that [he] had failed to establish . . . that the new facts" he wanted to develop in support of this claim "would change the outcome of the case." Pet. 35. As a result, the district court ruled that Kemp had not shown prejudice sufficient to overcome his procedural default of this claim. Pet. App. B23-25. But Kemp makes no effort to show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see* Pet. 35-36 (reciting *Slack*'s standard but making no argument that it is met in this case). This Court should neither summarily reverse the denial of a certificate of appealability nor grant Kemp's petition as to the second question presented.

Kemp's claim, which he refers to as a "*Brady/Napue* claim," rests on a supposed inconsistency between a statement his girlfriend, Becky, made during an interview with the prosecutor and another in her trial testimony. Pet. 33-34. Kemp's prejudice theory is that the jury could have believed his self-defense argument if Becky had testified at trial that she saw a gun the night of the murders. Pet. 36. The problem with this prejudice theory is that *the jury in fact heard about the gun*. The Arkansas Supreme Court noted in Kemp's postconviction review proceedings: "The jury was informed that a gun was found at the scene and that the gun did not match the weapon that was used to commit the murders." Pet. App. G5. And Kemp's friend Bill Stuckey testified that, when Kemp showed up at Stuckey's house after committing the murders, he told Stuckey the four victims had threatened him. Pet. App. A5. In other words, regardless of Becky's supposedly false testimony, "the jury could have determined that one of the victims had a gun and that [Kemp] was forced to use his gun in self-defense." Pet. App. G5.

In light of this, Kemp cannot explain how Becky's testimony "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (quotation marks and emphasis omitted); *see* Order, Dist. Ct. Dkt., DE 107 at 7 ("[T]here was sufficient evidence, even without [Becky's] testimony, for the jury to find Kemp guilty."). The district court correctly determined that Kemp had not "made a substantial showing" of his claims related to Becky's testimony and thus correctly refused to issue a certificate of appealability. 28 U.S.C. 2253(c)(2).

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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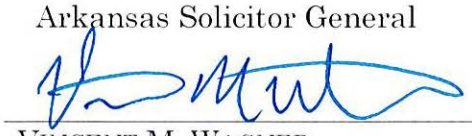

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