THIS IS A CAPITAL CASE

No. _____

In the Supreme Court of the United States

MICKEY THOMAS,

Petitioner

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

LISA G. PETERS
FEDERAL PUBLIC DEFENDER

JOHN C. WILLIAMS
Counsel of Record
Ass't Federal Public Defender
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
john_c_williams@fd.org

Counsel for Petitioner

THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

The district court vacated Petitioner's death sentence because his trial counsel rendered ineffective assistance. On appeal, Respondent contested only the district court's resolution of the merits. But the Eighth Circuit reversed on the basis of a procedural defense that Respondent abandoned on appeal. Specifically, the Eighth Circuit held that "bare bones, boilerplate allegations" of ineffectiveness in state court did not lead to a default that may be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). The questions presented are:

1. Whether *Wood v. Milyard*, 566 U.S. 463 (2012), prohibits a court of appeals from *sua sponte* raising a habeas defense that a state abandons on appeal.
2. Whether opportunity to object to an appellate court's actions in a rehearing petition satisfies this Court's conditions for *sua sponte* adjudication of habeas defenses. *See Wood* and *Day v. McDonough*, 547 U.S. 198 (2006).
3. Whether fair presentation of a federal habeas claim requires a petitioner to inform the state courts of the facts that support the claim.

PARTIES

The caption contains the names of all parties.

DIRECTLY RELATED CASES

- *State v. Thomas*, No. 67CR-04-52, Circuit Court of Pike County, Arkansas (on change of venue from Sevier County, Arkansas), trial proceedings, judgment entered September 28, 2005.

- *Thomas v. State*, No. CR-06-439, Arkansas Supreme Court, direct appeal from conviction and sentence, judgment entered May 17, 2007.

- *Thomas v. Arkansas*, No. 07-6419, United States Supreme Court, petition for a writ of certiorari, petition denied November 13, 2007.

- *Thomas v. State*, No. 67CR-04-52, Circuit Court of Sevier County, Arkansas, state postconviction, judgment entered February 1, 2010.

- *In re Mickey David Thomas*, No. 4:11-mc-49, United States District Court for the Eastern District of Arkansas, motion for appointment of federal habeas counsel, counsel appointed January 12, 2012.

- *Thomas v. State*, No. CR-10-545, Arkansas Supreme Court, appeal from denial of state postconviction, judgment entered March 20, 2014.

- *Thomas v. Kelley*, No. 6:14-cv-6038, United States District Court for the Western District of Arkansas, federal habeas, judgment entered March 31, 2017.

- *Thomas v. Payne*, Nos. 17-1833/17-2380, United States Court of Appeals for the Eighth Circuit, respondent's appeal from order granting sentencing-phase relief in federal habeas/petitioner's cross-appeal from order denying guilt-phase relief, judgment entered May 22, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Rules

PETITION FOR A WRIT OF CERTIORARI

Mickey Thomas 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 opinion of the United States Court of Appeals for the Eighth Circuit, reported at 960 F.3d 465 (8th Cir. 2020), is at Appendix A (App. 1a–20a). The order of the United States District Court for the Western District of Arkansas, unofficially reported at 2017 WL 1239148 (Mar. 31, 2017), is at Appendix B (App. 21a–78a). The order of the court of appeals denying panel rehearing is at Appendix C (App. 79a–80a). The order of the court of appeals denying rehearing en banc, reported at 977 F.3d 697 (8th Cir. 2020), is at Appendix D (App. 81a–82a).

JURISDICTION

The Eighth Circuit entered judgment on May 22, 2020. App. A. The Eighth Circuit denied a timely petition for panel rehearing on October 8, 2020. App. C. It denied a timely petition for rehearing en banc on October 15, 2020. App. D. Per this Court's order of March 19, 2020, a petition for a writ of certiorari is due 150 days from the date of an order denying a timely petition for rehearing. 589 U.S. ___ (2020). Thus, the deadline for this petition is March 15, 2021. *See* Rule 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented in this petition concern judge-made doctrines of waiver, forfeiture, and procedural default.

STATEMENT OF THE CASE

This case concerns an appellate court's order imposing a procedural bar that Respondent ("the State") knowingly abandoned on appeal.

The district court vacated Petitioner Mickey Thomas's death sentence because his trial counsel performed ineffectively. The district court reached the merits after determining that Thomas had defaulted his ineffectiveness claim in the initial-review collateral proceeding—a default excusable by the ineffective assistance of Thomas's state postconviction counsel. *See Martinez v. Ryan*, 566 U.S. 1, 16 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013); *Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) (holding that the *Martinez* exception is available in Arkansas because that state does not provide adequate review of ineffectiveness claims on direct appeal).

The State maintained throughout most of the district-court proceedings that Thomas had committed an initial-review default. After an evidentiary hearing on whether postconviction counsel's ineffectiveness should excuse the default, the State argued in simultaneous post-hearing briefing that Thomas actually committed an appellate-review default that *Martinez* could not reach. On appeal, the State dropped that belated contention and devoted the entirety of its opening brief—over 100 pages—to pressing error in the district court's merits analysis of the trial-ineffectiveness claim.

The court of appeals reversed, but not on the contested grounds. Instead, after an oral argument directed towards the merits, and without seeking additional input from the parties, the panel *sua sponte* revived the State's abandoned argument that

Thomas committed an appellate-review default. Thomas sought rehearing and requested an opportunity to brief the procedural-default issue. The court denied the petition, with Chief Judge Smith and Judges Colloton and Kelly dissenting from denial of rehearing en banc.

Additional details on the relevant procedural background are as follows.

A. State proceedings.

In September 2005, Thomas was convicted and sentenced to death for the capital murders of Donna Cary and Mona Shelton on June 14, 2004, at a business in De Queen, Arkansas. Thomas unsuccessfully appealed his conviction and sentence. *Thomas v. State*, 257 S.W.3d 92 (Ark. 2007). He then unsuccessfully petitioned this Court for a writ of certiorari. *Thomas v. Arkansas*, 552 U.S. 1025 (2007). From there, the case moved into state postconviction proceedings, which are of more direct relevance to the questions raised in this petition.

Jeff Harrelson was appointed to represent Thomas in state postconviction. The operative postconviction petition contains seven pages of substance and pleads eighteen legal points shorn of any supporting facts. Harrelson asserted that "[t]rial counsel was ineffective for failing to properly investigate and present mitigation evidence" and that "[t]rial counsel was ineffective for failing to properly investigate and present mental health issues." App. 95a. Those phrases constituted the entirety of the relevant ineffectiveness claims.

The state court held a hearing on the petition. Harrelson briefly presented testimony from the trial attorneys regarding their trial preparations, but he

introduced no exhibits and presented no evidence to illustrate what a proper investigation might have shown.

The state postconviction court denied the petition. Of the ineffectiveness claims related to mitigation and mental health, the court noted that "petitioner introduced no evidence in support of these claims." App. 88a.

An appeal to the Arkansas Supreme Court followed. Harrelson was allowed to remain on the case despite Thomas's pro se motions for new counsel and even though the Arkansas Supreme Court had already sanctioned him in two other capital cases. In *Sales v. State*, 2011 Ark. 402, the court twice referred Harrelson to disciplinary authorities for filing late and inadequate briefs. A concurring judge felt that Harrelson "demonstrated a casual disregard for the magnitude of the stakes that were entrusted to him and his obligations in representing a petitioner who is subject to the most severe penalty that our law recognizes. He simply should not be further entrusted with performing those duties before this court in this case." *Id.* at 3. That preferred sanction echoed the one Harrelson actually received in *Anderson v. State*, 2010 Ark. 375, where the court relieved him as counsel and referred him to disciplinary authorities because he twice filed a deficient brief and "[w]e do not foresee that giving him a third chance would change the outcome." A concurring judge noted Harrelson's disregard of instructions "to avoid the use of conclusory statements and arguments and [to] refrain from making arguments that are not fully developed." *Id.* at 4.

In Thomas's appeal, the Arkansas Supreme Court denied relief on two claims. *Thomas v. State*, 431 S.W.3d 923 (Ark. 2014). The appeal did not include the fact-free ineffectiveness claims concerning mitigation and mental health.

B. District court proceedings.

After appointment of new counsel, Thomas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleged "ineffective presentation of the case in mitigation." App'x 146.[1] In contrast to the fact-free state claims, this claim, referred to herein as the "mitigation claim," included eighty pages of factual allegations concerning counsel's investigative failures and the evidence counsel could have presented at sentencing. App'x 146–226. Specifically, the mitigation claim alleges omissions concerning failure to obtain documents, to prepare sentencing-phase testimony, to engage a trauma expert, and to present evidence of sexual abuse and particular mental disorders.

The State's answer to the petition correctly explained that procedural default arises if a petitioner did not "fairly present the facts and substance of his habeas claim to the state court" and if a state procedural rule would prevent him from doing so now. App'x 296; *cf. Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). The answer also expressed the State's understanding that *Martinez* may excuse an ineffectiveness claim that a petitioner fails to raise in state postconviction, but not one that he fails to appeal after raising it. App'x 298–99. The State then specifically

[1] Record citations are to the appendix the State filed in the Eighth Circuit. Where the appendix omits material necessary to understanding the issues, citations are provided to the relevant docket entry ("ECF No.") in the district court.

asserted that Thomas failed to raise the mitigation claim: "While Thomas generally alleged in his state post-conviction petition that his trial counsel 'failed to properly investigate and present mental-health issues,' . . . he did not allege any of the specific instances of deficient performance that he raises . . . in his federal habeas petition." App'x 387. The State further reasoned that Thomas's failure to offer these claims in state court created a procedural default because "the time to raise these claims in Arkansas has also expired under state law." *Id.*

The district court ordered an evidentiary hearing to determine whether postconviction counsel's ineffectiveness should excuse default of the mitigation claim. App. 51a; App'x 503. The court held a weeklong evidentiary hearing at which Thomas exhibited counsel's ineffectiveness and presented the mitigating evidence that effective counsel could have developed.

After the hearing, the district court called for simultaneous post-hearing briefs. In its brief, the State changed its position on whether Thomas defaulted the mitigation claim in the initial-review collateral proceeding. It now argued that Thomas presented the claim in state postconviction but then failed to appeal it. ECF No. 122, Br. at 1–4. The State thus reasoned that *Martinez* could not excuse the default after all. *See Martinez*, 566 U.S. at 16; *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). The State reiterated that position at an oral argument held the day after the briefs were filed, albeit sheepishly: "[I]t's a tough argument for me to stand and make to you now, having invested a substantial part of all of our collective lives in this hearing." ECF No. 135, Tr. at 68–69. The State asked the

district court to "address both arguments" but professed that it was "not simply asking you to just throw away all the evidence from the hearing." *Id.* at 70. It summed up: "[W]e don't just want you to write a two-page ruling that says *Martinez* doesn't apply." *Id.* at 70–71.

The district court issued judgment three weeks later. It first rejected the State's belated argument that *Martinez* does not apply to the mitigation claim. It reasoned that a habeas petitioner must present the factual and legal bases for his claim in state court. Harrelson failed to offer any facts to support the one-sentence ineffectiveness claims in the postconviction petition. That failure led to a default in the initial-review collateral proceeding. App. 58a–60a. Further, the district court concluded that Harrelson rendered ineffective assistance in state postconviction, having failed to investigate, to review trial counsel's file, or to do much more than read the record. App. 73a–74a.

On the merits, the district court found that trial counsel performed ineffectively at sentencing and ordered that Thomas's death sentence be vacated. App. 64a–73a. As the district court summarized, "[t]he result of trial counsel's lack of investigation and preparation was an entirely unconvincing case in mitigation, that failed to tell Thomas's whole life story." App.72a. The jury likely would have imposed a life sentence had it heard the "compelling" mitigating case that effective trial counsel would have presented. App. 69a. This included evidence that Thomas began using drugs as a four-year-old by mimicking his parents; that Thomas "witnessed domestic abuse between his mother, father, and mother's boyfriends, and between

his maternal grandparents"; that Thomas himself was "tied up and beaten on multiple occasions"; that "Thomas's childhood was permeated by poverty"; that "social services in Oklahoma supported Thomas's family for extended periods of time, with services including welfare assistance, food stamps, and housing subsidies," as exhibited by "voluminous" records that trial counsel failed to obtain; that Thomas has a "strong family and personal history of mental health issues"; and that Thomas was sexually abused. App. 66a–68a.

C. Eighth Circuit proceedings.

The State appealed the district court's order granting sentencing-phase relief on the mitigation claim. In its opening brief, the State unambiguously announced its intention to obtain reversal on the merits of that claim:

> The judgment should be reversed because Thomas's lawyers, who conducted a reasonable investigation of Thomas's life, family history, and mental health and presented a case for life sentences using multiple, interconnected categories of classically mitigating evidence, were not constitutionally ineffective in the penalty phase.

Appellant's Br. at i. The State held true to this statement. In a 117-page brief, it did not once suggest that the district court erred by reaching the merits. The State held to the same policy of arguing only the merits in its reply brief. It was aware, of course, that a procedural defense was available, having belatedly argued that defense in the district court.

The Eighth Circuit held an oral argument at which the State once again devoted its mitigation-claim efforts exclusively to pursuit of merits relief. The panel asked no questions about whether Thomas committed a form of procedural default that

Martinez cannot excuse. But five months later the panel released an opinion that reversed the district court by focusing on that very issue.

The Eighth Circuit disagreed with the district court that "failure to present both the factual and legal premises of the [mitigation claim] at the initial [state postconviction] proceeding led to procedural default." App. 8a. The court acknowledged that in state postconviction Thomas presented "bare bones, boilerplate allegations" and "only 'skimmed' the issues." App. 10a n.6. But it found no significance in the omission of a state-court factual presentation because "[t]he weakness of support for the claims in the [state postconviction] petition and hearing has no bearing on whether the claims were actually presented." App. 10a. The court concluded that "it was not Thomas's *failure to raise* the [mitigation claim] that triggered procedural default, because he did, in fact, raise [it]. Rather, it was his *failure to appeal* that resulted in the default." App. 10a–11a. Because *Martinez* does not excuse failure to appeal from an initial-review collateral proceeding, the court reversed the district court's order granting sentencing-phase relief.

In a footnote, the court acknowledged that the State "did not press the procedural default issue on appeal." App. 7a n.3. The court nevertheless thought it appropriate to rule on that ground because "the parties knew procedural default was in play and had opportunity to present their positions." *Id.* In support of that conclusion, the court cited *Dansby v. Hobbs*, 766 F.3d 809, 824 (8th Cir. 2014), a case in which the Eighth Circuit reversed a district court for *sua sponte* dismissing

a petitioner's habeas claim on procedural-default grounds without offering notice or an opportunity to be heard.

In a petition for panel rehearing and rehearing en banc, Thomas asserted that the State had waived the procedural defense by abandoning it on appeal and that the court lacked *sua sponte* authority to override the waiver under *Wood*. He alternatively argued that the panel failed to provide adequate notice and opportunity to be heard on the procedural defense. He requested en banc rehearing and, in the absence of review on the merits, supplemental briefing on the question of whether failure to support a bare ineffectiveness claim with facts in state court creates an initial-review default in federal habeas—a question on which, as explained below, the federal courts of appeal have reached a general consensus opposed to the panel's conclusion here.

The panel denied rehearing. Though silent on the waiver issue, it found that supplemental briefing was "unnecessary in light of the [rehearing] petition itself and the fully developed record from the district court proceedings." App. 79a.

The court denied rehearing en banc, though with three judges registering dissent. Judge Colloton wrote to explain his dissent:

> Having reversed a district court for relying *sua sponte* on procedural default without giving a prisoner notice and an opportunity to be heard, *Dansby v. Norris*, 766 F.3d 809, 824 (8th Cir. 2014), this court should hold itself to the same standard. *See also Day v. McDonough*, 547 U.S. 198, 2010 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). In this case, the State did not argue procedural default on appeal, so appellee Thomas did not have fair notice that the issue was "in play," and he had no reason to address the point in his brief.

> The panel's order denying the petition for panel rehearing does not solve the problem: a litigant's ability to point out after the fact that he was denied notice and an opportunity to be heard is not sufficient. A petition for rehearing, with its truncated length limit and distinct purpose, does not serve as a brief on the merits, and the panel did not grant rehearing in any event. Even assuming that a court of appeals may reverse *sua sponte* without notice or briefing when an issue is "raised and briefed before the district court," *Kennedy v. Kemna*, 666 F.3d 472, 481 (8th Cir. 2012), that proposition would be inapplicable here. Thomas did not brief the disputed procedural default issue in the district court; the State raised appellate default as to [the mitigation claim] for the first time in a post-hearing brief that was filed simultaneously with Thomas's post-hearing brief. The district court did not reach the issue, because it concluded that Thomas defaulted in the initial state [postconviction] proceeding.

App. 81a–82a (citations omitted).

REASONS FOR GRANTING THE PETITION

"In our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). That principle gives a little in habeas—but only a little. This Court has unambiguously instructed that a federal court may *never* consider a procedural defense that a state has knowingly waived. *See Wood v. Milyard*, 566 U.S. 463, 472–74 (2012). And the Court has been equally clear that a federal court should rarely consider *sua sponte* a forfeited (as opposed to waived) defense—certainly not before giving the parties notice and an opportunity to be heard on the defense. *Id.* The Eighth Circuit's failure to adhere to the Court's precedent in this case demands the Court's intervention to prevent future similar departures from the accepted—indeed, required—course of federal habeas proceedings.

The Eighth Circuit's departure from precedent is especially unfortunate here because, in reaching for the procedural defense, the court unnecessarily created a circuit split implicating important questions concerning procedural-default doctrine. The court concluded that a habeas petitioner fairly presents a federal habeas claim to a state court by articulating a legal ground that omits the facts upon which the claim relies. This conclusion places the Eighth Circuit in direct conflict with the Ninth Circuit, which has held in nearly identical circumstances that offering a generic ineffectiveness claim in state court *does not* suffice to fairly present a detailed federal ineffectiveness claim and *does not* preclude application of the *Martinez* exception to the federal claim. More broadly, the Eighth Circuit is out of step with the sensible position—which almost every federal court of appeals has explicitly embraced—that fair presentation of a federal habeas claim requires state-court articulation of facts upon which the claim relies.

A. The Eighth Circuit's opinion contradicts *Wood* and *Day*.

As this Court has explained, a federal court's discretion to raise a procedural habeas defense *sua sponte* hinges on the distinction between waiver and forfeiture. Forfeiture is the "failure to make the timely assertion of a right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Waiver is the "intentional relinquishment or abandonment of a known right." *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). A federal court may revive a forfeited habeas defense under certain conditions (discussed further below). It may never revive a waived habeas defense.

"[A] federal court has the authority to resurrect only forfeited defenses." *Wood*, 566 U.S. at 471 n.5 (citing *Day v. McDonough*, 547 U.S. 198 (2006)).

Day and *Wood* illustrate the distinction between forfeiture and waiver. In *Day*, the district court interposed a statute-of-limitations defense after detecting that the state had miscalculated the petition deadline. The Court characterized the miscalculation as an "inadvertent error" and saw no reason to think that the state "'strategically' withheld the defense or chose to relinquish it." *Day*, 547 U.S. at 211. Finding that the petitioner was not prejudiced by *sua sponte* action and that the district court had provided adequate opportunity to oppose it, the Court affirmed dismissal on the procedural ground. At the same time, the Court said it "would count it an abuse of discretion to override a State's deliberate waiver of a [procedural] defense." *Id.* at 202.

The Court identified such a waiver in *Wood*, where the state "express[ed] its clear and accurate understanding of the [procedural] issue" and "deliberately steered the District Court away from the question and towards the merits of [the] petition." *Wood*, 566 U.S. at 474. True to its word in *Day*, the Court found that the court of appeals abused its discretion by ruling on the procedural ground, thus disregarding the waiver and avoiding the merits. *Id.*

Here, the Eighth Circuit disregarded the State's intentional abandonment of a procedural-default defense. The State obviously was cognizant of that defense, for it specifically raised the defense (albeit belatedly) in the district court. Yet on appeal, the State asked the Eighth Circuit to take the mitigation claim on the merits. This

is textbook waiver—a conscious decision not to employ a defense despite awareness of it.[2] Imposing the defense *sua sponte* was an abuse of discretion, as should have been clear to the court of appeals from *Day* and *Wood*.

The Eighth Circuit was doubly wrong because, even assuming that the State's conduct should be counted as forfeiture rather than waiver, the court failed to employ the procedures this Court has required before *sua sponte* adjudication of a procedural defense. Foremost among these is the requirement to "accord the parties fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 210. As Judge Colloton rightly observed in his dissent from denial of rehearing en banc, the Eighth Circuit provided Thomas no such accommodation. Thomas was unable to develop an argument against the defense in the district court, as the State raised it there at the last minute. He had no reason to do so in response to a 117-page appellate brief focused only on the merits. And a rehearing petition, which does not permit full briefing and which comes *after* judgment, does not provide the requisite process. It is limited in space—necessarily, given the administrative burdens that would attend lengthy rehearing petitions—and simply asks the court to reopen the

[2] Examples of cases in which an appellate court finds a party to have waived or abandoned an issue for failing to present it on appeal are legion. *See, e.g.*, *United States v. Mayendía-Blanco*, 905 F.3d 26, 32 (1st Cir. 2018); *United States v. Quiroz*, 22 F.3d 489, 490–91 (2d Cir. 1994); *Nagle v. Alspach*, 8 F.3d 141, 143 (3d Cir. 1993); *Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 290 (4th Cir. 2018); *Calif. Gas Transp., Inc. v. NLRB*, 507 F.3d 847, 852 n.3 (5th Cir. 2007); *Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005); *Duncan v. Wis. Dept. of Health and Family Servs.*, 166 F.3d 930, 934 (7th Cir. 1999); *Borough v. Duluth, Missabe & Iron Range Rwy. Co.*, 762 F.2d 66, 68 n.1 (8th Cir. 1985); *United States v. Kellington*, 217 F.3d 1084, 1103 (9th Cir. 2000); *Coleman v. B-G Maintenance Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989).

merits, either because the panel made an error or because the importance of the question demands the full court's attention. *See* Fed. R. App. P. 35, 40.

The Eighth's Circuit's action contradicts *Day* and *Wood* in other ways as well. "[A]ppellate courts should reserve [*sua sponte*] authority for use in exceptional cases." *Wood*, 566 U.S. at 473. Before exercising this extraordinary authority, a court is required to "'determine whether the interests of justice would be better served' by addressing the merits." *Day*, 547 U.S. at 210 (quoting *Granberry v. Greer*, 481 U.S. 129, 136 (1987)). The Eighth Circuit made no such determination, at least not on the record. In this case, where the district court found that the available mitigating evidence likely would have led a jury to spare Thomas's life, the interests of justice favor addressing the merits. Moreover, this Court instructs that "[d]ue regard for the trial court's processes and time investment is also a consideration appellate courts should not overlook." *Wood*, 566 U.S. at 473. The district court devoted a significant amount of time and effort to an evidentiary hearing after the State took a position that permitted that hearing.

Intervention by this Court is Thomas's only recourse for relief from the Eighth Circuit's disregard of clear precedent. Action is particularly urgent given the gravity of Thomas's sentence and the starkness of the Eighth Circuit's departure. The Eighth Circuit lacked authority to consider the procedural defense at all. Much less did it have discretion to rule on the defense without allowing Thomas to register his objections and without considering the interests of justice in this case.

B. The Eighth Circuit's opinion unnecessarily creates a circuit split on an important question of federal habeas law.

"[T]he substance of a federal habeas corpus claim must first be presented to the state courts." *Picard v. Connor*, 404 U.S. 270, 278 (1971). This "fair presentation" requirement advances comity by allowing a state court the first opportunity to rule upon a federal claim. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999). Fair presentation contains both a legal and a factual component:

> [F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief. . . . [It] is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the "substance" of such a claim to a state court.

Gray v. Netherland, 518 U.S. 152, 162–63 (1996). A claim supported by new facts in federal habeas has not been fairly presented if the new facts "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Here, Thomas broadly asserted in state postconviction that his attorneys were ineffective for failing to investigate and present "mitigation evidence" and "mental health issues." Postconviction counsel offered no facts to support these claims. In federal habeas, Thomas alleged failure to support a case for a life sentence and pleaded detailed facts concerning his background and mental-health problems. In holding that Thomas's fact-free state claim offered the Arkansas postconviction court a fair opportunity to consider his federal mitigation claim—a position with which the State itself initially disagreed and did not pursue on appeal—the Eighth

Circuit created a direct split with the Ninth Circuit and more broadly departed from habeas principles that are well-established throughout the courts of appeals.

In circumstances materially indistinguishable from those at issue here, the Ninth Circuit has held that a fact-free state claim does not fairly present a detailed federal habeas claim (and thus that *Martinez* may excuse default of the federal claim). *See Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc). In *Dickens*, the Ninth Circuit addressed whether the federal habeas petition "fundamentally alter[ed] the legal claim already considered by the state courts" or "place[d] the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Id.* at 1318. It held that new factual allegations in federal habeas transformed the "naked *Strickland* claim" presented in state court:

> [T]he new evidence creates a mitigation case that bears little resemblance to the naked *Strickland* claim raised before the state courts. There, Dickens did not identify any specific conditions that sentencing counsel's allegedly deficient performance failed to uncover. He only generally alleged that sentencing counsel did not effectively evaluate whether Dickens "suffer[ed] from any medical or mental impairment." This new evidence of specific conditions (like FAS and organic brain damage) clearly places Dickens's *Strickland* claim in a "significantly different" and "substantially improved" evidentiary posture. As such, the Arizona courts did not have a fair opportunity to evaluate Dickens's altered IAC claim.

Id. at 1319. The Ninth Circuit proceeded to conclude that *Martinez* entitled Dickens to review of the defaulted claim if he could show that postconviction counsel was ineffective. *Id.* at 1319–22.

In the Ninth Circuit, Thomas would have received full merits review because his detailed federal mitigation claim transformed his fact-free state claim. But in the

Eighth Circuit, his "naked" state claim was deemed sufficient to apprise the state courts of his detailed federal claim.

Most other federal circuits agree with the Ninth Circuit's take on the fair presentation requirement: a federal claim that significantly strengthens a state claim with new facts transforms the claim and creates a procedural default. To summarize the state of the law in other circuits:

- **Second Circuit**. Facts that are "merely supplemental" to the state claim need not be presented in state court, but the claim is not fairly presented if new facts cast the claim "in a significantly different light." *Caballero v. Keane*, 42 F.3d 738, 741 (2d Cir. 1994). In *Caballero*, allegations that trial counsel used drugs transformed the ineffectiveness claim presented in state court. *Id.* See also *Morgan v. Jackson*, in which the federal claim was not fairly presented because the state-court presentation was "perfunctory" and "terse and uninformative." 869 F.2d 682, 684–85 (2d Cir. 1989).
- **Third Circuit.** A federal claim may not rely on "factual predicates" that are "substantially different" from the state claim. *Landano v. Rafferty*, 897 F.2d 661, 670 (3d Cir. 1990). *Landano* concluded that the state court had no opportunity to determine the materiality of suppressed evidence that the petitioner presented for the first time in federal habeas: "Since the factual predicates of Landano's various suppression allegations are substantially different, it is wrong to rigidly label them all as the *same* claim in order to satisfy the exhaustion requirement." *Id.* Contrast *Stevens v. Delaware*

Correctional Center, in which the court found fair presentation where new affidavits in federal court "presented no new facts but rather merely recite facts already submitted to the state courts." 295 F.3d 361, 370 (3d Cir. 2002). *Cf. Suny v. Pennsylvania*, 687 F. App'x 170, 175 (3d Cir. 2017) ("[T]he extremely general and overbroad statements in his [postconviction] petition and brief do not come close to providing the necessary factual and legal underpinnings to present the specific ineffectiveness claim he argues here.").

- **Fourth Circuit.** New evidence that strengthens a state claim does not result in default unless it "fundamentally alters" the claim. *Winston v. Kelly*, 592 F.3d 535, 449–50 (4th Cir. 2010). "[I]f the petitioner presented *no evidence* to the state courts to establish the existence of fact X, the claim will be fundamentally altered by the new evidence presented to the district court." *Id.* at 550. In *Winston*, the presentation of an additional IQ score in federal court did not alter a state claim, supported by other IQ scores, that counsel was ineffective for failing to investigate intellectual disability. *Id. Winston* distinguished *Wise v. Warden*, 839 F.2d 1030 (4th Cir. 1988), a case in which the petitioner offered "bald assertions" of his claim in state court accompanied by a single affidavit. *Id.* at 550–51. The state claim relied on "mere conjecture" and failed to fairly present the federal claim because "no reasonable fact-finder in *Wise* could have found the facts necessary to support the petitioner's claim from the evidence presented to the state courts." *Id.* at 551. Like the Ninth Circuit, the Fourth Circuit has continued to apply this

framework after *Martinez*. *See Vandross v. Stirling*, 986 F.3d 442, 446, 451 (4th Cir. 2021) (holding that submission of an expert affidavit in federal habeas did not "fundamentally alter" a state claim that "list[ed] experts in eight distinct disciplines" to support trial counsel's ineffectiveness for failure to hire experts); *Moore v. Stirling*, 952 F.3d 174, 182–84 (4th Cir. 2020) (holding that, unlike a situation in which the petitioner "offered no evidence or only 'mere conjecture'" in state court, new proof that "only elaborates on the evidence presented in state court" does not "fundamentally alter" a claim).

- **Fifth Circuit.** "[A] habeas petitioner fails to exhaust state remedies when he presents material additional evidentiary support to the federal court that was not presented to the state court." *Graham v. Johnson*, 94 F.3d 958, 968 (5th Cir. 1996). In *Graham*, the petitioner alleged that his counsel was ineffective for failing to investigate his innocence. He raised this claim twice in state postconviction and supported the claim with affidavits and testimony presented at a state evidentiary hearing. *Id.* at 960–63. Yet in federal habeas his presentation of "numerous affidavits and exhibits" that had not been presented in state court led the court to find that he had not fairly presented his claim. *Id.* at 965, 969. By contrast, the Fifth Circuit found fair presentation despite submission in federal court of a new affidavit to support an ineffectiveness claim because "the portion of [petitioner's] state post-conviction brief dedicated to ineffective assistance is remarkably detailed in

both fact and law" and because state filings discussed the importance of the witness who provided the new affidavit. *Anderson v. Johnson*, 338 F.3d 382, 388 (5th Cir. 2003). See also *Escamilla v. Stephens*, 749 F.3d 380, 385–86, 395 (5th Cir. 2014), a post-*Martinez* case finding no default under the "fundamentally altered" test where new evidence in federal habeas touched upon topics (familial abuse and familial criminal history) already covered in a detailed state presentation.

- **Sixth Circuit.** In applying the "fundamentally altered" standard of *Vasquez*, the Sixth Circuit has found, for example, that new facts did not create a new claim when "at all relevant times, [petitioner's] ineffective-assistance claim has been predicated on the single theory that his counsel was ineffective in handling the scientific evidence" and when the federal petition "pleaded the same theory of ineffective assistance of counsel as he had in his state post-conviction petition, often using the identical language." *Richey v. Bradshaw*, 498 F.3d 344, 352–53 (6th Cir. 2007). The court reached the opposite result where new facts about counsel's substance abuse transformed an ineffectiveness claim into a "wholly different animal." *Morse v. Trippett*, 37 F. App'x 96, 104–05 (6th Cir. 2002).
- **Seventh Circuit.** "The exhaustion requirement is not satisfied if the petitioner presents . . . new factual allegations in federal court which cast her claim in a significantly different light." *Cruz v. Warden*, 907 F.2d 665, 669 (7th Cir. 1990). The court found the state-court presentation inadequate because,

although she alleged ineffectiveness related to suppression of a confession, petitioner failed to allege, as she had in federal court, "that counsel failed to prepare and that she would not have testified had her confession been suppressed." *Id.*

- **Tenth Circuit.** "[E]vidence that places the claims in a significantly different legal posture must first be presented to the state courts." *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997). The court found that, even though the state postconviction proceedings covered the same broad areas of ineffectiveness alleged in the federal petition, addition of facts meant the claim had not been fairly presented: "In the state court proceedings, [petitioner] made general allegations concerning his trial counsel's failure to investigate the case and interview witnesses. However, in the federal proceedings, those general allegations were supported by testimony of several witnesses concerning the prejudicial effect of his trial counsel's deficient performance." *Id.* at 939.
- **Eleventh Circuit. "**[H]abeas petitioners cannot preserve otherwise unexhausted, specific claims of ineffective assistance merely by arguing that their lawyers were ineffective in a general and unspecified way. . . . [T]o preserve a claim of ineffective assistance of counsel for federal review, the habeas petitioner must assert this theory of relief and transparently present the state courts with the specific acts or omissions of his lawyers that resulted in prejudice." *Kelley v. Sec'y*, 377 F.3d 1317, 1344 (11th Cir. 2004).

> Under that test, the broad articulation in state court of counsel's ineffective "failure to develop defense theories" did not encompass a claim in federal court that counsel was ineffective for failing to investigate and for using a specific inept investigator. *Id.* at 1347–48.

In sum, unlike the Eighth Circuit, other federal appellate courts follow a rule that derives from *Vasquez* and this Court's other precedents: there has been no fair presentation when a federal petitioner significantly strengthens the claim by accumulation of facts that he never presented in state court. Certainly, when the petitioner provides the state court no facts to show how counsel's performance harmed him, later presentation of those facts in federal court "fundamentally alters" the claim. And when, as here, the state court would decline to hear the altered federal claim, there is a procedural default that is potentially excusable under *Martinez*.

*****

The Eighth Circuit's departure from generally accepted habeas law raises particularly important questions worthy of further attention. The fair-presentation requirement ensures respect for state courts by allowing them a first opportunity to correct constitutional error. *See O'Sullivan*, 526 U.S. at 844–45. The state courts cannot perform that duty if petitioners do not inform them of the facts that create the basis for their claims. The Eighth Circuit's approach to fair presentation departs from decades of precedent and disserves comity.

What caused the Eight Circuit to go so far astray (*sua sponte*)? Discomfort with the demands of *Martinez* might have had something to do with it. Whereas trial-ineffectiveness claims were previously treated like any other claim—in all likelihood inexcusably defaulted if not fairly presented in state court—*Martinez* opened a new avenue of federal relief for petitioners whose default of a substantial trial-ineffectiveness claim was caused by ineffective postconviction counsel. In doing so, the Court did not alter the rules of fair presentation or invite lower courts to recalibrate them. Rather, it reasoned—against the background of existing procedural-default principles—that a petitioner is entitled to one fair shot to vindicate his right to effective counsel, a "bedrock principle in our justice system." *Martinez*, 566 U.S. at 12. When postconviction counsel unreasonably fails to present a substantial trial-ineffectiveness claim, the petitioner has been denied that shot in state court, and the forum moves to federal court. *See id.* at 11–12; *Davila v. Davis*, 137 S. Ct. 2058, 2066–67 (2017). Insofar as this situation is unsatisfactory, the solution is for states to provide adequate postconviction counsel (thus allowing petitioners to raise their fact-specific ineffectiveness claims in state court in the first instance) or to permit petitioners an avenue to return to state court for exhaustion (thus avoiding the procedural default that typically results from postconviction counsel's inadequate state-court presentation). The solution is not for lower courts to distort fair-presentation principles so as to deprive petitioners of any review of their substantial trial-ineffectiveness claims at all.

One form of postconviction counsel's ineffectiveness is failure to investigate—and thus to plead and present—facts supporting trial-ineffectiveness claims. *See Martinez*, 566 U.S. at 11–12 ("Claims of ineffective assistance at trial often require investigative work . . . . To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney."). A petitioner's entitlement to federal review of such claims cannot depend on whether a postconviction attorney who fails to investigate the petitioner's case decides to slip a generic, fact-free ineffectiveness claim into the state petition. All can agree that Thomas's postconviction counsel performed atrociously—including in litigating the question of trial counsel's ineffectiveness, the very evil *Martinez* is meant to remedy. The lower court should not be permitted to thwart merits review of a substantial—indeed, meritorious—trial-ineffectiveness claim by (*sua sponte*) imposing an idiosyncratic vision of fair presentation or initial-review default.

C. Certiorari is warranted to correct a manifestly erroneous ruling.

If Mickey Thomas is executed it will be because the Eighth Circuit applied a procedural bar that the state waived, that he had no opportunity to dispute, and that relies on an outlier view of the fair-presentation requirement. In finding that no facts are required to make a fair presentation to the state courts, the Eighth Circuit gratuitously departed from the law of other circuits. Because the State steered the appellate court toward the merits, it was not entitled to a ruling imposing a type of default beyond *Martinez*'s scope. Insofar as the State committed

a mere forfeiture, the Eighth Circuit's aberrational treatment of the fair-presentation rule simply highlights the consequences of failure to provide the required opportunity to be heard before *sua sponte* adjudication of a procedural defense. The arguments above could have been fully developed in the Eighth Circuit had that court adhered to the instructions this Court issued in *Day* and *Wood*.

In short, the Eighth Circuit could have—and should have—avoided a circuit conflict by following this Court's precedent on *sua sponte* adjudications. The Court should now intervene to ensure uniform understanding of what it means to give state courts a fair opportunity to adjudicate federal habeas claims.

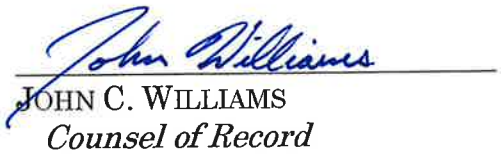
CONCLUSION

The petition for a writ of certiorari should be granted.

MARCH 12, 2021

Respectfully submitted,

LISA G. PETERS
FEDERAL PUBLIC DEFENDER



JOHN C. WILLIAMS
Counsel of Record
Ass't Federal Public Defender
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
john_c_williams@fd.org

Counsel for Petitioner