No. _____

In the Supreme Court of the United States

October Term 2021

WILLIAM SPEER,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In federal habeas proceedings, Petitioner William Speer presented a claim of ineffective assistance of trial counsel for failure to investigate and present mitigating evidence in the sentencing phase of his capital trial. The magistrate judge denied a request for supplemental funding for investigation services to develop his evidence of trial counsel's ineffective assistance, and the district court later dismissed the claim after reviewing it *de novo*. The Fifth Circuit affirmed the district court's judgment. The questions presented are:

1. Whether the Fifth Circuit's resolution of the prejudice prong under *Strickland v. Washington*, 466 U.S. 668 (1984), contravenes settled Sixth and Eighth Amendment precedent by applying a results-oriented "double-edged evidence" doctrine.

2. Whether a district court may disregard the case-specific factors that *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), "requires courts to consider," *id.* at 1094, when determining whether to authorize a request for investigative or expert services in a capital case under 18 U.S.C. § 3599(f).

NOTICE OF RELATED CASES

Anibal Canales v. Bobby Lumpkin, Dir., Tex. Dep't of Crim. Justice, Corr. Inst. Div., S. Ct. No. 20-7065 (pet. for certiorari pending). The Court may have held consideration of *Canales* until it has rendered a decision in *Shinn v. Ramirez*, No. 20-1009. Because the State asserted the same defense under 28 U.S.C. § 2254(e)(1) in

Speer's case as it did in *Canales*, it should consider whether holding this petition is appropriate.

CORPORATE DISCLOSURE STATEMENT

Petitioner William Speer, a death-sentenced Texas inmate. He was the appellant in the United States Court of Appeals for the Fifth Circuit. Respondent, Bobby Lumpkin, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division, was the appellee in that court.

LIST OF PROCEEDINGS

State v. Speer, No. 99-F-0506-005 (5th Jud. Dist. Ct., Bowie Cty., Tex. Oct. 31, 2001) (conviction of capital murder and sentence of death)

Speer v. State, No. AP-74,253 (Tex. Crim. App. Oct. 8, 2003) (affirming conviction and sentence on direct appeal)

State v. Speer, No. 99-F-0506-005-A (5th Jud. Dist. Ct., Bowie Cty., Tex. Apr. 30, 2004) (recommending denial of initial state habeas application)

Ex parte Speer, No. WR-59,101-01 (Tex. Crim. App. June 30, 2004) (denying relief from initial state habeas application)

Ex parte Speer, No. WR-59,101-02 (Tex. Crim. App. March 3, 2010) (dismissing subsequent state habeas application)

Speer v. Thaler, No. 2:04-cv-269 (E.D. Tex. Dec. 14, 2012) (adopting magistrate judge's report and recommendations and denying federal habeas relief)

Speer v. Stephens, No. 13-70001 (5th Cir. Mar. 31, 2015) (remanding for appointment of supplemental counsel to investigate and raise potential claims of ineffective assistance of trial counsel)

Speer v. Davis, No. 2:04-cv-269 (E.D. Tex. Sept. 14, 2018) (adopting magistrate judge's report and recommendations and dismissing federal habeas petition)

Speer v. Davis, Nos. 13-70001 & 19-70001 (5th Cir. Aug. 17, 2020) (granting certificate of appealability)

Speer v. Lumpkin, Nos. 13-70001 & 19-70001 (5th Cir. Aug. 9, 2021) (granting panel rehearing and affirming district court judgment)

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Speer respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Fifth Circuit affirming the dismissal of his application for a writ of habeas corpus.

LOWER COURT OPINIONS AND ORDERS

The Opinion of the U.S. Court of Appeals for the Fifth Circuit denying the petition for rehearing en banc (Sept. 9, 2021), is attached as Appendix A. The Order of the U.S. Court of Appeals for the Fifth Circuit granting panel rehearing and affirming district court judgement (Aug. 9, 2021) is cited as *Speer v. Lumpkin*, 860 F. App'x 66 (5th Cir. 2021), and is attached as Appendix B. The withdrawn opinion of the Fifth Circuit denying habeas relief (Feb. 25, 2021), is cited as *Speer v. Lumpkin*, 845 F. App'x 66 (5th Cir. 2021), and is attached as Appendix C. The Fifth Circuit's non-dispositive opinion granting a certificate of appealability (Aug. 17, 2020) is cited as *Speer v. Lumpkin*, 824 F. App'x 240 (5th Cir. 2020), and is attached as Appendix D. The district court's order of dismissal denying habeas relief (Sept. 14, 2018) is cited as *Speer v. Dir., TDCJ-CID*, No. 2:04-cv-269, 2018 WL 11350042 (E.D. Tex. Sep. 14, 2018), and is attached as Appendix E. The magistrate judge's report and recommendation (June 25, 2018), is attached as Appendix F. The district court's order denying a request for additional funding (Dec. 1, 2016) is attached as Appendix G. The Fifth Circuit opinion remanding the case (March 31, 2015) is cited as *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015), and is attached as Appendix H. The pre-remand district court order and judgment (Dec. 14, 2012), is attached as Appendix I. The pre-remand magistrate judge's report and recommendation for denial of habeas

relief (Nov. 28, 2012) is attached as Appendix J. The Order of the Texas Court of Criminal Appeals denying state habeas relief (June 30, 2004) is cited as *Ex parte Speer*, No. 59,101–01, 2004 WL 7330992 (Tex. Crim. App. June 30, 2004), and is attached as Appendix K. The Findings of Fact and Conclusions of Law, 5th District Court of Bowie County, Texas (May 3, 2004), are attached as Appendix L.

BASIS FOR JURISDICTION

The Fifth Circuit granted a certificate of appealability, App. 35a, and had jurisdiction pursuant to 28 U.S.C. § 2253(c).[1] The opinion of the Fifth Circuit was entered on August 9, 2021. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

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

The Eighth Amendment provides, in relevant part:

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

Title 18, Section 3599, subsection (f), of the United States Code provides:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor.

[1] A certificate was not necessary to appeal the denial of Speer's application for investigative services under Fifth Circuit precedent. *See* App. 35a.

STATEMENT OF THE CASE

A jury convicted William Speer of committing a murder while he was serving a life sentence at the Barry Telford Unit, in Bowie County, Texas. Tex. Penal Code § 19.03(a)(6). ROA.27. The alleged offense involved a dispute that Speer had only an attenuated connection to—a fight over cigarettes between rival gangs. Speer was not a member of any gang. ROA.2071.[2] However, he wanted to be a member of the "Texas Mafia" gang. ROA.2072.

At the sentencing phase of trial, to show that Speer was a "future danger,"[3] the State presented one witness: Franklin Manyoma, a man who had persuaded Speer to commit a murder on his behalf when Speer was 16 years old. *See* ROA.1253-83; *see also Speer v. State*, 890 S.W.2d 87 (Tex. App.—Hous. [1st Dist.] 1994). Manyoma, who was 19 at the time, gave a damaging version of events that emphasized Speer's culpability. Manyoma said that Speer volunteered to commit the murder, ROA.1262, ROA.1264, acted on his own, ROA.1266, and appeared "calm" afterwards, ROA.1269. In fact, Speer had no personal reason to kill the man; Manyoma owed the victim money and was looking for a way to avoid paying the debt. Speer had been tried for the murder as an adult and sentenced to life imprisonment. *Speer*, 890 S.W.2d at 89.

Speer's attorneys presented two witnesses at sentencing. ROA 1283-1344. Both were lay ministers at the prison who met Speer after he was indicted on the capital

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[2] "ROA.[ ]" refers to the electronic record on appeal in Fifth Circuit case number 19-70001.

[3] Texas law requires a jury to determine whether there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1).

murder charge but believed he was a "changed man." ROA.1286, ROA.1328. Both testified that they had ministered to Speer and believed that he was remorseful, ROA.1294-95, ROA.1325-26, and no longer a danger to society. Both conceded that they could not be sure that Speer was no longer a danger. Speer's attorneys presented no other mitigation. The jury sentenced Speer to death. ROA.1416-17.

Evidence uncovered by new habeas counsel with the assistance of a mitigation specialist shows that Speer suffered from deficits ranging from learning disabilities to emotional problems to profound abuse and neglect. Those deficits were beyond Speer's control and are relevant to the circumstances under which Speer allegedly committed the murders. In addition, the evidence inherently humanizes Speer, revealing a caring and sensitive man valued by family.

1. Speer is sentenced to death by a jury who heard no mitigating evidence.

In November 1999, Speer was charged with capital murder for killing fellow inmate Gary Dickerson while serving a life sentence for a prior murder. Counsel was appointed to represent him. ROA.1747-48. Between the appointment and Speer's trial, counsel spent little time preparing for the punishment phase. Speer fully cooperated with his attorneys. ROA.1754-81 (billing records). He told them about a psychological evaluation conducted related to his first and only prior offense, a murder he committed at the age of 16. ROA.1749. Counsel never obtained that evaluation. Counsel's files indicate they made a few attempts to get it from prior conviction counsel, but never received anything, and gave up. Counsel spoke to only one of Speer's family members in their year and a half of representation—they met

with Speer's estranged biological father just two days before Speer's trial began. ROA.1777, 1755, 1765. Counsel did not speak with Speer's mother, sister, stepfather, aunt, or cousin, all of whom knew Speer well. *See* ROA.1711; ROA.1726; ROA.1734; ROA.1745.

On the eve of trial, the prosecution faxed counsel a copy of a psychiatric evaluation performed in connection with Speer's first murder trial. The evaluation documented the abuse Speer described when he was 16 years old: then only a boy, Speer reported that his biological father Richard "got drug problems, he shoots Speed, and Crack, and he gave me Coke to snort." ROA.1782. He told her, "I got a lot of bad memories about my dad, he was always hitting on me, he was hitting my mom, too." Speer described the cruel abuse his father inflicted when he wet himself as a toddler: He said, "I had a bedwetting problem for a long time[,] and I remember when I was maybe 2 years old, he would you know, cover my head with the wet underwear, just cover my head with it, I remember that." *Id.* He gave instances where the father would take the urinated undergarments and wrap them around the child's head.

In spite of the report the defense had received suggesting Speer had been abused, the defense case for a life sentence included no evidence about his pre-incarceration life.

2. Speer's habeas attorney conducts no investigation of trial counsel's ineffectiveness.

Speer was appointed new counsel for state habeas proceedings. This was the first meaningful opportunity for Speer to raise claims of trial counsel's ineffectiveness. State habeas counsel recognized that trial counsel had "failed to

conduct an adequate life history investigation in preparation for the sentencing phase of" Speer's trial and requested appointment of a mitigation specialist. ROA.1974, 1978. The state habeas court granted the request and invited counsel to seek additional funding as needed. ROA.1985. But the investigator did no work, and counsel failed to hire another investigator or conduct an investigation himself. ROA.2062. Instead, counsel filed an initial state habeas application that generically alleged that Speer's trial counsel had "failed to investigate or present evidence which would have mitigated against the imposition of the death penalty." He included no evidence supporting Speer's ineffective-assistance-of-trial-counsel claim. The state court denied relief. App. 115a, 121a (trial court recommendation).

3. During federal proceedings, this Court provides a vehicle for overcoming default of ineffective assistance claims when state habeas counsel are ineffective.

State habeas counsel continued to represent Speer in federal court, filing the same generic ineffectiveness claim in Speer's initial petition for writ of habeas corpus, alleging no facts in support of the claim. ROA.29. After a stay of proceedings to develop other claims and an amendment to the petition, the district court denied relief. App. I (adopting magistrate judge's report and recommendations, App. J).

While Speer's appeal was pending, this Court extended its decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), to Texas capital post-conviction cases. *See Trevino v. Thaler*, 569 U.S. 413 (2013). Those decisions enabled Speer to argue that state habeas counsel's ineffective assistance during his initial state habeas proceedings excused his failure to present a substantial claim of ineffective assistance of trial counsel. Recognizing his conflict of interest, Speer's attorney moved to withdraw. The Fifth

Circuit instead ordered the district court to appoint supplemental counsel. *Speer v. Stephens*, 781 F.3d 784, 786 (5th Cir. 2015) (App. H). The Court of Appeals remanded the case for the district court "to consider in the first instance whether Speer [could] establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims[,] ... and if so, whether those claims merit relief." *Id*. at 787.

On remand, the magistrate judge appointed supplemental counsel, who conducted the first-ever mitigation investigation of Speer's pre-offense life history. Soon after supplemental habeas counsel was appointed, the magistrate judge granted a request for $15,000 so that counsel could obtain a mitigation specialist to investigate Speer's mental-health and social histories. ROA.2606-07. Counsel for Speer later sought an additional $30,000. ROA.2618 (sealed application). The magistrate judge granted that motion, but only in part, and requested approval from Fifth Circuit Chief Judge Carl Stewart for an additional $15,000. ROA.2640. In August, Chief Judge Stewart granted the request "without prejudice to the submission of additional funding requests based upon the results of the ongoing investigation." ROA.2642.

After exhausting these funds in the middle of investigation, counsel made a detailed request for additional mitigation funding, explaining that the evidence gathered so far had revealed "a number of mental health flags," including a history of trauma, head injuries, cognitive defects, mood disorders, and substance abuse. ROA.2644. Counsel pointed to specific witnesses the team wished to interview in light of the evidence they had uncovered:

- witnesses to the period just before Speer's first murder who could testify about the "bizarre" relationship be-tween Speer and Franklin Manyoma, the mastermind of the crime (and the State's only sentencing phase witness in aggravation);
- a witness who had sexually abused Speer when he was a young boy; and
- numerous witnesses to Speer's relationship with his co-defendant in this case, Anibal Canales.

ROA.2646.

Attached to the motion was an affidavit by the mitigation specialist who verified counsel's assertion that witnesses needed to be located. ROA.2651-54. The specialist also stated that evidence about Speer's mental health and cognitive problems required that mental health and "brain experts" be consulted. She stated she needed an additional $15,000 to complete the work.

The magistrate judge denied the motion. App. 79a. The court did not perform a claim- or fact-specific analysis as this Court would later require in *Ayestas*, 138 S. Ct. at 1094. Rather, the court stated Speer's request must be denied because "he is asking for six times the statutory amount" listed in 18 U.S.C. § 3599(g)(2), and so "far exceeds the norm for expert funding in capital habeas proceedings." App. 79a.

4. In spite of the denial of access to services, supplemental counsel uncovered significant mitigating evidence.

Speer's new defense team uncovered a significant amount of information about his life and circumstances that both humanized Speer and contextualized his offense.

The adults who raised Speer neglected him and physically, verbally, and emotionally abused him. When he was a young child and wet the bed (a problem that would persist until Speer went to prison at age 16), his father would make him wear his urine-soaked underwear over his head. ROA.1782.

Both of Speer's biological parents used drugs, sometimes in front of him. Speer's mother used drugs at least once when she was pregnant with him. ROA.1718. When Speer was very young, he was in charge of getting his mother's stash of marijuana for her. *Id.* Speer's parents divorced in 1978, when Speer was four. ROA.1672. When he was nine years old, his mother remarried. Like Speer's parents, his stepfather also used drugs. ROA.1673.

His mother and stepfather frequently "whipped" Speer with a belt. Speer continued to wet the bed, and his mother "whipped" him for it. ROA.1721; ROA.1722; ROA.1722-23; ROA.1730. Once, when Speer misbehaved, his mother held him up by the throat, and his stepfather had to intervene.

His stepfather both physically and verbally abused the young Speer. ROA.1730; ROA.1732. He told Speer, who was overweight, that he was fat, worthless, and stupid, and he sometimes knocked him on the back of the head for no reason. He called Speer "retarded." ROA.1730. And said that "he was never going to be anything, and that his own father didn't want him so why would anyone else." *Id.*

Speer suffered from a learning disability. ROA.1730. He repeated the first grade and was placed in special education classes in the second and remained there for most of his education. ROA.1671, 1679. When he was tested in connection with his

1991 trial, his scores indicated a "learning disability relative to every academic area assessed." ROA.1655-56.

Speer began exhibiting signs of stress as a young child, with angry outbursts, but his mother refused professional help. ROA.1656. Speer exhibited out-of-the-ordinary clumsiness. He often came home bruised or cut and had "quite a few" bike accidents. His stepfather especially ridiculed him for his awkwardness.

Speer had poor self-esteem. *See Speer v. State*, 890 S.W.2d 87, 93 (Tex. App.—Hous. [1st Dist.] 1994) (Speer's first jury heard "mitigating" testimony that he had low self-esteem, allowing others to make important decisions for him). He was "very unhappy" as a kid and had a hard time in school. He got "bullied a lot." ROA.1728, 1736. He was a "follower." ROA.1723. According to his stepfather, "[y]ou could talk [Speer] into doing pretty much anything—whether to please you or what." *Id.*

When, as a young teenager, Speer was sent to live with his biological father, his father used marijuana, pills, and methamphetamine in front of his son and introduced Speer to cocaine. He also abused Speer and sent him home with black eyes and a cut face. ROA.1672; ROA.1724.

When Speer returned to live with his mother and stepfather in the winter of 1990, he was different. His stepfather described him as "a little bit harder." ROA.1725. Within a week or two after returning, Speer began hanging out with an older man named Franklin Manyoma. ROA.1725, 1732. Manyoma let Speer wear his clothes. Speer's sister said that Speer "liked getting positive attention from some-one older." ROA.1711. Eventually, Manyoma allegedly talked Speer into killing

Jerry Collins, from whom Manyoma had stolen money. According to Speer's aunt, she asked Speer about that 1990 murder and Manyoma's role in it, and Speer told her, "He just kept saying "do it, do it, do it." ROA.1737.

Speer continued to be bullied in prison. In an altercation, the top of his ear was bitten off. ROA.1711; ROA.1725-26. ROA.1721; ROA.1737. This fight may have been one of the several he was in as a result of the embarrassing fact that he was still wetting the bed. When his fellow inmates realized that Speer slept so deeply that he did not wake to go to the bathroom, they put toilet paper between his toes and lit it on fire. Speer did not wake up, even though his feet were burned. ROA.1737. After Speer went to prison, his mother, who had never been attentive, disowned him. ROA.1711. And at some point after that, Speer's stepfather shot and killed her. ROA.1708; ROA.1728.

At his juvenile murder trial, psychologist Walter Quijano[4] testified that he suffered from "dependent personality disorder." That disorder "is characterized by [a] very dependent lifestyle." People who suffer from it "do not have the inner substance to sort of become independent and self-determining …They do things for other people to the point of allowing them to make very important decisions for them."

Dr. Barbara Hamm, a psychologist who specializes in trauma, reviewed Speer's case and said that victims of abuse and neglect are targets for bullies and

[4] Counsel could not rely on this expert opinion. Dr. Quijano's racially odious testimony regarding Black and Latino defendants' increased probability of committing acts of violence led to several death sentences being overturned. *See Buck v. Davis*, 137 S. Ct. 759, 769-71 (2017).

sexual predators. ROA.2253. She noted there were still many questions left unanswered about Speer's mental health and culpability. *Id.* Among those questions were: the full extent of his abuse as a child, when his childhood abuse began, whether he suffered sexual abuse (something Dr. Hamm believed there is reason to suspect), and the full extent of his caretaker's deficiencies. *Id.*

The magistrate judge found that these facts made a "compelling" case of trial counsel's deficiency. App. 71a. However, the magistrate judge believed that Speer had not been prejudiced by counsel's deficient performance, based largely on the court's view that much of the mitigating evidence could also be viewed as aggravating. *See* App. 73a-75a. Over Speer's objections, the district court adopted in full the magistrate judge's recommendations, dismissed the petition, and denied Speer's request for a certificate of appealability. App. 43a. Speer appealed both the ineffectiveness finding and the denial of funding.

5. Applying a "double-edged" evidence analysis, the Fifth Circuit finds no prejudice from counsel's failure to investigate and present substantial mitigating evidence.

The Fifth Circuit denied relief on the merits of the ineffective-assistance claim. App. 6a.[5] Although the court found "Speer ha[d] identified much more to put on the mitigation scale," App. 9a, it discounted much of the evidence as "double-edged," App. 8a-9a. For the court, "[a]lthough much of it might have painted him in a sympathetic light, some of it could also be used as additional evidence of future dangerousness."

[5] The court examined the claim de novo. *See* App. 6a n.1.

App. 9a (citing *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011); *Wong v. Belmontes*, 558 U.S. 15, 26 (2009)). Among the evidence cited by the court as "double-edged," were Speer's outburst in daycare when he was four years old, his dependent personality disorder, and, the court suggested, his lie about having been converted to Christianity. App. 9a.

6. The Fifth Circuit affirms the denial of funding.

The court also faulted Speer for not producing evidence similar to that present in successful ineffectiveness claims—evidence of sexual abuse, *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003); limited cognitive functioning, *Sears v. Upton*, 561 U.S. 945, 949 (2010); and positive incarceration history, *Williams v. Taylor*, 529 U.S. 362, 396 (2000). In district court, Speer had requested the opportunity to develop just that kind of evidence with additional investigative resources. *See* ROA.2643-48; ROA.2630-38 (described above). The court of appeals initially neglected to decide Speer's access to investigative resources in its original opinion. *See* App. C. But on petition for rehearing, the court withdrew its original opinion and closed the door on the issue. App. B. The Fifth Circuit characterized the claim-specific factors *Ayestas* "require[d] courts to consider," 138 S. Ct. at 1094, as considerations that "can inform" a decision whether to grant funding. App. 13a. The court thus perceived "no requirement that [the magistrate judge's] order include the 'claim-by-claim' analysis that Speer seeks" where it had already found funding was reasonably necessary and was familiar with the case. App. 13a.

The court denied Speer's request for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to determine whether the Fifth Circuit's application of a "double-edged evidence" doctrine contravenes this Court's Eighth Amendment and Sixth Amendment precedent.

William Speer's attorneys conducted no mitigation investigation and presented no mitigation evidence at his murder trial. As recognized by the district court and the court of appeals, significant mitigating evidence existed, including evidence that Speer had been neglected and abused, exposed to and given drugs by his parents, and bullied at school. There was also evidence that he suffered from an intellectual deficit and was so ill-treated that, by the time he was 16, he had a dependent personality disorder that rendered him gullible and easily misled.

In spite of this significant evidence—evidence that contextualized the crimes he had been convicted of—the court of appeals concluded the Speer's attorney's failure to make a case for him was not prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984). An essential component of the court's no-prejudice conclusion was its reliance on a "double-edged evidence" analysis that discounted the mitigating weight of Speer's evidence. The analysis has been applied sporadically in other circuits, but it has especially taken root in the precedent of the Fourth, Fifth, Tenth, and Eleventh Circuits.

Under this approach, the reviewing court assesses where omitted evidence has both mitigating and aggravating aspects—or is a "double edged sword." If mitigating evidence can conceivably possess an aggravating edge, then—in the vast majority of cases—the court concludes there can be no prejudice.

This analysis conflicts with this Court's Sixth and Eighth Amendment precedent regarding the role mitigation evidence plays in a capital case. This Court should grant certiorari to determine whether the double-edged inquiry aligns with its Sixth and Eighth Amendment precedent and whether lower courts' application of it, which consistently results in a finding of no prejudice, produces arbitrary results.

A. The double-edged evidence inquiry contravenes this Court's Sixth Amendment precedent.

1. The double-edged prejudice inquiry does not originate in this Court's Sixth Amendment precedent.

The double-edged inquiry is ill-suited to prejudice inquiries in appeals involving counsel's failure to investigate in a capital case. *See Stankewitz v. Wong*, 698 F.3d 1163, 1173 (9th Cir. 2012) (state had presented highly prejudicial case, and it was difficult to see how double-edged evidence could have made it worse). Those appeals are brought by defendants who were sentenced to death because a jury found they had committed a terrible crime and one or more aggravating factor was present. Yet the inquiry functions to dismiss ineffectiveness claims on the grounds that missing mitigation evidence would have made matters worse. To the extent that this appears incongruous, it is because the inquiry does not originate in this Court's Sixth Amendment cases.

In the years after *Strickland* was decided, this Court applied a "double-edged" inquiry to determine whether counsel had delivered deficient performance—the first prong of *Strickland*'s two-part test. *See, e.g., Darden v. Wainwright*, 477 U.S. 168, 186 (1986); *Burger v. Kemp*, 483 U.S. 776, 793-94 (1987). To decide whether trial counsel's decision to forgo or limit a mitigation investigation, the Court asked whether counsel

acted pursuant to a reasonable strategy. If counsel had sufficiently investigated and determined that the omitted evidence would bring with it additional aggravating evidence, then counsel could reasonably decide to cease investigation. *Burger*, 483 U.S. at 794; *Darden*, 477 U.S. at 186.

But it was not until this Court decided *Penry v. Lynaugh*, 492 U.S. 302 (1989), an Eighth Amendment decision, that a double-edged analysis appeared in *Strickland*'s prejudice inquiry. In *Penry*, this Court reviewed Texas's old capital sentencing scheme, which did not have a vehicle for jurors to give effect to mitigating evidence it received. *Penry* recognized that some sentencing evidence, like a "history of abuse" or "mental retardation" is "two-edged"—that is, capable of "diminish[ing] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." 492 U.S. at 324. Without a vehicle expressly directing the jury to consider the mitigating effect of this kind of two-edged evidence, the Texas statute violated the Eighth Amendment. *See id.*

Penry did not hold that such evidence would make a death sentence more appropriate. To the contrary, finding that juries must be given a vehicle for responding to the mitigating aspects of such evidence reflected the Court's well-established view that at least one juror might rely on it in assessing the defendant's moral culpability. *See Penry*, 492 U.S. at 323 (juror hearing the double-edged evidence could have concluded Penry's life and deficits "diminished his moral capacity").

In the following years, a new approach to adjudicating *Strickland* prejudice grew out of *Penry*. In 1995, the Fourth Circuit, citing *Penry*, concluded that a trial

attorney's decision not to present evidence of "abuse and dysfunction" in his client was not prejudicial under the Sixth Amendment because the evidence could be viewed as both mitigating and prejudicial. *Barnes v. Thompson*, 58 F.3d 871, 981 (4th Cir. 1995); *see Beavers v. Pruett*, No. 97-4, 1997 WL 585739 (4th Cir. Sept. 23, 1987); *Gilbert v. Moore*, 134 F.3d 642, 665 (4th Cir. 1998). The analysis took hold in the Fourth Circuit. *See* John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*," 58 Md. L. Rev. 1480 (1999).[6]

Other circuit courts followed the Fourth Circuit's lead. *E.g.*, *Sutton v. Bell*, 645 F.3d 752, 763 (6th Cir. 2011); *Cannon v. Gibson*, 259 F.3d 1253, 1278 (10th Cir. 2001); *Grayson v. Thompson*, 257 F.3d 1194, 1228 (11th Cir. 2001). But the analysis has especially taken hold in the Fourth, Fifth, Tenth, and Eleventh Circuits.[7] *See, e.g.*, *Evans v. Sec'y, Dep't of Corrs.*, 703 F.3d 1316 (11th Cir. 2013); *Gilson v. Sirmons*, 520 F.3d 1196 (10th Cir. 2008); *Bell v. Kelly*, 260 F. App'x 599, 606-07 (4th Cir. 2008);

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[6] *See also* John Blume, *The Dance of Death or (Almost) "No One Here Gets Out Alive": The Fourth Circuit*, 61 S. Carolina L. Rev. 478 (2010) (calling "double-edged" prejudice inquiry "creation of [Fourth Circuit's] own doctrine").

[7] Other circuits apply the standard sporadically, or not at all, including the Third, Sixth, and Ninth Circuits. *See, e.g.*, *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009) (although missing evidence painted defendant as "sadistic," it also "acted as a common thread" tying the evidence of defendant's life and offense together); *St. Pierre v. Walls*, 297 F.3d 617, 632 (7th Cir. 2002) (finding failure to present mitigation evidence nonprejudicial and noting mitigation evidence is double-edged); *compare, e.g., Carter v. Mitchell*, 443 F.3d 517, 531-32 (6th Cir. 2006) (testimony by family members would have exposed defendant's criminal history), *with Hamblin v. Mitchell*, 354 F.3d 482, 489–93 (6th Cir. 2003) (failure to investigate and present family history prejudicial); *Stankewitz*, 698 F.3d at 1173 (9th Cir. 2012) (although some missing mitigation evidence was double-edged, prejudicial error not to offer it).

Jones v. Catoe, 9 F. App'x 245, 254 (4th Cir. 2001); *Hernandez v. Johnson*, 108 F.3d 554, 562-64 (5th Cir. 1997); *West v. Johnson*, 92 F.3d 1385, 1410 (5th Cir. 1996); *Woods v. Johnson*, 75 F.3d 1017, 1035 (5th Cir. 1996).

In the Fifth Circuit alone, the analysis has been applied in at least 30 capital cases. *See* App. M (collecting Fifth Circuit decisions applying the "double-edged evidence" analysis).[8] In those cases, the Fifth Circuit has labeled as "double-edged" a broad swath of the most compelling mitigating facts: temporal lobe epilepsy;[9] "alleged brain injury, abusive childhood, and drug and alcohol problems;"[10] "family difficulties;"[11] inadequate supervision as a child;[12] mental health problems;[13] juvenile legal problems;[14] and intellectual disability.[15]

The overwhelming number of cases in which the inquiry is applied find no prejudice from the failure to present mitigating evidence that might also be seen as aggravating. *See* Appendix M. Indeed, the Fifth Circuit has articulated the rule in near-blanket terms: a petitioner "cannot show prejudice because much of the new evidence is 'double edged.'" *Gray v. Epps*, 616 F.3d 436, 449 (5th Cir. 2010) (citing

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[8] The number is certainly higher, as it accounts only for cases in which the Fifth Circuit used the term "double-edged," "dual-edged," or "two-edged." Courts sometimes apply the same analysis without invoking one of these terms.

[9] *Martinez v. Quarterman*, 481 F.3d 249, 254-55 (5th Cir. 2007).

[10] *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002).

[11] *Williams v. Stephens*, 575 F. App'x 380, 385 (5th Cir. 2014).

[12] *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002).

[13] *Zimmerman v. Cockrell*, No. 01-40591, 2002 WL 32833097, at *7 (5th Cir. Aug. 1, 2002) (unpublished).

[14] *Cockrum v. Johnson*, 119 F.3d 297, 304-05 (5th Cir. 1997).

[15] *Andrews v. Collins*, 21 F.3d 612, 624 (5th Cir. 1994).

Dowthitt v. Johnson, 230 F.3d 733, 745 (5th Cir. 2000)). Not coincidentally, the Fifth Circuit has not granted sentencing phase relief on a claim of ineffective assistance of counsel for failure to present mitigating evidence once in the last 13 years. *See Walbey v. Quarterman*, 309 F. App'x 795, 805-06 (5th Cir. 2009); *Adams v. Quarterman*, 324 F. App'x 340, 352 (5th Cir. 2009). This pattern holds in the other circuits that routinely apply this analysis.[16] Thus, courts may discount substantial new mitigating

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[16] **Fourth Circuit:** *Jones*, 9 F. App'x at 254 (no finding of prejudice; additional evidence of defendant's psychosis was "double-edged"); *Gilbert v. Moore*, 134 F.3d 642, 655 (4th Cir. 1998) (en banc) (no finding of prejudice; additional evidence of mental impairment and drug abuse was "two-edged"); *Beavers v. Pruett*, No. 97-4, 1997 WL 585739, at *4 (4th Cir. Sept. 23, 1997) (no finding of prejudice; additional evidence of psychological problems was "two-edged"); *Bell*, 260 F. App'x at 606-607 (no finding of prejudice; additional evidence of marital infidelity was "cross-purpose").

Sixth Circuit: *Carter*, 443 F.3d at 531-32 (no finding of prejudice; additional evidence of drug use and violent character had an implied "double edge").

Seventh Circuit: *St. Pierre*, 297 F.3d at 632 (no finding of prejudice; "availability and admissibility of practically any evidence" was "double-edged"); *Jones v. Page*, 76 F.3d 831, 846, 848 (7th Cir. 1996) (no finding of prejudice; additional evidence of substance abuse was "double-edged").

Tenth Circuit: *Gardner v. Galetka*, 568 F.3d 862, 881 (10th Cir. 2009) (lower court's finding of no prejudice was not unreasonable; additional evidence of criminal history had a potential "double-edged effect"); *Harris v. Sharp*, 941 F.3d 962, 997-98 (10th Cir. 2019) (no finding of prejudice; additional mental health evidence was "double-edged"); *Gilson*, 520 F.3d at 1248-49 (no finding of prejudice; additional evidence of "explosive behavior" was "two-edged"); *Littlejohn v. Royal*, 875 F.3d 548, 560 (10th Cir. 2017) (no finding of prejudice; additional evidence of organic brain damage was "two-edged" by implication); *Stafford v. Saffle*, 34 F.3d 1557, 1565 (10th Cir. 1994) (no finding of prejudice; additional evidence of "antisocial, sociopathic personality" was "double-edged"); *Wackerly v. Workman*, 580 F.3d 1171, 1178-80 (10th Cir. 2009) (no finding of prejudice; additional evidence of drug abuse was "double-edged"); *Duvall v. Reynolds*, 139 F.3d 768, 782 (10th Cir. 1998) (no finding of prejudice; additional evidence of substance abuse was "double-edged" by implication); *Cannon*, 259 F.3d at 1277-78 (no finding of prejudice; additional evidence of social history was "two-edged" by implication); *Davis v. Exec. Dir. of Dep't of Corr.*, 100 F.3d 750, 762 (10th Cir. 1996) (no finding of prejudice; additional evidence of family testimony was "two-edged").

evidence even when the jury heard no mitigation evidence at a petitioner's capital sentencing proceeding. *E.g.*, *Gates v. Davis*, 660 F. App'x 270, 272, 276-77 (5th Cir. 2016) (holding, in case in which "defense did not present any evidence at the punishment phase of Gates's trial," no prejudice because new evidence of fetal alcohol syndrome was as aggravating as it was mitigating).

2. The double-edged prejudice inquiry violates core tenets of *Strickland*.

The double-edged evidence analysis departs in three fundamental ways from the well-known *Strickland* prejudice standard in capital sentencing. *See* 466 U.S. at 695-96. The approach eschews a holistic inquiry, ignores the role of competent counsel, and overlooks the effect new evidence would have on even a single juror who could give the evidence mitigating effect. Thus, as Judge McConnell recognized in *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008), invocation of the double-edged sword to classically mitigating mental-health evidence would vitiate "*Williams, Wiggins, and Rompilla* … and many more decisions across the country holding that

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Eleventh Circuit: *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (no finding of prejudice; additional evidence was "double-edged"); *Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1296 (11th Cir. 2012) (lower court's finding of no prejudice was reasonable; additional evidence was "two-edged"); *Robinson v. Moore*, 300 F.3d 1320, 1345-46, 1349 (11th Cir. 2002) (lower court's finding of no prejudice was not unreasonable; additional evidence of intoxication was "two-edged" by implication); *Tompkins v. Moore*, 193 F.3d 1327, 1338-39 (11th Cir. 1999) (no finding of prejudice; additional evidence of substance abuse was "two-edged"); *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1368-69 (11th Cir. 2009) (no finding of prejudice; additional evidence of family's criminal history was "double-edged); *Grayson v. Thompson*, 257 F.3d at 1227-28 (no finding of prejudice; additional evidence of intoxication was "two-edged" by implication); *Suggs v. McNeil*, 609 F.3d 1218, 1231, 1233 (11th Cir. 2010) (lower court's finding of no prejudice was not unreasonable; additional evidence of substance abuse was "two-edged").

the failure to present mental health evidence of this sort was prejudicial." *Id.* at 1095-96. But these Sixth Amendment decisions "do not permit us to regard" that evidence "as inconsequential." *Id.* at 1096.

First, the double-edged evidence analysis fails to "consider the value of the newly discovered evidence in the context of the whole record." *Trevino v. Davis*, 138 S. Ct. 1793, 1798-99 (2018) (Sotomayor, J., dissenting from denial of certiorari). Courts must assess the "totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98. Thus, the mitigating impact of evidence will be greater if it is not cumulative of other evidence already presented. *See Belmontes*, 558 U.S. at 22 (discounting evidence "merely cumulative of the humanizing evidence … actually presented" at trial). By the same token, the aggravating qualities of new "double-edged" evidence may only have "barely altered" the evidentiary picture because of significant aggravation already presented at trial. *See, e.g.*, *Strickland*, 466 U.S. at 700. By abstracting the "aggravating" and "mitigating" aspects of evidence from the actual record, the double-edged evidence rule impermissibly "truncates" *Strickland*'s prejudice inquiry. *Sears*, 561 U.S. at 955.

Second, the analysis gives dispositive weight to the impressions of jurors (or judges) who are unpersuaded by mitigation evidence, rather than the persuadable juror who could affect the outcome. Evidence has no inherent aggravating quality that all must weigh alike; evidence may strike jurors in different ways. The question

under the Sixth Amendment is whether there is a reasonable probability that even one juror of twelve would have "struck a different balance" if presented with new evidence that counsel failed to investigate and present. *Wiggins*, 539 U.S. at 537. And in determining the constitutional question of prejudice resulting from counsel's errors, it is this latter group—those who could find mitigating content in the new evidence—who matter. *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("[A]lthough … it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test."). For example, *Williams* acknowledged that "unfavorable" evidence might come in with a defendant's new mitigation evidence, but still found a jury "might well" reach a different result. 529 U.S. at 329. By treating the potentially aggravating qualities of evidence as a scientific fact—necessarily neutralizing their mitigating qualities—the double-edged analysis improperly ignores the mitigating impact even one juror could reasonably give to that evidence.

Third, the double-edged evidence inquiry fails to account for the role of competent counsel. It is axiomatic that prejudice must be assessed in light of how "competent counsel" could have "presented and explained the significance of all the available evidence." *Williams*, 529 U.S. at 399; *see also Kyles v. Whitley*, 514 U.S. 419, 441 (1995) (materiality in *Brady* context judged according to how disclosure of evidence to "competent counsel would have made a different result reasonably probable"); *Elmore v. Holbrook*, 137 S. Ct. 3, 9 (2016) (Sotomayor, J., dissenting from denial of certiorari); *United States v. Sipe*, 388 F.3d 471, 481-82 (5th Cir. 2004) (concluding that defense counsel must be permitted to decide whether to use double-

edged evidence suppressed by prosecutor in assessing materiality). Yet courts applying the double-edged prejudice inquiry fail to account for the role of competent counsel to present the new evidence, even as they assume the unassailability of the case the State might present in rebuttal.

What may appear to a court or prosecutor as aggravating, or double-edged, can be powerfully mitigating in the hands of a competent defense team. Competent counsel can explain how the mitigating evidence—even if painful or unflattering—humanizes their client, explains their client's actions (or failures to act), or, more generally, provides the opportunity for a "reasoned moral response" from the jury. *See Sears*, 561 U.S. at 951 (although the new evidence included some that was "adverse" to the defendant, "[c]ompetent counsel should have been able to turn some of the adverse into a positive—perhaps in support of a cognitive deficiency mitigation theory"). Whether a fact is viewed as aggravating or mitigating will often depend on the sensibilities of the juror considering it. But it will perhaps just as often depend on the way that it is exploited by competent defense counsel.

Finally, the court below cited two cases as supporting a "double-edged" rule: *Pinholster*, 563 U.S. 170 and *Belmontes*, 558 U.S. 15. App. 9a. Neither case remotely ratifies the Fifth Circuit's practice of discounting mitigating evidence. *Belmontes* addressed the rare circumstance in which counsel strategically elected not to present certain mitigation evidence because it would "open the door" to aggravating prosecution evidence (in *Belmontes*, a prior murder). 558 U.S. at 19. Because the additional mitigation evidence would have triggered the prosecution's use of its prior-

murder evidence, *Belmontes* held that a court must assess the aggravating evidence that "almost certainly would have come in with it." *Id.* at 20. Outside this tit-for-tat context, *Belmontes* has no purchase.

Pinholster analyzed whether the California Supreme Court had unreasonably found no prejudice based on the "little additional new evidence presented to it" under the highly deferential review of 28 U.S.C. § 2254(d). 563 U.S. at 202. Far from re-writing the *Strickland* standard, however, *Pinholster* merely found that some evidence was not so "clearly mitigating" that fair-minded jurists could not disagree about its probable effect on the outcome. *Id.* at 201.

These cases' limited holdings did not revise the *Strickland* prejudice standard.

B. The double-edged prejudice inquiry offends the Eighth Amendment guarantee of individualized capital sentencing.

The failure to investigate and present mitigating evidence in a capital case implicates two constitutional rights—the Sixth Amendment right to effective assistance of counsel and the Eighth Amendment right to be sentenced by a jury who has considered, and been permitted to give full effect to, evidence in mitigation of a death sentence.

The Sixth Amendment's "right to the effective assistance of counsel at trial is a bedrock principle in our justice system," *Martinez*, 566 U.S. at 1, and is never more important than in the sentencing phase of a capital trial, where a defendant's life is at stake. It ensures that a capital defendant has qualified and competent assistance in answering the state's charges and, if necessary, in making the most persuasive case possible for life. The Eighth Amendment ensures, in part, that the defendant's

life is taken fairly, and not arbitrarily. It does so by requiring that the sentencing jury not be prevented from hearing or giving effect to evidence that might persuade it to choose a sentence of life. *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982) (internal quotation marks and citation omitted); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). This individualized sentencing requirement, in turn, is a central safeguard against impermissibly arbitrary death sentences. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (requiring jurors consider "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind").

As applied in the manner described above, the "double-edged" analysis stands in stark conflict not just with this Court's Sixth Amendment precedent, but also with its Eighth Amendment precedent.

1. The double-edged inquiry gives anchoring weight to the State's case.

The Eighth Amendment requires that each capital juror reach a reasoned moral response to the defendant and his offense, based on their own calculation of relevant sentencing evidence. *See, e.g.*, *Smith v. Texas*, 543 U.S. 37, 43-44 (2007); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251-52 (2007); *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004). Jurors must be free to reach that response based on any evidence—regardless whether it is tied to the offense or explains or justifies it. *Tennard,* 542 U.S. at 284-85. This Court's mitigation precedent is premised on the view that jurors may accept the prosecutor's case in aggravation and nonetheless decide on a life sentence, based on the humanizing facts they heard during the sentencing trial. *See Sears v. Upton*,

561 U.S. 945, 951 (2010) (evidence of a personality disorder might not have endeared the defendant to the jury, but "might well have helped the jury understand Sears, and his horrific acts…"); *Williams*, 529 U.S. at 398 (evidence of borderline intellectual disability and childhood abuse is "consistent with the view that [the petitioner's] behavior was a compulsive reaction rather than the product of cold-blooded premeditation").

A defendant's drug addiction, for example, may not make him less dangerous. But, in a case where no mitigation evidence was offered, the jury has nothing but the state's evidence in aggravation without any facts that might prompt mercy. *See Mitchell v. Kemp* 107 S. Ct. 3248, 3252 (1987) (Marshall, J., dissenting) (in light of importance Court placed on mitigation, *Strickland* cannot permit death sentence based solely on State's evidence to stand).

The double-edged prejudice inquiry defies these principles by giving anchoring weight to the State's case for death in assessing whether the absence of mitigation evidence prejudiced the defendant. *See Hodge v. Kentucky*, 133 S. Ct. 506, 510 (2012) (Sotomayor, J., dissenting from denial of certiorari) (noting Kentucky Supreme Court discounted the mitigating evidence because the evidence did not explain the defendant's offense). That the State's evidence is harmful—even very harmful—should not be the metric by which the potential efficacy of mitigating evidence is measured.

This is particularly problematic in Texas cases such as this one, because it means that a single aggravating question—whether the defendant is a continuing

threat to society—controls the prejudice inquiry. *See* Tex. Code Crim. Proc. art. 37.071 § 2(b)(1); *Johnson*, 306 F.3d at 253 (characterizing evidence about defendant's "alleged brain injury, abusive childhood, and drug and alcohol problems" as "double-edged" because it could support future dangerousness). Even when dangerousness is only one of many factors, that question can drive the inquiry. *See, e.g.*, *Wackerly*, 580 F.3d at 1180 (labeling defendant's evidence of psychological disorders as "double-edged" because it supported conclusion that he represented a continuing threat); *Bell*, 260 F. App'x at 606-07.

The anchoring effect can produce absurd results. The Tenth Circuit has suggested that a moderately terrible childhood is more mitigating than a very terrible one, because the latter "could increase the jury's perception" of the defendant's dangerousness." *Gardner*, 568 F.3d at 881. The court observed that "[t]he greater the dysfunction in his family, the less likely it is that Mr. Gardner's violence would subside if ever released." *Id.* In this case, the court of appeals agreed with the district court that Speer's behavioral problems at the age of four, when he was at the mercy of adults who were supposed to help him, increased the likelihood that he was a future danger. *But see Jells v. Mitchell*, 538 F.3d 478, 500 (6th Cir. 2008) (prejudicial to fail to investigate and present evidence that defendant's learning disabilities produced behavioral problems in school).

2. The double-edged inquiry renders capital sentencing unreliable.

The double-edged inquiry's conflict with this Court's Eighth Amendment jurisprudence goes beyond the deprivation caused to defendants and capital jurors.

It affects the integrity of appellate review. "[R]eview by courts at every level helps to ensure reliability." *Glossip v. Gross*, 576 U.S. 863, 937 (2015) (Breyer, J., dissenting). The double-edged inquiry overtaxes reviewing courts' institutional competence. Whereas *Strickland* asks judges to decide whether mitigating evidence is cumulative or to police the margins of relevancy, the double-edged analysis *introduces* arbitrariness into the determinations of reviewing courts by asking them to predict whether a particular set of evidence would move a single juror to mercy.

Without guidance from this Court, inconsistent and seemingly conflicting decisions regarding the effect of overlooked mitigation evidence will increase the "freakish" and arbitrary nature of the imposition of the death penalty. *See Furman v. Georgia*, 408 U.S. 238, 310 (1972) (opinion of Stewart, J.).

C. This case is a good vehicle for reviewing the "double-edged" prejudice inquiry.

This Court has not taken a case to expressly decide whether a double-edged inquiry can, consistent with the Eighth Amendment, play a role in deciding *Strickland*'s prejudice question when a capital attorney fails to conduct a mitigation investigation or present mitigating evidence. However, in recent years, this Court has considered a number of cases involving the proper prejudice inquiry, and many of those cases came from courts applying the "double-edged" analysis. *See, e.g., Andrus v. Texas*, 140 S. Ct. 1875 (2020) (remanding resolution of mitigation ineffectiveness claim for prejudice analysis where Texas Court of Criminal Appeals applied double-edged doctrine); Petition for Writ of Certiorari, *Fields v. United States*, No. 14-772, 2014 WL 7405893, at *10-*19 (2014) (challenging Fifth Circuit's double-edged

analysis on mental-health evidence); Respondent's Brief in Opposition to Certiorari, *Trevino v Thaler*, 2012 WL 3555164, at *17-*18 (2012) (arguing petitioner's ineffective assistance claim should be rejected because missing mitigation evidence was "double edged").

This case presents an excellent opportunity to harmonize the views of the lower courts and increase fairness in capital sentencing. Speer's case was decided by a circuit that prominently applies the double-edged analysis.[17] It was Texas's capital sentencing scheme that produced *Penry v. Lynaugh*, the decision that gave rise to the analysis. In addition, the Fifth Circuit's double-edged analysis has produced stark results, with no successful mitigation-based ineffectiveness claim since 2009.

Speer's case is both factually and procedurally clear-cut. There is no serious question about whether his attorneys completed a sufficient investigation or whether their failures to investigate were strategic. They wholly failed to investigate mitigation evidence. Counsel failed to obtain the readily available prior conviction file, which, just like *Rompilla*, 545 U.S. at 384, contained a trove of social history and mitigation leads. Speer raised his claim at the earliest possible point in this litigation after receiving the assistance of supplemental counsel. And Speer has sharply

[17] Some courts have been openly critical of the approach. *See, e.g., Wilson*, 536 F.3d at 1095-96 (rejecting dissenting opinion that evidence was double-edged and thus there was no prejudice in not presenting it: "if true, the point would apply not just to this case, but also to *Williams, Wiggins,* and *Rompilla* …"); *Lopez v. Att'y Gen. for Nev.*, 845 F. App'x 549, 553 (9th Cir. 2021) (state court unreasonable "in even considering" the potentially aggravating facts in an expert's report in light of the expert's overall mitigating opinions).

articulated his objection to "double-edged" evidence leading to thorough decisions that amply reflect the courts' jurisprudence in this area.

Finally, Speer's mitigation evidence is strong and paradigmatically relevant. Bullied and abused as a child, Speer acted out as a child and received little help. He was exposed to and provided drugs by his parents. Intellectual deficits put him in remedial education. He looked up to and admired people he believed to be superior to him. While this evidence "may not have overcome a finding of future dangerousness," *see Williams*, 529 U.S. at 398, it could have "reduced the ballast on the aggravating side of the scale," *Porter*, 558 U.S. at 42, by offering a narrative about two seemingly senseless killings with a narrative about a person who was so broken that he allegedly let others lead him to commit terrible crimes. *See Simmons v. Luebbers*, 299 F.3d 929, 936 (8th Cir.2002) (without missing mitigation evidence, jury "was allowed to conclude that Simmons's violent behavior was simply the result of his wicked and aggressive nature").

Speer's traumatic upbringing that made him dependent on male authority figures was a "common thread" that tied the acts he was accused of committing together. *Thomas v. Horn*, 570 F.3d 105, 129 (3d Cir. 2009) (holding defendant's "mental health history acts as a common thread that ties all this evidence together").

Without in any way diminishing the seriousness of the crimes for which Speer was convicted, Speer's case was not so aggravating that a case in mitigation would have been futile. The assumption that mitigating evidence cannot produce sentences less than death is contrary to the facts. In *Buck*, 137 S. Ct. 759, the Court found

counsel's punishment-phase error prejudiced the petitioner "notwithstanding" the vicious nature of the crime or the defendant's remorseless behavior afterward. *Id.* at 776. The numerous life verdicts that actual jurors have reached despite defendants' brutal, horrific murders also refutes this rationale. *See* Russell Stetler, *The Past, Present, & Future of the Mitigation Profession*, 46 Hofstra L. Rev. 1161, apps. 2-4 (2018); *see also Hamilton v. Ayers*, 583 F.3d 1100, 1134 (9th Cir. 2009) (listing cases to demonstrate that gruesome nature of defendant's crime does not mean death penalty is unavoidable).

Jurors regularly respond positively to double-edged evidence, even in highly aggravated cases. In a capital jury room, the smallest fact can determine the sentence.[18] Although courts have held that the abuse a defendant suffered as a child is double-edged and insufficiently mitigating to overcome a strong case of dangerousness, jurors have voted for life sentences based on abuse, even after hearing of an unspeakably brutal crime. In a recent federal death-penalty trial, a jury gave a sentence of life without parole to a defendant, Jesse Con-ui, who murdered a federal prison guard while serving a life sentence for a prior murder. *Jury Spares Jesse Con-ui's Life for Federal Prison Guard's Murder*, Times Leader, July 10, 2017.[191] The jury in Con-ui's case heard copious aggravating evidence about Con-ui's penchant for

[18] *See* Scott Sundby, *A Life and Death Decision* 137 (2017) (margin between life and death is often "razor thin"). In the central case in Sundby's book, for example, a juror held out for a life sentence for some days based mainly on testimony that the defendant had lost a brother as a child.

[19] https://www.timesleader.com/news/local/667029/jury-spares-jes-sie-con-uis-life-for-federal-prison-guards-murder.

violence. *Id.* Con-ui had previously committed a gang-related murder that had sent him to prison; in prison, he stabbed an in-mate, attacked another with a metal meal tray, and threatened to kill a guard before he then brutally murdered a federal corrections officer. *Id.* He expressed no remorse at sentencing. *Id.* Yet all twelve jurors found the following evidence mitigating: Con-ui entered the prison system at the age of 19; juvenile inmates were inadequately and improperly treated by the juvenile prison system; the prison system could not ensure the safety of its prisoners; and Con-ui was exposed to "'adverse childhood experiences' that had a negative effect on the course of his life." Special Verdict Form at 13, 14, 17, *United States v. Con-ui*, No. 3:13-cr-00123 (M.D. Pa. July 11, 2017), ECF No. 1242. In *United States v. Bass*, for example, a jury rejected an invitation to impose a death sentence even though the defendant had been accused of shooting four people—one repeatedly—to death, in connection with his illegal-drug business. 460 F.3d 830, 832–33 (6th Cir. 2006). At sentencing, defense counsel presented mitigating evidence that included testimony from Bass's family about childhood poverty, violence, and brain damage.[20] Similarly, white supremacist Chevie Kehoe was sentenced to life rather than death after being convicted of murdering and torturing two adults and a small child. *United States v. Kehoe*, No. 4:97-CR-00243(1), 2008 WL 4079316, at *2 (E.D. Ark. Aug. 28, 2008). Among the mitigating facts the jury heard were that Kehoe had small children, came

[20] *Jury weighing death penalty—Lawyer makes plea for life prison term for convicted killer*, Detroit News (Aug. 14, 2013).

from a dysfunctional family, was influenced by his extremist parents, and was prompted by his parents to commit crimes.

Some of those facts were every bit as "double-edged" as the facts recited in Speer's case. That Kehoe killed a small child while raising children of his own could easily be seen as aggravating. Some courts would view his dysfunctional family as potentially aggravating. Nonetheless, the jury relied on the potentially "double-edged" evidence to provide context for Kehoe's offenses.[21]

II. This Court Should Decide Whether the Fifth Circuit Disregarded the Court's Recent Interpretation of 18 U.S.C. § 3599(f) in *Ayestas v. Davis* When It Held That the District Court Could Deny a Request for Investigative Services Without Conducting a Claim-Specific Review.

The second question presented concerns an antecedent issue in the federal habeas proceedings: when deciding an application for investigative or expert services in a capital case under 18 U.S.C. § 3599(f), may a district court disregard the claim-specific requirements set out in *Ayestas v. Davis*? Because this Court plainly admits no exception to its interpretation that the statute requires such consideration, the Fifth Circuit's contrary conclusion that there was "no requirement" must be reversed.

A. The Fifth Circuit's opinion is in conflict with *Ayestas*.

In 18 U.S.C. § 3599(f), Congress provided a vehicle for appointed counsel in capital cases to obtain funding to hire "investigative, expert, or other services" that

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[21] *See also United States v. Beckford*, 211 F.3d 1266, at *4, unpub. op. (4th Cir. 2000) (choosing life sentence after conviction for six drug-related murders); *United States v. Pitera*, 5 F.3d 624, 625 (2d Cir. 1993) (choosing life for defendant, drug-conspiracy ringleader, who dismembered bodies of victims); *United States v. Gilbert*, 92 F. Supp. 2d 1, 2–3 (D. Mass. March 26, 2001) (life sentence for nurse convicted of murdering four patients).

are "reasonably necessary" for representation. The provision of funds "as reasonably necessary" to investigate in capital cases reflects Congress's recognition of the high stakes in capital representation and the cost required to provide effective counsel in these cases.

In *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), this Court rejected the Fifth Circuit's restrictive gloss on funding requirements under 18 U.S.C. § 3599. The Court identified three factors that district courts were "require[d] … to consider" when determining whether requested services were "reasonably necessary":

> [1] the potential merit of the claims that the applicant wants to pursue,
> [2] the likelihood that the services will generate useful and admissible evidence, and
> [3] the prospect that the applicant will be able to clear any procedural hurdles standing in his way.

Id. at 1094.

In Speer's case, the Fifth Circuit again sidestepped § 3599's requirements. In rejecting Speer's access to services claim, the Fifth Circuit undercut the import of *Ayestas*. The court held that this Court's requirements merely "*can* inform whether a funding request is 'reasonably necessary.'" App. 13a (emphasis added). Stressing the "highly discretionary" nature of the funding determination, the court stated it saw "no requirement that [the district court's] order include the "claim-by-claim" analysis that Speer seeks." App. 13a. Dispensing with the need for a proper analysis under *Ayestas*, the Fifth Circuit stated that a district court considering a third disbursement of funds would be "quite familiar with the case and the funding needs." *Id.*

In reaching this outcome, the Fifth Circuit gave tacit approval to funding determinations unmoored from the claim-specific "reasonably necessary" inquiry. Below, the magistrate judge took an abstract approach to deciding the funding request that *Ayestas* would later repudiate. Without examining the claim under development or the investigative services requested, the judge denied the request because Speer had already been given "four times the amount provided by 18 U.S.C. § 3599(g)(2),"[22] and the court "simply cannot certify to the Fifth Circuit that additional funding should be approved." App. 79a.

Speer provided clear and particularized support to show that the funds were reasonably necessary. His claim plainly had potential merit. At the time Speer made his supplemental funding request, the mitigation specialist in the case had uncovered extensive new evidence and explained his foundation for needing a mental-health expert. Indeed, the Fifth Circuit later found the claim "substantial" enough to grant a COA. *See* App. D.

Speer also showed how the services would be useful. He identified which witnesses he intended to interview. He detailed his need for medical records that contained data that could confirm the accuracy of certain diagnoses and observations and inform whether further testing should be pursued. As the mitigation specialist noted, Speer had exhibited signs of psychological and psychiatric problems for more

[22] Under § 3599(f), district courts may authorize funds of up to $7,500 without additional approval. Funds in excess of that amount may be sought, "as necessary to provide fair compensation for services of an unusual character or duration," if the excess payment is approved by the chief judge of the circuit. 18 U.S.C. § 3599(g)(2).

than 30 years. His problems appeared to have a neurological component. Yet he had received no mental-health evaluation prior to his capital trial or any time after.

The court of appeals thus relieved district courts in the very same circuit that had given rise to *Ayestas* from conducting the review of evidence that *Ayestas* mandated.

B. It is important to resolve this question about access to investigative and expert services in capital cases.

There are several reasons that it is important to correct the Fifth Circuit's decision. Correcting this errant interpretation of *Ayestas* (1) reflects the essential role extra-record investigation has taken on in capital post-conviction cases; (2) is consistent with federal judiciary policy aimed at ensuring capital counsel are provided adequate resources; (3) avoids a cruel irony in Speer's case in which courts simultaneously created a lack of evidence through the denial of services and faulted Speer for failing to present enough evidence; and (4) remedies harshly unequal treatment for capital petitioners depending on who represents them.

First, investigation outside the trial record is a critical responsibility of post-conviction representation. Inadequate investigation of sentencing mitigation increases the possibility that the death penalty will be imposed even though there are compelling factors calling for lesser punishment. *Lockett*, 438 U.S. at 605. A claim that trial counsel was ineffective for failing to present a mitigation case at sentencing can require extensive investigation. To prove the claim, habeas counsel is required to trod territory that trial counsel failed to explore. *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). Counsel may not rely on the record, but must conduct a "thorough,

independent investigation." ABA Death Penalty Guideline 10.15.1, cmt. Because this new investigation invariably happens at a date much later than the original trial, witnesses and records may be hard to locate.

Proper investigation often requires specialized services, too, such as a mitigation specialist, often with special training in social work, mental-health, or work with vulnerable populations. In *Wiggins*, for example, a licensed social worker uncovered the "powerful" mitigating evidence that resulted in the vacating of the petitioner's death sentence. *Wiggins*, 539 U.S. at 516, 534; *see also McFarland v. Scott*, 512 U.S. 849, 855 (1994) (the services of experts may be "critical" in habeas proceedings). Failure to provide funding for such experts can impede the defense attorney's ability to attract, and keep, qualified assistance in capital cases. As the ABA has recently recognized, "'[w]hen counsel fails to provide effective representation, it is often due to limitations such as fee caps and the *failure to fully fund expert and investigative members* of the defense team." Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, at 24, *Ayestas v. Davis,* 138 S. Ct. 1080 (2018) (quoting Emily M. Olson-Gault, Testimony, Feb. 18, 2016, *Birmingham, Alabama Hearing Before the Judicial Conference of the United States*).

The decisions in *Martinez*, 566 U.S. 1, and *Trevino*, 569 U.S. 413, highlight the special need for extra-record investigation by *federal* habeas counsel. This Court's decisions in *Martinez* and *Trevino* offered federal habeas petitioners a pathway to secure habeas relief on claims of trial counsel's ineffectiveness that state habeas

counsel failed to raise in the first available proceeding. Often in these cases, the petitioner's trial and state post-conviction counsel have performed no meaningful investigation, and federal habeas counsel is the first to do so. As *Ayestas* recognized, with the resources to investigate claims under *Martinez* and *Trevino*, "it is possible that investigation might enable a petitioner to carry [his] burden." 138 S. Ct. at 1094. Without those resources, however, *Martinez* and *Trevino* are a dead letter.

Second, in its policymaking, the federal judiciary has recognized the need to improve the provision of investigative and expert services in capital habeas cases. Contrary to the magistrate judge's use of $7,500 as a "norm" for expenses, in 2010 federal judges already described that figure "as outdated, unreasonably low, and 'wholly unrealistic.'" Jon B. Gould & Lisa Greenman, Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 78 n.82 (Sept. 2010), https://www.uscourts.gov/sites/default/files/fdpc2010.pdf. In fact, in trial cases in which the government was authorized to seek a death sentence between 1998 and 2004, federal courts authorized on average $128,129 in expert and investigative services for cases. *Id.* at 32, Table 8. More recently, the Report of the Ad Hoc Committee to Review the CJA (the "Cardone Report") drove home the same point. It found that, "[g]iven the crucial role that specialists play in capital habeas petitions," § 3599(g)(2)'s $7,500 trigger is "far too low." *Id.* at 191.[23]

[23] The Cardone Report also highlighted the endemic problem of failing to fund capital habeas investigation in the Fifth Circuit. The report repeatedly discussed funding problems in Texas capital habeas cases. *See id.* at 207-209. For example, it

Several recommendations from the Cardone Report have been adopted by the Judicial Conference of the United States, including that judges should be trained on "the need to generate extra-record information" in capital habeas cases. *See* Report of Proceedings of the Judicial Conference of the U.S. 41 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf.

Third, under the Fifth Circuit's view, a district court—for reasons completely unrelated to the case—can deny a petitioner the ability to investigate whether trial counsel failed to perform a reasonable investigation of mitigating evidence. And then, on merits review, that same court can fault the petitioner for failing to marshal enough mitigating evidence to show that counsel's errors would have prejudiced the petitioner. In other words, the court can fault the petitioner for the incomplete record the court itself caused by denying resources to investigate.

Fourth, death-sentenced prisoners who receive court-appointed counsel depend on the court to fund investigative and expert services. Those prisoners will be far likelier to lose in habeas than their counterparts. *See* Cardone Report at 195 & n.927 (summarizing testimony that "the more time and resources [petitioners] had

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noted one practitioner's report that a Texas district judge "has an announced practice of providing no funding for any investigative, expert or other services provided for by Section 3599(f)." *Id.* at 207. The Cardone Committee also received testimony that, during her term as Chief Judge, Judge Jones criticized payments for services in capital habeas cases and proposed that "[c]ourts should … preferably [] place an outside dollar limit on all experts." Memorandum from Edith H. Jones to All Chief Circuit Judges, All Circuit Execs., & Gary Bowden *3 (Mar. 11, 2011), available at https://cjastudy.fd.org/sites/default/files/hearing-archives/miami-florida/pdf/stephenbrightmiamiwritten-testimony-done.pdf.

for investigators and experts for habeas petitions, the greater the probability that their petition would be successful"). To paraphrase the Court's seminal declaration on equal protection for poor criminal defendants, "There can be no equal justice where the kind of [habeas representation] a man gets depends on the amount of money [his counsel has]." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

CONCLUSION

This Court should grant certiorari to resolve these important questions.

Respectfully submitted,

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