THIS IS A CAPITAL CASE

No. 20-7480

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

PETITIONER'S REPLY BRIEF

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

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PETITIONER'S REPLY BRIEF

The Eighth Circuit dismissed Thomas's habeas petition on procedural-default grounds after explicitly acknowledging that the State "did not press the procedural default issue on appeal." App. 7a n.3. Implausibly, the State now argues that the Eighth Circuit did not actually raise procedural default *sua sponte*. Alternatively, the State posits that the particular litigation choice at issue here—abandonment of a known defense on appeal—does not implicate the rule this Court established in *Day v. McDonough* and *Wood v. Milyard*. Those cases contain no such qualification. The Court counts it "an abuse of discretion to override a State's deliberate waiver of a [procedural] defense," and "a *federal court* has the authority to resurrect only forfeited defenses." 547 U.S. 198, 202 (2006); 566 U.S. 463, 471 n.5 (2012) (emphasis supplied). Here, the State abandoned the procedural-default defense it had relied on in the district court. The Eighth Circuit—decidedly a "federal court"—thus lacked authority to resurrect it.

None of the State's arguments undercuts the reason for granting certiorari in this case: the Eighth Circuit decided an important question of federal habeas law "in a way that conflicts with relevant decisions of this Court." Rule 10(c). As Judge Colloton recognized in his dissent from denial of rehearing *en banc*, the Court's precedents required the Eighth Circuit, at the very least, to offer Thomas an opportunity to be heard before it overrode the State's 117-page merits argument in favor of a procedural-default defense that the State chose not to invoke.

Adhering to *Day* and *Wood* would likely moot the third question presented. If the Court finds a waiver, it should reverse and remand to the Eighth Circuit with instructions to conduct a merits review (during which the State may renew its arguments—contrary to the district court's conclusion and irrelevant to the questions presented in this Court—that Thomas's Sixth Amendment rights were preserved). Even if the State merely forfeited the defense, a remand is proper. In that event, the Court should require the Eighth Circuit to either give Thomas additional opportunity to be heard or to give him the merits review that the interests of justice require. However, the circuit division offers an additional reason for certiorari. The Court would advance uniformity on the fair-presentation issue by reversing the Eighth Circuit's aberrant opinion.

A. The State abandoned the procedural-default defense on appeal.

The State suggests that the Eighth Circuit mischaracterized the proceedings when it said it was addressing procedural default despite the State's failure to invoke it. So it is worth briefly reviewing the State's litigation conduct to establish that the Eighth Circuit did indeed raise procedural default *sua sponte*.

According to the State, "[f]rom the first page of Arkansas's brief below, it was clear that it challenged the district court's procedural-default ruling." BIO at 13. The State supports that assertion with . . . a citation to the first page of its brief. Actual analysis of the brief refutes the assertion. The first page of the brief, entitled "Summary of the Case," reads in full as follows:

> Mickey David Thomas was convicted in 2005, of the capital murders of Mona Shelton and Donna Cary and was sentenced to death. In 2014, he

> filed an everything-but-the-kitchen-sink petition for habeas corpus pursuant to 28 U.S.C. § 2254, claiming over 157 constitutional errors occurred during his trial. The district court rejected all of them except for Thomas's claim that defense counsel had been ineffective in the penalty phase of the trial for failing to adequately investigate and present mitigating evidence. The district court held an evidentiary hearing under *Martinez v. Ryan*, 566 U.S. 1 (2012), on that claim (and several other procedurally-defaulted ineffectiveness claims, which were rejected). The court ultimately excused the procedural default of Thomas's penalty-phase claim and, based on the state-court record and evidence adduced in the *Martinez* hearing, granted the writ, requiring Arkansas to try the sentencing phase again or consent to life-without-parole sentences.
>
> ***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 respectfully requests 30 minutes of oral argument.

Appellant's Br. at i (emphasis supplied). Page one does not argue that the district court should have avoided the merits because of procedural default. Page one argues that the district court incorrectly adjudicated the merits—a theme the State carried forward in its Statement of the Issue: "The district court erred in finding trial counsel was ineffective in the penalty phase." *Id.* at 2. The theme continued with the first page of the Statement of the Case:

> The ultimate question to be answered in this habeas-corpus case is whether trial counsel's work in defense of Thomas on the capital-murder charges brought by the State for the killing of Mona Shelton and Donna Cary was constitutionally reasonable. That the answer to that question is "yes," and that the district court's ruling to the contrary was error, is demonstrated beyond cavil by the fifteen-month arc of active and engaged attorney work that extended from Thomas's arraignment in an Arkansas state court on June 17, 2004, to the conclusion of his trial on September 27, 2005.

Id. at 3. The State then developed this point with approximately seventy-five pages of factual presentation before offering a summary of the argument. For example: "[T]he district court's ruling that Thomas's presentation at the federal hearing below established a reasonable probability of a different outcome is also erroneous and should be reversed." *Id.* at 83. The State did not contend, either in the summary or the ensuing thirty-five pages of argument, that procedural default should have prevented the district court from adjudicating the merits.

The State nevertheless suggests that arguing the merits on appeal was tantamount to arguing procedural default because the merits of the ineffectiveness claim "are central to the procedural-default question." BIO at 16. This contention again provides an inaccurate account of the State's arguments in the Eighth Circuit. The State requested a full merits review, not a review of the district court's decision to excuse default under *Martinez v. Ryan*, 566 U.S. 1 (2012).

To excuse the default of an ineffective-assistance-of-trial-counsel claim, the petitioner must show (1) that "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*" and (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit [analogous to the standard for granting a certificate of appealability]." *Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). The determination of whether a claim is substantial, like the determination of whether a certificate of appealability

should issue, "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336).

In its Eighth Circuit briefing, the State did not contest the obvious ineffectiveness of state postconviction counsel. Nor did it challenge the district court's determination that the trial-ineffectiveness claim was substantial. Indeed, its opening brief mentioned *Martinez*'s requirement of a "substantial" claim just once, when describing some declarations that the district court took into account for the limited purpose of determining whether to excuse default. Appellant's Br. at 75 n.5. The 117-page brief was squarely focused on the district court's determination that ineffective trial counsel deprived Thomas of his Sixth Amendment rights. Contrast the State's response to Thomas's cross-appeal claim that counsel performed ineffectively in their handling of jury-selection issues: "Thomas failed to demonstrate a substantial claim of ineffective assistance for failing to timely present and support a motion to expand the jury pool." Appellant's Resp. Br. at 62. Or its response to Thomas's cross-appeal claim that trial counsel should not have conceded guilt: "Thomas's *McCoy* claim is wholly unsupported and obviously without merit; that is, it is 'insubstantial.'" *Id.* at 45.

The State makes too much of the fact that assessing substantiality requires a court to form a basic view of the underlying claim. Substantiality "is not coextensive with a merits analysis." *Buck*, 137 S. Ct. at 773. The State attacked the district

court's decision to grant sentencing-phase relief, not its independent decision that the claim was substantial for the purpose of excusing default. And, of course, the State never said a word to indicate—as it belatedly argued in the district court—that the district court's ruling might be wrong because Thomas committed an appellate-review default that foreclosed examination of the merits. The State cannot avoid its litigation choice by labeling its appellate conduct a shift in argument rather than abandonment of its procedural-default defense.

Finally, the State posits that, even if it "did not press the procedural default issue on appeal," there was no deliberate waiver. BIO at 13. Thomas begs to differ. Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). The State agrees that it alleged an appellate-review default in the district court—albeit without acknowledging that it did so only "for the first time in a post-hearing brief that was filed simultaneously with Thomas's post-hearing brief." App. 82a (Colloton, J., dissenting from denial of rehearing en banc). The State cannot seriously claim that it did not intentionally abandon this known defense when it presented a lengthy appellate brief that failed to invoke it. Courts routinely consider such litigation conduct to constitute waiver. *See* Pet. at 14 n.2.

B. *Day* and *Wood* speak clearly to this scenario.

The State attempts to cabin *Day* and *Wood* to situations in which "the State fails in the district court to plead an affirmative defense based on a procedural requirement." BIO at 15. But it offers no satisfactory reason for differentiating

between intelligent abandonment of a defense in a district court and intelligent abandonment of a defense on appeal.

The State ignores a crucial background principle: parties, not courts, make litigation choices. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). *Day* illustrates a modest difference in habeas cases—federal courts may forgive inadvertent oversights to preserve values of comity and federalism inherent in procedural habeas defenses. But when a State decides to abandon a procedural defense in favor of the merits, the court's hands are tied: "[W]e would count it an abuse of discretion to override a State's deliberate waiver of a [procedural] defense." *Day*, 547 U.S. at 202. *Day* and *Wood* do not discard that rule when the parties move to the appellate court. An appellate court does not have special authority to invite and rule on arguments that the parties did not assert. *See Sineneng-Smith*, 140 S. Ct. at 1580–81. Nor does it have special authority to revive a habeas defense that a state chooses not to pursue on appeal.

Indeed, in *Wood* this Court rejected the very kind of district court/appellate court distinction that the State attempts to draw here. *Day* had explained that, "should a State intelligently choose to waive a [procedural] defense, a district court would not be at liberty to disregard that choice." 547 U.S. at 210 n.11. This focus on district courts was commensurate with the context in which the case arose—from a state's failure to include a procedural defense in its habeas answer. Some circuits took the literal approach the State does here, reading *Day* to apply only to district courts. *See Wood*, 566 U.S. at 468 n.2. This Court corrected that error and held that the

same rules apply to district courts and appellate courts: "a federal court has the authority to resurrect only forfeited defenses." *Id.* at 471 n.5.

To return to the broader principle upon which *Day* and *Wood* rely, "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Id.* at 472. Holding the State to its choice to focus the appeal on the merits—when it knew it had a procedural-default defense that would render the merits irrelevant—is hardly the extension of law that the State suggests. "In our adversary system, in both civil and criminal cases, in the first instance *and on appeal*, we follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (emphasis supplied). Neither an appellate court nor a district court may ignore a State's intelligent decision to forego a habeas defense.

C. There is a split on the fair-presentation issue.

The State severely understates the conflict between the opinion below and the Ninth's Circuit's decision in *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc). In both cases, the petitioner alleged a failure to investigate mitigating evidence without ever establishing what the omitted mitigating evidence was. In the Ninth Circuit, Dickens's detailed federal habeas allegations created a new claim. In the Eighth Circuit, Thomas's detailed federal habeas allegations did not. As a result, Dickens was afforded a chance at merits review while Thomas was not.

The State argues that *Dickens* is distinguishable because Thomas's state postconviction counsel questioned trial counsel at an evidentiary hearing about

their trial preparation. He might also have asked trial counsel what the prosecutor disclosed to them, but that inquiry would not create a *Brady* claim unless postconviction counsel produced suppressed information for a determination of materiality. *Cf. Landano v. Rafferty*, 897 F.2d 661, 669–70 (3d Cir. 1990). When a petitioner alleges ineffectiveness for failure to discover evidence, the evidence *is the claim*—and, as he later admitted at the federal hearing, postconviction counsel had no idea what it was because he failed to investigate. Tr. Vol. 5 at 1034–35. The evidence—and thus the claim—emerged only after Thomas received federal habeas counsel who actually investigated and pleaded it.

The State is also incorrect that the Eighth Circuit's opinion represents, at most, a misapplication of a correctly stated rule of law. The opinion rests on the court's judgment that the "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. That statement runs directly against the opinions of other circuits cited in the petition for a writ of certiorari. In those cases, the weakness of factual support in state court is *precisely* the point—if the federal iteration of the claim provides significant new factual material, then the petitioner has failed to fairly present the claim in state court.

Even if earlier Eighth Circuit opinions correctly articulate the law, the idea that weak state-court support "has no bearing on whether the claims were actually presented" is a sea change. And the more recent case upon which the State relies, *Sasser v. Payne*, merely explains that claims presented the same way in state court

and federal court are the same claim. No. 18-1678, slip op. at 4–7, 2021 WL 2212590, at *2–3 (8th Cir. June 2, 2021). Such a conventional holding does not implicate the more sweeping conclusion that a federal petitioner does not run afoul of the fair-presentation requirement by presenting substantial facts to bolster a weak state claim.

In light of its judgment that the state-court factual presentation "has no bearing on whether the claims were actually presented," the Eighth Circuit never even discussed the content of Thomas's federal petition, much less compared it to the state-court presentation. Rather, it contented itself to label the state postconviction claim "specific," without assessing whether the federal claim relies on significant new mitigating evidence. App. 10a. Other courts of appeals would have recognized that the sort of new facts upon which Thomas's federal claim depends must be presented in state court.

D. The State's merits arguments are for the Eighth Circuit.

Finally, the State suggests that the Court should deny certiorari because it can be confident that Thomas's death sentence is sound. BIO at 26. Of course, the only court to have reviewed the relevant facts disagreed, finding that "[t]he result of trial counsel's lack of investigation and preparation was an entirely unconvincing case in mitigation." App 72a. The State's argument is properly raised in the Eighth Circuit, not in this Court. Indeed, it already was raised in the Eighth Circuit over the course of 117 pages that said nothing about procedural default. The questions in this Court concern whether the Eighth Circuit should have adjudicated the procedural defense

sua sponte and whether it did so in an improper manner. The Eighth Circuit can and should address the merits on remand.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

JUNE 29, 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