No. 21–7082

IN THE
Supreme Court of the United States

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari review is merited to consider a previously litigated ineffective-assistance-of-trial-counsel claim that is successive, is foreclosed by AEDPA's relitigation bar, relies on new evidence barred under *Cullen v. Pinholster*, 563 U.S. 170 (2011) and 28 U.S.C. § 2254(e)(2), and, if new, is time-barred under 28 U.S.C. § 2244(d).

2. Whether the Fifth Circuit's resolution of Speer's ineffectiveness claim—that his new mitigating evidence is double-edged and failed to outweigh the aggravating evidence that while in prison for murder he murdered again—warrants certiorari review.

3. Whether the Fifth Circuit's determination that the district court did not abuse its discretion in refusing to grant Speer additional discretionary funds beyond the $30,000 it allotted to him contravenes *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

LIST OF ALL 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)
(direct appeal opinion affirming conviction and sentence)

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. Nov. 28, 2012) (magistrate's report and recommendation)

Speer v. Thaler, No. 2:04-cv-269 (E.D. Tex. Dec. 14, 2012) (adopting magistrate judge's report and recommendation 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. Jun. 25, 2018) (magistrate's report and recommendation)

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

Speer v. Davis, Nos. 13-70001 & 19-70001 (5th Cir. Aug. 17, 2020) (affirming the denial of habeas relief and granting certificate of appealability)

Speer v. Lumpkin, Nos. 13-70001 & 19-70001 (5th Cir. Feb. 25, 2021) (affirming district court's judgment)

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

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BRIEF IN OPPOSITION

William Speer was incarcerated for life in TDCJ-CID for murdering the father of a friend. Once incarcerated, Speer—a prospective member of the Texas Mafia prison gang—carried out a "hit" on another inmate at the direction of his gang leader. Speer was convicted and sentenced to death for this second murder.

In the lower courts, Speer claimed that trial counsel were ineffective for failing to investigate and present mitigating evidence. This was a claim Speer presented to the state court, which denied it on the merits. The federal district court did the same. On appeal, Speer's federal counsel, who was also his state habeas counsel, filed a motion to withdraw. The Fifth Circuit construed "present counsel's motion to withdraw as a motion for the appointment of supplemental counsel," granted the motion in that regard but denied the motion to withdraw, and remanded the case to the district court for the appointment of conflict-free supplemental counsel "for the sole purpose of determining whether Speer has *additional* habeas claims that ought to have been brought." *Speer v. Stephens*, 781 F.3d 784, 786–87 (5th Cir. 2015) (emphasis added); App'x H at 82–84. The Fifth Circuit instructed the district court to resolve whether Speer could demonstrate cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), to overcome a procedural default for any ineffective-assistance-of-trial-counsel (IATC) claims and whether any of those claims merited relief. App'x H at 82–84. However, instead of identifying unadjudicated, procedurally defaulted claims potentially excusable under *Martinez*, Speer reasserted the same IATC claim that was rejected on the merits in

state *and* federal court, albeit with new evidence. The district court determined that Speer could not demonstrate prejudice due to the double-edged nature of the new evidence and, primarily, Speer's murderous history, and it denied Speer habeas relief. The Fifth Circuit ultimately affirmed on the same grounds.

Certiorari review is not merited because, although not resolved by the lower courts, multiple procedural hurdles bar any relief. Specifically, (1) because the Fifth Circuit did not vacate the federal district court's first opinion denying habeas relief despite its remand and because Speer raised the same IATC claim in his amended petition the district court previously adjudicated, the court lacked jurisdiction to consider it under 28 U.S.C. § 2244(b); (2) because Speer's IATC claim was adjudicated on the merits by the state court, Speer cannot rely on new evidence in federal court to surmount AEDPA's[1] relitigation bar under *Cullen v. Pinholster*, 563 U.S. 170 (2011); (3) Section 2254(e)(2) likewise bars review of Speers new evidence; and (4) if Speer's claim is new, AEDPA's statute of limitations bars relief.

Further, if Speer could overcome these procedural hurdles, he would not be entitled to certiorari review because the Fifth Circuit correctly determined that Speer's ineffectiveness claim failed on prejudice grounds. As the lower court held, even in light of Speer's new evidence, "[g]uesswork on that paramount consideration [of future dangerousness] was not needed here. While in prison for murder, Speer murdered again. It is difficult to think of more probative evidence on whether Speer might commit violent acts while incarcerated than the fact that he already had."

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[1] The Antiterrorism and Effective Death Penalty Act of 1996.

Speer v. Lumpkin, 860 F. App'x 66, 71 (5th Cir. Aug. 9, 2021) (unpublished); App'x B at 11. As such, Speer cannot meet the *Martinez/Trevino* equitable exception to defaulted IATC claims. *Martinez*, 566 U.S. at 14 (holding that a petitioner can overcome a defaulted IATC claim upon showing that (1) the claim is "substantial," and (2) his initial state habeas counsel was ineffective in failing to present this claim in his initial state habeas application); *Trevino*, 569 U.S. at 429.

Finally, Speer's argument that the Fifth Circuit disregarded *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), in affirming the district court's denial of his funding request is unavailing. The lower courts could not consider any new evidence, and *Ayestas* does not address a situation like this where a petitioner requests extraordinary funding beyond the presumptive statutory cap. Speer received $30,000 in funding from the district court; he was entitled to no more. The lower court's decision is correct, and certiorari review is unwarranted.

STATEMENT OF THE CASE

I. Facts of the Crime

Speer was an inmate in the general population section of TDCJ's Telford Unit, serving a life sentence for capital murder. 9 RR 50; 10 RR 158; SX 32.[2] He was also

[2] "RR" refers to the reporter's record of transcribed trial proceedings, preceded by volume number and followed by page number(s). "SX" refers to the State's exhibits, followed by exhibit number. "CR" refers to the clerk's record, followed by page number(s). "SHCR" refers to the state habeas clerk's record—the transcript of pleadings and documents filed with the court during Speer's original state habeas proceeding—followed by page number(s). "Supp. SHCR" refers to the supplemental state habeas clerk's record—that pertaining to Speer's second state habeas proceeding—followed by page number(s). "ROA" refers to the Fifth Circuit's record on appeal, followed by page number(s).

a prospective member of the Texas Mafia prison gang, whose leader at the time of the instant offense was Michael Constandine. 9 RR 129, 133, 140; 10 RR 234. The gang was involved in the illicit trade of smuggling tobacco into prison. Due to several failed transactions, Constandine incurred a debt to a rival prison gang. 9 RR 140–44. To obtain money to repay the rival gang, Constandine decided to strong-arm inmate James Baker into splitting a 240-pack drop of tobacco Baker was scheduled to receive. 9 RR 139, 145–48; 10 RR 226–28. However, the drop was witnessed by the assistant warden, and the tobacco was intercepted by prison officials. 10 RR 148–53.

One day prior to the tobacco being seized, the victim in this case, Gary Dickerson, was apprehended by prison officials for possessing contraband currency. That currency belonged to another gang that gave it to Dickerson to purchase cigarettes through Baker. Dickerson later approached Baker and threatened to tell prison authorities about the upcoming tobacco delivery if Baker did not help him avoid retaliation by the gang. 10 RR 259–63. After the tobacco was seized, Dickerson checked himself into protective custody. 10 RR 154, 229–30. Because of his threat to Baker and subsequent removal from general population, the Texas Mafia incorrectly assumed that Dickerson had "snitched" and told authorities about the tobacco drop. 9 RR 148–52; 10 RR 229–31, 259–60.

About a week later, Dickerson returned to his cell in general population. 9 RR 152–53; 10 RR 155–57, 230. The next day, Constandine held a meeting with three other Texas Mafia members—Speer, Anibal Canales, and Jessie Barnes—and decided that Dickerson must be killed in retaliation. 9 RR 154–61; 10 RR 133–35.

The "hit" was ultimately given to Speer after he volunteered. 9 RR 159–61; 10 RR 235–36. Speer and Canales rehearsed how Speer was going to place a choke hold on Dickerson while Canales held him down. 10 RR 237–39.

Later that day, Speer and Canales approached Dickerson and convinced him to return to his cell with them to smoke some cigarettes. 9 RR 161–64; 10 RR 45–46, 197–98, 240–41. As Dickerson bent down to blow smoke in the vent below his toilet, Speer reached over and placed him in a choke-hold until he stopped breathing. 9 RR 164; 10 RR 45–46, 192–94, 252. Speer later recounted to fellow Texas Mafia members that he choked Dickerson so hard that he crushed something in his throat and that he told Dickerson as he was dying, "[D]on't fuck with the Texas Mafia, not even in hell." 10 RR 45–47, 192–94, 254. Speer also wrote a letter to fellow inmate and prospective gang member David Ellis describing the murder, stating:

> I'm in Seg for killing a snitch. He may not have snitched on the 240 packs like the police say, but he had my family's name in his mouth in 1-Building, so I made his parole come early! The Texas Mafia is not (sic) no joke. We play the game and we play to win!

10 RR 39–40, 44; SX 34.

II. Evidence Relating to Punishment

In addition to the evidence concerning Dickerson's murder, the State presented evidence at the punishment phase about the impact Dickerson's murder had on his family. Gail Martin, one of Dickerson's four siblings, testified about the close relationship Dickerson had with his family and how his death devastated her, her mother, and her siblings. ROA.785–91.

The State then presented evidence concerning the previous capital murder for which Speer was serving a life sentence. Franklin Nanyoma, Speer's co-conspirator, described the murder of their friend's father, Jerry Collins, back in 1990. ROA.791–821. About a month before the murder, Collins's son, John, and Nanyoma had cashed about $900 worth of checks they had stolen from Collins's checkbook. ROA.794–97. Collins found out, became angry, and demanded that the boys repay the amount or he would turn them over to the police. ROA.797–99. After they failed to come up with a plan to repay the money, Speer volunteered to help them by murdering Collins. ROA.800–01. Speer stole a handgun from his mother's car, and, late one night, Nanyoma drove Speer to Collins's house where John had purposely left a window unlocked. ROA.801–03. Nanyoma waited in the car while Speer entered the house through the window, approached Collins while he was sleeping, and shot him in the head. ROA.803–08. Speer then returned to the car, where he calmly described the murder to Nanyoma as they drove off. ROA.806–11.

In their punishment case, the defense presented the testimony of two prison chaplains, both of whom had spent considerable time ministering to Speer during his incarceration. ROA.821–81. They testified that Speer was remorseful and a sincerely "changed man" who hungered "to know more about the Lord" and "[h]ow to live by His rules." ROA.828–35, 857–69. Both testified that they did not believe Speer to be a danger to society and that he could be beneficial to the prison by sharing the gospel with other inmates. ROA.835, 868.

III. Trial, Direct Appeal, and Postconviction Proceedings

Speer was convicted and sentenced to death in Bowie County, Texas, for the July 11, 1997, capital murder of Gary Dickerson while incarcerated in a penal institution. CR 2–9, 160–164. His conviction and sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals (CCA). *Speer v. State*, No. 74,253, 2003 WL 22303983 (Tex. Crim. App. Oct. 8, 2003) (unpublished).

While his direct appeal was still pending, Speer filed a state habeas application in the trial court. ROA.1443–72. The trial court entered findings of fact and conclusions of law recommending that relief be denied. App'x L. The CCA adopted the trial court's recommendation and denied relief. App'x K.

Speer then filed his first federal habeas petition in the federal district court. ROA.26–58. After obtaining a stay from the court to allow him to exhaust new claims, ROA.177–81, Speer returned to state court and filed a subsequent habeas application. The CCA remanded the case to the trial court for factual development and credibility determinations. Eventually, the trial court determined that Speer's new claims were available when he filed his first state habeas application and that he failed to satisfy the successive writ requirements of Texas Code of Criminal Procedure Article 11.071, Section 5. Supp. SHCR 169–84, 228. The CCA dismissed Speer's application as an abuse of the writ. ROA.209–10.

Speer then filed an amended federal petition. ROA.215–314. The Director answered. ROA.215–314. The magistrate issued a report and recommendation that Speer's federal petition should be denied. App'x J. The district court adopted the

magistrate's recommendation and denied Speer federal habeas relief. App'x I. The court then granted and denied in part Speer's motion for a certificate of appealability (COA). ROA.511–12. Then, Speer's federal habeas counsel, who was also his state habeas counsel, filed a motion in the Fifth Circuit to withdraw. *Speer v. Stephens*, No. 13-70001, Mot. filed Sept. 26, 2014; ROA.515. The Fifth Circuit remanded the case to the district court solely for the appointment of supplemental counsel to consider whether Speer could establish cause and prejudice under *Martinez* and *Trevino* for any IATC claims that should have been brought on state habeas review. App'x H.

Subsequently, the district court appointed Speer supplemental counsel and granted him funding for a mitigation expert. ROA.521, 539. Speer then filed an amended federal petition raising the same IATC claim raised in his original petition, although it was accompanied by numerous exhibits. ROA.610–1071. The Director answered. ROA.1554–603. The magistrate issued a report and recommendation that Speer's amended petition be denied. App'x F. The district court adopted the report and recommendation and denied Speer habeas relief and a COA. App'x E.

Speer then filed an application for a COA in the Fifth Circuit. The Fifth Circuit affirmed the district court's judgment with respect to the two claims on which the district court previously granted a COA and granted a COA on Speer's IATC claim. App'x D. The Fifth Circuit affirmed the district court's denial of Speer's IATC claim. App'x C. The Fifth Circuit subsequently granted panel rehearing, withdrew its prior opinion, and affirmed the district court's decision. App'x B.

REASONS FOR DENYING CERTIORARI REVIEW

The questions Speer presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of jurisdictional discretion, and will be granted only for "compelling reasons." Those reasons do not exist here, and Speer's petition is an exceedingly poor vehicle for consideration of the questions he presents. For the Court to entertain those questions, Speer would have to first overcome multiple procedural barriers including jurisdiction under § 2244(b), AEDPA's relitigation bar, *Pinholster*, § 2254(e)(2)'s bar on new evidence, and timeliness under § 2244(d).

Assuming Speer accomplishes that feat, his questions are still unworthy of the Court's attention for several reasons. First, regarding his complaint about the Fifth Circuit's double-edged inquiry, Speer downplays this Court's multiple decisions recognizing that mitigating evidence can likewise be aggravating. At the same time, he overstates his case by failing to demonstrate any meaningful circuit split regarding double-edged evidence.

Second, Speer disregards that the Fifth Circuit seriously considered his mitigating evidence, but after reweighing that evidence against the aggravating evidence pursuant to this Court's precedent, the lower court determined—correctly—the latter surpassed the former. In truth, Speer simply disagrees with the lower court's proper application of the law to the facts. *See* Sup. Ct. R. 10.

Third, Speer's mitigating evidence is, in fact, laced with other evidence that is damaging, including drug use, manipulation, aggressiveness, and a psychiatric

opinion that essentially explains his propensity to commit murder. Speer's petition never seriously engages these factors.

Fourth, the Fifth Circuit's double-edged analysis was not the critical premise for its decision. Instead, it turned primarily on the fact that speculating about Speer's future dangerousness was not needed here. While in prison for one capital murder, Speer committed capital murder again. And in both cases, Speer voluntarily murdered at the direction of someone else. Without question, this is the most important evidence in this case, evidence that Speer sidesteps altogether.

Speer likewise provides no compelling reason for this Court to consider his funding claim. The district court determined that funding was reasonably necessary and provided Speer $30,000. *Ayestas* does not address funding beyond the statutory cap, let alone the excessive funding Speer sought, which is highly discretionary. Moreover, given the facts of this case, no amount of factual development would demonstrate that Speer is entitled to habeas relief. Certiorari review is not merited.

I. Multiple Procedural Barriers Render This Case a Poor Vehicle for Certiorari Review.

Numerous procedural barriers stand in Speer's path, and he must overcome them all if he were ever to be afforded any relief on his IATC claim. Although the Fifth Circuit chose not to address these matters, App'x B at 5 (noting the "unusual procedural posture of the prior panel's remand" and concluding that "Speer's inability to establish prejudice from any alleged failure to develop and use mitigation evidence presents the most straightforward resolution"), they still exist. Speer addresses none

of them in his certiorari petition. *See generally* Pet. at 1–40. Thus, this case is a poor vehicle to consider the questions Speer presents.

A. Speer's IATC claim is successive under 28 U.S.C. § 2244(b).

Under AEDPA, a habeas petitioner may not file a second or successive application without an order from the court of appeals authorizing the filing. 28 U.S.C. § 2244(b)(3)(A). "Under those provisions, which bind the district court even when leave is given, a prisoner may not reassert any claims 'presented in a prior application.'" *Banister v. Davis*, 140 S. Ct. 1698, 1704 (2020) (quoting 28 U.S.C. § 2244(b)(1)); *see also id.* at 1705–06 (explaining that a successive petition is one that constitutes an abuse of the writ).

The district court rendered a final judgment denying all of Speer's claims—including his IATC claim—in December 2012. App'x I; App'x J at 91–93, 110. After Speer appealed, the Fifth Circuit remanded the case to the district court for the appointment of supplemental counsel. App'x H. On remand, Speer filed a brief that functioned as an amended petition and reasserted his IATC claim, this time supported by new evidence. ROA.610–1071. The district court again rejected his claim. App'x E & F.

Because Speer's amended petition was filed after the district court entered final judgment and reasserted the IATC claim that the district court previously adjudicated, it was subject to dismissal. "[A]ny claim that has already been adjudicated in a previous petition must be dismissed." *Gonzalez v. Crosby*, 545 U.S. 524, 529–30 (2005) (citing 28 U.S.C. § 2244(b)(1)); *see Adams v. Thaler*, 679 F.3d 312,

322 (5th Cir. 2012) (holding that Adams's "second-in-time habeas petition" was successive because it raised claims "that are identical to the two claims presented in his initial federal habeas petition"). And a district court's "[f]inal judgment marks a terminal point." *Phillips v. United States*, 668 F.3d 433, 435–36 (7th Cir. 2012).

The Fifth Circuit remanded the case for the district court to appoint supplemental counsel "for the sole purpose of determining whether Speer has additional habeas claims that ought to have been brought," App'x H at 82, and "to consider in the first instance whether Speer can establish cause for the procedural default of any [IATC] claims pursuant to *Martinez* and *Trevino* that he may raise, and if so, whether those claims merit relief," *id.* at 84. The Fifth Circuit was also careful to "express no opinion on whether any new claims would be barred by [AEDPA]." *Id.* And the court did *not* vacate the district court's final judgment rejecting Speer's IATC claim. Moreover, although the Fifth Circuit remanded the case for the appointment of supplemental counsel "in the interest of justice," *id.* at 82, the court could not have intended to authorize relitigation of Speer's IATC claim without granting him permission to file a successive petition. Courts "ha[ve] no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

Even if the Court were to consider Speer's post-remand IATC claim to be new and not presented in the prior petition, § 2244(b)(3)(A) would still bar his claim because the Fifth Circuit never authorized the filing of a second or successive petition. App'x H. The lower court's remand order contained no such authorization and noted

that AEDPA might bar any claims Speer presented on remand. *Id.* at 84. In any event, Speer's new claim would have to be dismissed unless he showed "that the claim relies on a new rule of constitutional law" or "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2). Speer has never argued that his claim relies on a new rule of constitutional law. And it would be self-defeating for him to argue that the factual predicate for his claim could not have been discovered through due diligence because the basis of his IATC claim is that his trial and state habeas counsel could have discovered the additional mitigation evidence. *See infra*, Sections I, C & II. Furthermore, Speer has not—and cannot—argue that, in light of the additional evidence, no reasonable factfinder would have found him "guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B)(ii), because his additional evidence is relevant, if at all, only to the assessment of his punishment, not the jury's determination of his guilt. Because this claim is barred under § 2244(b), certiorari review is not merited.

B. Speer may not overcome AEDPA's relitigation bar with new evidence.

Even if Speer's post-remand habeas application were not second or successive, he cannot overcome AEDPA's relitigation bar. In state court, Speer urged the same IATC claim he now brings before this Court: that his trial counsel insufficiently

investigated and presented mitigation evidence at the punishment phase of his trial. *Compare* ROA.984–94 (state briefing) *with* ROA.218–32, 1620–54 (federal briefing). The CCA adjudicated his IATC claim on the merits and rejected it. App'x K; App'x L at 117. AEDPA's relitigation bar therefore precludes federal habeas relief unless Speer can establish that "the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Speer has not attempted to make that showing, nor could he. Because Speer cannot attack the state court's adjudication with evidence not before the state court, his federal habeas claim fails.

1. A federal habeas petitioner may not rely on new evidence to attack a state court's adjudication of his claim.

In *Pinholster*, this Court considered "whether review under § 2254(d)(1) permits consideration of evidence introduced" for the first time in "federal habeas court." 563 U.S. at 180. This Court concluded that § 2254(d)(1) does not, holding that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 181. This Court found further support in AEPDA's "context," which "demonstrates Congress' intent to channel prisoners' claims first to the state courts." *Id.* at 182. "It would be contrary to that purpose," the Court reasoned, "to allow a petitioner to overcome an adverse state-court decision

with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo." *Id.*

While *Pinholster* focused on § 2254(d)(1), this Court also considered § 2254(d)(2), which allows a petitioner to relitigate a claim if the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The text of § 2254(d)(2), the Court acknowledged, bars new evidence with even more "clarity" than § 2254(d)(1). *Pinholster*, 563 U.S. at 185 n.7.

Moreover, Speer's new evidence does not create a new, unexhausted claim. The scope of a "claim," 28 U.S.C. § 2254(d), is determined by the legal basis for relief it asserts, not the evidence used to support it. When AEDPA refers to the "claim" adjudicated in state court, it means "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530.[3] Courts "have repeatedly held that new evidence and new legal arguments in support of a prior claim are insufficient to create a new claim." *In re Hill*, 715 F.3d 284, 293 (11th Cir. 2013); *cf. Cunningham v. Estelle*, 536 F.2d 82, 83 (5th Cir. 1976) (per curiam) (new "factors . . . demonstrat[ing] incompetency" of counsel "raise[d] the same ground"). In other words, "[a] rehashed claim is not a new claim." *Brannigan v. United States*, 249 F.3d 584, 588 (7th Cir. 2001).

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[3] Although *Gonzales* was interpreting "claim" as used in 28 U.S.C. § 2244(b)(1), "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *see also Pouncy v. Palmer*, 846 F.3d 144, 159 (6th Cir. 2017) (applying the same interpretation to 28 U.S.C. § 2254(d)).

Speer's asserted basis for relief in federal court is that his trial counsel failed to adequately investigate and present mitigation evidence. ROA.1623–24. The state court rejected this allegation on the merits. ROA.28–29, 218. Speer's state-court briefing complained that his trial counsel "fail[ed] to investigate and develop facts material to Mr. Speer's punishment." ROA.984. Specifically, "[c]ounsel failed to investigate Mr. Speer's family background, or his social, medical and mental history. Mr. Speer's trial counsel could have investigated and presented a wealth of evidence relevant to such mitigating factors at trial, but failed to do so." *Id.* In federal court, Speer complained of the exact same allegedly ineffective assistance. *Compare id.* (state habeas petition) *with* ROA.218–19 (amended federal habeas petition); *see also* ROA.1652 (brief following remand, asserting that "[t]he members of the jury that decided William Speer should die did not know the story of his life").

There is no difference between the two claims. Speer even conceded in the district court that he was presenting claims that "have been denied by the convicting court and by the Texas Court of Criminal Appeals." ROA.28–29, 218. Speer's federal IATC claim is "appropriately characterized as presenting not an independent claim, but rather emphasizing new evidence or argumentation in support of an old claim." *Pouncy*, 846 F.3d at 159. "And because the [CCA] 'adjudicated' that claim 'on the merits,' the deferential standards set forth in 28 U.S.C. § 2254(d) constrain [this Court's] review." *Id.*

2. Factual-exhaustion precedent does not create a loophole in AEDPA.

In the lower court, Speer argued that a petitioner may defeat the *Pinholster* bar by relying on new evidence. *See* Appellant's Brief at 63–65. Should he argue the same in his reply, that contention would be unavailing. Speer attempted to navigate around *Pinholster* and AEDPA via Fifth Circuit factual-exhaustion precedent, which prohibited the introduction of new evidence to support a habeas claim in federal court if the new evidence would "fundamentally alter" the claim adjudicated in state court. *Anderson v. Johnson*, 338 F.3d 382, 388 (5th Cir. 2003). New facts and evidence breaching that limit were treated as unexhausted. *Id.* Although Speer conceded that he "presented a seemingly similar claim in state court," Appellant's Brief at 64, he asserted that his new evidence created a new, unexhausted claim. *Id.* at 63–65.

But the judicially created factual-exhaustion doctrine is a one-way ratchet designed to protect federal-state comity, not benefit petitioners. Before AEDPA, federal courts gave no deference to state-court legal determinations, and petitioners could rely on new facts and evidence to attack state-court decisions. To promote comity, however, courts limited the type of new facts and evidence on which petitioners could rely in federal court. *See Vasquez v. Hillery*, 474 U.S. 254, 257–58 (1986); *Picard v. Connor*, 404 U.S. 270, 276 (1971). Petitioners could rely on new facts and evidence only if they "merely . . .supplement[ed]" that presented in state court, not if they "fundamentally alter[ed] the legal claim already considered by the state courts." *Vasquez*, 474 U.S. at 260. To use the factual-exhaustion doctrine as a mechanism to allow in new facts and evidence would turn the doctrine on its head

and eviscerate AEDPA's protections of "comity, finality, and federalism." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017).

Regardless, the factual-exhaustion doctrine has no role to play after AEDPA. AEDPA, as a statute, trumps judicially created doctrine. *See City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313–16 (1981). "Claim" as used in AEDPA means a legal basis for relief, not facts or evidence. And Congress chose to apply factual-exhaustion principles only to claims that were either not adjudicated or otherwise not subject to AEDPA's relitigation bar, 28 U.S.C. § 2254(e)(2); *Pinholster*, 563 U.S. at 186, so it is no longer open to courts to apply those principles to properly adjudicated claims like Speer's, *see Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) ("Absent provisions cannot be supplied by the courts." (cleaned up)). *Pinholster* therefore read AEDPA to preclude the use of *all* new facts and evidence to attack a state court's adjudication of a claim. 563 U.S. at 182–85; *see Stokley v. Ryan*, 659 F.3d 802, 809 (9th Cir. 2011) ("*Pinholster* dramatically changed the aperture for consideration of new evidence."). There is now no relevant difference between a lot of new evidence or a little, or between unimportant or pivotal new facts and evidence. AEDPA precludes the use of any new evidence to attack the state court's adjudication under § 2254(d).

The state court adjudicated Speer's IATC claim on the merits, so he must overcome the relitigation bar of § 2254(d). Because Speer has never attempted to shoulder that heavy burden, AEDPA bars relief on his IATC claim. As such, this case presents a poor vehicle for the grant of certiorari review.

C. Section 2254(e)(2) bars consideration of Speer's new evidence in a federal habeas proceeding.

Speer's claim rests on evidence introduced for the first time in his federal habeas proceeding. None of his new evidence was developed in state court. And Speer argues in his petition that his state habeas counsel was ineffective for his failure to develop and pursue Speer's IATC claim. Pet. at 5–7. Thus, assuming Speer's IATC claim is unexhausted and procedurally defaulted and he can overcome that default, he cannot introduce new mitigation evidence to prove the merits of that claim unless he can overcome the strict limitations of 28 U.S.C. § 2254(e)(2). Speer has not made any attempt to show that he can meet that standard, and the record indicates that he cannot. Moreover, because his attempt to prove prejudice rests entirely on new evidence, his IATC claim necessarily fails.

Section 2254(e)(2) provides that where an applicant has "failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim" unless the applicant shows that the claim relies on a new rule of constitutional law made retroactive to cases on collateral review, *or* "a factual predicate that could not have been previously discovered through the exercise of due diligence"; *and* the facts underlying his claim demonstrate his actual innocence for his conviction. 28 U.S.C. § 2254(e)(2). That restriction "continues to have force where § 2254(d)(1) does not bar federal habeas relief," including instances where constitutional claims have not been "adjudicated on the merits in State court proceedings." *Pinholster*, 563 U.S. at 185–86. "At a minimum, therefore, § 2254(e)(2)

still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Id*. at 186.

There is no question that § 2254(e)(2) applies to Speer's new evidence because he failed to develop the factual basis of his claim in state court. Again, Speer maintains that his state habeas counsel was ineffective in failing to develop and pursue Speer's IATC claim in state habeas proceedings. Pet. at 5–7. This concession dooms his claim. AEDPA bars federal courts from considering evidence not diligently developed in state court by the habeas petitioner. 28 U.S.C. § 2254(e)(2). And for purposes of § 2254(e)(2), the action or inaction of state habeas counsel "is chargeable to the client." *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam). Accordingly, this Court has consistently instructed that state habeas counsel's failure to develop the record in state court bars the introduction of new evidence in federal court. In fact, *Holland* applied § 2254(e)(2) to an IATC claim premised on an alleged failure to investigate by both trial and state habeas counsel. *See id*. at 650, 652–53. *Holland* controls here. Section 2254(e)(2) applies, and Speer has made no effort to meet its conditions for introducing new evidence in federal court. The result is that the evidence on which Speer relies is barred from consideration, and his IATC claim necessarily fails on the merits. Consequently, this procedural barrier should preclude the grant of certiorari review.

D. If Speer's claim is new, AEDPA's statute of limitations bars relief.

As explained, Speer's post-remand IATC claim is not new. But, if it were, it would be barred by AEDPA's statute of limitations. Far more than a year has passed

since any of the events listed in § 2244(d)(1). Specifically, under § 2244(d)(1)(A), any new claim would be untimely by nearly twelve years.[4] Should Speer argue as he did below that his new IATC claim relates back to his initial petition, *see* Appellant's Brief at 66–67, that argument would also fail. To relate back, the amended petition must assert "a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. Proc. 15(c)(1)(B). In other words, "relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005).

But any relation-back argument is undermined by Speer's exhaustion argument. For instance, in attempting to avoid the relitigation bar, Speer argued below, Appellant's Brief at 64–65, that his additional evidence "fundamentally alter[ed]" his IATC claim and made it "substantially different." If that is true, then his claim does not relate back, because "[a]n amended habeas petition . . . does not relate back (and thereby escape AEDPA's one year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Felix*, 545 U.S. at 650. On the other hand, if Speer is

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[4] In his brief on appeal, Speer argued that the Director waived a limitations argument. *See* Appellant's Brief at 66. The Director argued limitations in a district-court brief, albeit in a footnote, ROA.1573, and also in the COA Response Brief (at 24 n.11). Although Speer may argue this amounts to waiver, a court may, sua sponte, consider "the timeliness of a state prisoner's habeas petition." *Day v. McDonough*, 547 U.S. 198, 209 (2006); *see also Sanchez v. Davis*, 936 F.3d 300, 304 (5th Cir. 2019) (holding that a court may affirm the district court's denial of habeas relief "'on any ground supported by the record'") (quoting *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013)). The record in this case establishes that any new, post-remand IATC claim is untimely.

correct that his claim relates back, then it is exhausted and cannot evade *Pinholster*'s bar on new evidence.

Speer cannot have it both ways. If his claim is new, it is time-barred; if not, then it is subject to AEDPA's relitigation bar. Either way, Speer would not be entitled to relief. For this additional reason, this case is a poor vehicle for certiorari review.

II. The Fifth Circuit Correctly Denied Relief on Speer's IATC Claim.

Speer had already been sentenced to life imprisonment for capital murder when he committed another "heinous" capital murder. App'x E at 41. Therefore, the lower courts prudently focused on prejudice when denying relief on his ineffectiveness claim.[5] App'x B at 5. Speer contends that his lawyers should have uncovered and presented evidence of Speer's "physical and verbal abuse," the "domestic violence in his childhood home," the fact he was bullied, and his dependent personality disorder. App'x. B at 7–8. But while this evidence may have mitigating aspects, presenting it would have also cut against Speer. If Speer had mounted a defense based on this evidence, the prosecution could have pointed out: Speer was kicked out of daycare; he threw a desk at teacher; he frequently used drugs; he was manipulative; a psychologist found Speer to be shrewd, resentful, hostile, and aggressive; he had poor insight and judgment; a school psychological assessment found that he was emotionally disturbed and had an aggressive conduct disorder; and he set fires. App'x

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[5] Federal habeas courts may "cut to the core" and resolve a case de novo and on the merits when it is uncertain whether 28 U.S.C. § 2254(d) applies or if the underlying claims are procedurally defaulted. *King v. Davis*, 883 F.3d 577, 585–86 (5th Cir. 2018) (citing *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) & *Bell v. Cone*, 543 U.S. 447, 451 & n.3 (2005)). Nonetheless, the Director maintains that the procedural barriers discussed above apply here.

B at 9; App'x F at 73–74. Moreover, Dr. Walter Quijano's opinion that Speer had a dependent personality disorder would have added an expert imprimatur to what was already evident from Speer's two murders, namely, that "Speer has a disorder that predisposes him to do anything to please others, including crimes and murder." App'x F at 74. Presenting this evidence would have provided the prosecution a compelling narrative that Speer was an incorrigible and lifelong troublemaker.

The courts below properly reweighed the evidence, concluding that the mitigating evidence, both new and old, did not outweigh the aggravating evidence. App'x B at 6–11; App'x E at 41–42; App'x F at 75. Pursuant to Court and Fifth Circuit precedent, the lower courts considered the double-edged nature of Speer's new evidence. Yet, that was not the dispositive factor. The Fifth Circuit observed that "the biggest difference between Speer's *Wiggins*[6] claim and successful ones is on the aggravating evidence side of the scale"—i.e., the fact that Speer is a double capital murderer. App'x B at 11; *see also* App'x E at 41. This also conformed to Court precedent. *See*, *e.g.*, *Strickland v. Washington*, 466 U.S. 668, 700 (1984) (finding no prejudice in part due to the State's overwhelming evidence). Because the lower courts properly applied this Court's precedent, there is no jurisprudential concern, and Speer merely asks this Court to correct an alleged error in the outcome. Thus, certiorari should be denied. *See* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law).

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6 *Wiggins v. Smith*, 539 U.S. 510 (2003).

A. The lower courts' decisions comply with the Court's Sixth Amendment precedent.

This Court has long recognized that mitigation evidence offered to show that a defendant's troubled background caused his violence may be double-edged. Such evidence may reduce the defendant's blameworthiness, but it can also suggest that the defendant cannot be rehabilitated. *See Penry v. Lynaugh*, 492 U.S. 302, 324 (1989) ("Penry's mental retardation and history of abuse is thus a two-edged sword"); *Burger v. Kemp*, 483 U.S. 776, 793 (1987) (counsel not deficient for failing to investigate and present mitigation evidence that contained adverse facts and "suggest[ed] violent tendencies"). For instance, in *Pinholster*, the Court explained that "new evidence relating to Pinholster's family" including "serious substance abuse, mental illness, and criminal problems" was "by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation." 563 U.S. at 201–02 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), for the proposition "that mitigating evidence can be a 'two-edged sword' that juries might find to show future dangerousness"). *Pinholster* likewise cautions that some mitigating evidence may expose the defendant to damaging rebuttal. *Id*. (citing *Wong v. Belmontes*, 558 U.S. 15, 24 (2009) (per curiam)); *see also Darden v. Wainwright*, 477 U.S. 168, 186 (1986). Speer's petition produces considerable precedent, but he studiously avoids saying that there is any serious disagreement among the circuit courts concerning usage of the double-edged inquiry. At best, he offers that some circuits only make this inquiry "sporadically" or have been "critical" of the approach.

Pet. at 14, 17 n.7, 29 n.17. This lack of a meaningful circuit split undermines Speer's request for certiorari review. Sup. Ct. R. 10(a).

Speer argues that the double-edged inquiry vitiates *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins*, and *Rompilla v. Beard*, 545 U.S. 374 (2005). Pet. at 20 (citing *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008)). He also contends that the double-edged rubric is a creation of the circuit courts. *Id.* at 16–18. But *Williams*, *Wiggins*, and *Rompilla* do not preclude courts from concluding that some mitigating evidence may cast a defendant in a negative light. In fact, *Wiggins* expressly acknowledged in its prejudice analysis that some evidence is "double edge[d]." 539 U.S. at 535 (citing *Burger* and *Darden*).

Wilson itself is also not compelling. Pet. at 20–21. In *Wilson*, the petitioner alleged that his counsel failed to present mental-health evidence. 536 F.3d at 1094–96. The Tenth Circuit held that the petitioner was entitled to an evidentiary hearing. *Id*. at 1096. In doing so, the Tenth Circuit declined to find the petitioner's evidence "inconsequential." *Id*. at 1095–96. But here, the Fifth Circuit likewise did not deem Speer's evidence inconsequential—it was seriously considered. App'x B at 9; App'x F at 75. The problem was that Speer's mitigating evidence simply paled in comparison to the aggravating evidence. *Id*.

Speer suggests that the double-edged rubric consistently prevents petitioners from obtaining relief in the Fifth Circuit. Pet. at 18–20 (citing App'x M at 125–27). But this argument is misguided, and Speer's numbers are meaningless. Some of

Speer's cases apply the AEDPA standard.[7] The AEDPA standard is "'difficult to meet[]' because the purpose of [the] AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011)). And when reviewing claims under *Strickland*, a federal habeas court's review is "doubly deferential." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (citing *Burt v. Titlow*, 571 U.S. 12, 15 (2003); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560–61 (2018)). Even without AEDPA, "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Petitioners *should* lose most of the claims that they bring under AEDPA and *Strickland*. And, of course, Speer cannot rely on purported error in other cases to obtain relief—he must show that error occurred in his own case. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987) (requiring defendant to show discrimination occurred "in *his* case").

Speer says that "[t]he double-edged prejudice inquiry violates core tenets of *Strickland*" because it "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." Pet. at 21. However, Speer's "holistic inquiry" argument appears to be based on the dissent in *Trevino*, 138 S. Ct. at 1794 (Sotomayor, J., dissenting). But the *Trevino* dissent is primarily concerned with the

[7] *See, e.g.*, *Clark v. Thaler*, 673 F.3d 410, 424 (5th Cir. 2012); *Gray v. Epps*, 616 F.3d 436, 439 (5th Cir. 2010).

fact that the Fifth Circuit purportedly "stopped its analysis short without reweighing the totality of all the evidence." *Id.* Even if this dissenting opinion controlled (which it does not), the Fifth Circuit explicitly recognized that it had to consider all the evidence and reviewed the trial evidence. App'x B at 6–11. Further, the *Strickland* prejudice standard does not ask whether a defense attorney could possibly persuade a particularly sympathetic juror to return a verdict for life.[8] Rather, *Strickland* asks "whether there is a reasonable probability that, absent [counsel's] errors, the sentencer [. . .] would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. This "should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Id.* Indeed, Speer's approach is the one that "eschews a holistic inquiry," as it would ignore the aggravating aspects of new evidence as well as what a competent prosecutor would do with it, in contradiction of *Wong* and *Pinholster*. *Wong*, 558 U.S. at 26; *Pinholster*, 563 U.S. at 201–02.

B. The lower courts' decisions comply with the Court's Eighth Amendment precedent.

Speer argues that the double-edged rubric violates the Eighth Amendment. Pet at 24–25. But the Eighth Amendment does not govern ineffectiveness claims. *See Balentine v. Quarterman*, No. 2:03-CV-39, 2008 WL 862992, at *18 (N.D. Tex. Mar. 31, 2008) (unpublished). Speer makes an individualized sentencing argument,

[8] For the same reason—along with the reasons discussed in the Director's briefing below, *see* Respondent-Appellee's COA Response at 52–54—Speer's list of cases with favorable verdicts for the defense are either not compelling or are distinguishable. Pet. at 31–33.

but he does not contend that the jury was instructed that death was mandatory for a prison murder. *See* Pet at 25 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). Speer's citations to *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality op.), likewise miss the mark because those cases discuss the constitutional ability of capital juries to consider mitigating evidence—not the standard for adequate representation vis-à-vis such evidence. Pet. at 24–25.

Speer asserts double-edging gives "anchoring weight to the State's case for death in assessing whether the absence of mitigation evidence prejudiced the defendant." *Id.* at 25–28. But *Wiggins* explains that prejudice is assessed by balancing the aggravating evidence against the totality of the mitigation. 539 U.S. at 534. Similarly, a Texas juror must assess whether "taking into consideration *all* of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," the mitigation evidence is "sufficient . . . to warrant . . . a sentence of life imprisonment without parole rather than a death sentence." Tex. Code Crim. Proc. art. 37.071 § 2(e)(1) (emphasis added). There is no basis for ignoring the aggravating evidence.

Speer further claims that the double-edged analysis "*introduces* arbitrariness . . . by asking [courts] to predict whether a particular set of evidence would move a single juror to mercy." Pet. at 27–28 (emphasis in original). However, *Strickland* requires courts to make "an assumption" about what a reasonable, conscientious, and impartial juror would do. 466 U.S. at 695. This is "necessarily [a] speculative

inquiry." App'x B at 6 (citing *Sears v. Upton*, 561 U.S. 945, 956 (2010)). It is also just the nature of appellate review.

C. Speer's new evidence would have hurt more than helped.

Speer's new evidence of mental-health issues and childhood abuse could be seen as aggravating and would not have helped Speer's case. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007) (recognizing that previous *Penry* holding that evidence of "mental retardation and childhood abuse" can function as a "two-edged sword"); *Clark*, 673 F.3d at 423 (mitigation evidence "double-edged" where it "might suggest [that the defendant], as a product of his environment, is likely to continue to be dangerous in the future." (alteration in original) (internal citations and quotations omitted)); *Druery v. Thaler*, 647 F.3d 535, 541–42 (5th Cir. 2011) (agreeing that evidence of a mental-health issue would be double-edged because it "could indicate that [petitioner]'s violent behavior was of a permanent nature . . . suggesting he could be a future threat to those in prison"); *see also Martinez v. Quarterman*, 481 F.3d 249, 258 (5th Cir. 2007). A juror could easily have determined that any reduction in Speer's culpability was undercut by the attendant risk of future dangerousness. *Pinholster*, 563 U.S. at 201–02; *cf. Burger*, 483 U.S. at 793–94.

In addition, Speer's mitigation strategy at trial was to show that he had experienced a religious conversion, rendering him a changed man no longer dangerous to prison society. But during a psychiatric exam after his first murder, Speer stated that he had been reading the Bible and accepted God into his life. ROA.650–52. Had Speer attempted to utilize this psychiatric report, counsel could

not have presented the testimony from the chaplains without the prosecution countering that Speer stated that he had found religion after his first murder and yet he killed again. As a result, defense counsel's punishment theme would have been undermined. App'x B at 9.

Similarly, evidence from Dr. Quijano would have been truly damaging. Dr. Quijano said that people with dependent personality disorder must rely on others for support; allow others to make important decisions for them; often engage in demeaning tasks to maintain relationships; are gullible; and have a strong inner desire to please others. ROA.683–97. Had defense counsel presented this evidence at trial, the prosecution would have had ammunition to explain not only why Speer committed murder twice, but also why Speer would likely kill again if sent back to general population. Speer had committed two murders that were essentially mirror images of each other. In both cases, Speer volunteered upon the request of a "superior" to carry out murder without questioning the wisdom of such action or considering the consequences. The State would have argued that, if given another life sentence, Speer would fall back into old behavioral patterns, seek out others to please—like a gang leader—and carry out another murder if asked. Indeed, the evidence Speer presented from his family members corroborates this theory. For instance, Speer's stepfather stated: "You could talk [Speer] into doing pretty much anything—whether to please you or what." ROA.713.

While Speer now considers this evidence to be mitigating, it is intertwined with information that fits a general pattern: Speer is predisposed to do anything to please

others, including committing murder. If a life sentence for murder did not deter him, another life sentence would likely fail in that regard. That Speer's counsel recognized this fact is apparent from the record.[9] As counsel's closing argument explained, they could have paraded witnesses before the jury who did not believe in the death penalty, but they wanted the focus on the witnesses who supported Speer's religious conversion. ROA.933. Similarly, counsel noted that they had Richard Speer (Speer's father) in the audience, but they did not call him because any father would plead for his son. ROA.934–35. Counsel thus understood that rebutting the argument that Speer was dangerous in prison was paramount—not explaining why he committed the murder or trying to excuse it.

D. The case against Speer is overwhelming.

Speer's general argument that his outcome was driven by the lower courts double-edged inquiry also blinks reality. Speer would have been sentenced to death even without application of the double-edged rubric because the evidence against him was simply overwhelming. While incarcerated for one murder, Speer—at the direction of his Texas Mafia captain Constandine—murdered Dickerson by brutally choking him to death. *See* Statement of Facts, *supra*. The hit was based on the incorrect assumption that Dickerson was a prison snitch. *Id*. Speer did not question the order; in fact, he volunteered to do the job. *Id*. And as he murdered Dickerson,

[9] Like the Fifth Circuit, *see* App'x B at 5, the Director maintains that a no-prejudice finding offers the simplest resolution of Speer's IATC claim. However, the Director continues to assert that counsel were not deficient and reserves that argument for future briefing if necessary.

he stated: "[D]on't fuck with the Texas Mafia, not even in hell." Speer then boasted about the killing. *Id*.

In judging prejudice, "*Strickland* asks whether" there is a "substantial" "likelihood of a different result." *Richter*, 562 U.S. at 111–12. The unusual and brutal facts of Speer's crime—a vicious capital murder committed while Speer was incarcerated for another capital murder—make it especially difficult to show prejudice. *See Wong*, 558 U.S. at 27–28 (approvingly noting the description of an additional murder as "the most powerful imaginable aggravating evidence"). Here, the aggravating facts make it "virtually impossible to establish prejudice." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (citing *Strickland*, 466 U.S. at 698). Again, "in assessing prejudice, [courts] reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534; *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020). Given the overwhelming aggravating evidence against Speer, there is no reasonable probability that, had the jury heard the mitigation evidence, it would not have imposed the death penalty. App'x E at 41–42.[10]

E. This case is a poor vehicle to resolve the question presented.

Speer asserts that his case is "a good vehicle for reviewing the 'double-edged' prejudice inquiry" because the case is "both factually and procedurally clear-cut." Pet. at 28–29. Nothing could be further from the truth. As the Fifth Circuit noted,

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[10] *See also Clark*, 673 F.3d at 424; *Smith v. Davis*, 927 F.3d 313, 338–39 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1299 (2020); *Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012), *cert. denied*, 568 U.S. 1164 (2013); *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001).

the procedural history of Speer's case is "convoluted" and necessitated the parties addressing a "number of potential issues arising out of the unusual procedural posture of the prior panel's remand." App'x B at 5. This is one reason why the lower courts elected to focus on the prejudice element, as the finding of no prejudice cuts through everything in this case and "presents the most straightforward resolution." *Id*. If Speer cannot make a substantial showing that trial counsel's purported failures were prejudicial, then he cannot show that he is entitled to relief on the merits, that he can circumvent any default under *Martinez*, that state habeas counsel was ineffective, or that there is the actual prejudice necessary to circumvent the default. Moreover, to grant relief, the courts would necessarily have to address these questions, along with the jurisdictional, AEDPA relitigation bar, *Pinholster*, § 2254(e)(2), and timeliness arguments. *See* Section I, *supra*.

Likewise, the lower courts have disagreed with Speer's assertion that his evidence is "strong and paradigmatically relevant." Pet. at 30. This Court has explained that the fact patterns of its IATC cases do not necessarily set the bar for a finding of prejudice. *Andrus*, 140 S. Ct. at 1887 n.6. Nevertheless, the Fifth Circuit noted that Speer's allegedly mitigating evidence does not compare to the mitigating evidence the Court has found to be prejudicially omitted in other cases. App'x B at 9–10.[11] And the district court thought that the evidence was "not so compelling" as to justify a life sentence. App'x E at 41 (quoting *Martinez*, 481 F.3d at 258).

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[11] *See*, *e.g.*, *Wiggins*, 539 U.S. at 516–17, 525–26, 534–35 ("Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care."); *Rompilla*, 545 U.S. at 378, 390–95 (evidence

Simply put, Speer committed a capital murder while incarcerated for capital murder. This is extremely powerful aggravating evidence, and there is no reasonable probability that the new double-edged evidence would have affected the jury's evaluation. The district court and the Fifth Circuit properly weighed the new and old mitigating evidence against the aggravating evidence. App'x B at 6–11; App'x E at 41; App'x F at 75. The lower courts' no-prejudice finding is unassailable, and Speer provides no compelling reason for review by this Court, which "does not sit as an error-correction instance." *Halbert v. Michigan*, 545 U.S. 605, 611 (2005). The Court should deny Speer's petition.

III. The Lower Court Correctly Held That the District Court Did Not Abuse Its Discretion Denying Speer Additional Funding.

Speer requests certiorari review regarding the Fifth Circuit's decision that the district court did not abuse its discretion in denying his request for expert funding beyond the $30,000 he received from the district court. Pet. at 33–40. His primary complaint is that, contrary to *Ayestas*, the district court denied his last request for $15,000 without "examining the claim under development or the investigative services requested" because Speer had already been given four times the statutory cap. *Id.* at 35. The Fifth Circuit held that the district court did not abuse its

established that Rompilla was reared in a slum, quit school at sixteen, had a series of incarcerations, his mother drank during pregnancy, his father had a "vicious temper," Rompilla and his siblings "lived in terror," he and a brother were locked "in a small wire mesh dog pen that was filthy and excrement filled," their home had no indoor plumbing, and they slept in an attic with no heat); *Williams*, 529 U.S. at 395 (counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records").

discretion, App'x B at 12–13, and Speer argues that "the Fifth Circuit gave tacit approval to funding determinations unmoored from the claim-specific 'reasonably necessary' inquiry." Pet. at 35. Speer's case presents a poor vehicle for certiorari review because (1) the district court did find $30,000 was "reasonably necessary"; (2) any funding beyond the $7,500 statutory cap is highly discretionary and not an issue *Ayestas* addressed; (3) the multiple procedural barriers discussed above preclude consideration of any new evidence; (4) and for the reasons stated in Section II, *supra*, no additional evidence would have rendered Speer's IATC claim meritorious.

"Section 3599(a) authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is 'financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.'" *Ayestas*, 138 S. Ct. at 1092 (quoting 18 U.S.C. § 3599(a)). For "services provided by experts, investigators, and the like," the movant must show that "[s]uch services [are] 'reasonably necessary for the representation of the [petitioner]' in order to be eligible for funding." *Id*. (quoting § 3599(f)). "Proper application" of this standard "requires courts to consider [1] the potential merit of the claims that the [petitioner] wants to pursue, the [2] the likelihood that the services will generate useful and admissible evidence, and [3] the prospect that the [petitioner] will be able to clear any procedural hurdles standing in the way." *Id*. at 1094.

The Fifth Circuit stated that the district court not only found that funding was reasonably necessary, but that there was also a need "for services of an unusual

character or duration" that merited excess funds. App'x B at 13. This occurred even though the district court had already approved four times the statutory amount, admonished Speer it would not approve more than $30,000, and observed that $45,000 would exceed the norm in capital habeas cases. *Id.* at 12. Thus:

> The amount of such excess funding is a highly discretionary determination. And by the time a court is considering a request for a third disbursement of funds, it is quite familiar with the case and the funding needs. We thus see no requirement that its order include the "claim by-claim" analysis that Speer seeks. As a result, the district court did not abuse its discretion in refusing to grant more than $30,000 in funding.

Id. at 13. This decision is correct.

Under 18 U.S.C. § 3599(g)(2), for a petitioner to receive an amount in excess of $7,500, the district court or magistrate judge must certify that the additional funds are "necessary to provide fair compensation for services of an unusual character or duration," and the request must be approved by the chief judge of the circuit. Speer's claim that the lower court failed to adhere to *Ayestas* disregards that *Ayestas* did not address a request for extraordinary funding under 18 U.S.C. § 3599(g)(2). Speer does not cite any case where an appellate court has concluded, on the basis of *Ayestas*, that a court abused its discretion in declining to certify that funds in excess of $7,500 were necessary—particularly when, as here, the evidence collected after exhausting $30,000 did not persuade the district court that reasonable jurists could debate the denial of Speer's IATC claim, ROA.2274. Nor does Speer cite any case holding that *Ayestas* requires a district court to conduct a claim analysis on a third funding request when it has twice approved funds regarding the same claim. In fact, the Director has

located only one non-Fifth Circuit case since *Ayestas* with similar facts, and there, the Fourth Circuit held that the district court did not abuse its discretion in denying the petitioner an additional $25,000 in expert funding beyond the "previously approved $34,500 in funding for a mitigation investigator and social historian" where the petitioner sought the extra funding to develop a *Martinez* claim. *Mahdi v. Stirling*, 20 F.4th 846, 888–90 (4th Cir. 2021) ("We cannot say that the district court abused its discretion by denying Mahdi carte blanche to pursue any theory he wished based on nothing more than his vague request. And *Ayestas* does not compel a contrary result.") (citation omitted).

No amount of factual development would demonstrate that Speer is entitled to relief. He cannot overcome the procedural bars discussed above. *Ayestas*, 138 S. Ct. at 1094 (holding that whether services are reasonably necessary includes "the prospect that the applicant will be able to clear any procedural hurdles standing in the way"). Moreover, contrary to Speer's argument that he needed funds for a mental-health expert to show that his claim "plainly had potential merit," Pet. at 35, the extensive investigation Speer's supplemental counsel already conducted turned up evidence that is largely double-edged and would not have swayed a jury in light of the aggravating factors—namely that Speer carried out a "hit" that sent him to the penitentiary for life and then carried out another while in prison. *Ayestas*, 138 S. Ct. at 1094 ("[I]t would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief.").

Speer provides four additional reasons this Court should review the Fifth Circuit's decision, none of which directly concern *Ayestas*'s holding. First, he refers to the importance of "extra-record investigation" in capital habeas cases discussing, for instance, the circumstances in *Wiggins*. Pet. at 36–37. But Speer received more than his share of extra-record investigation, which included obtaining prior psychological, neurological, and psychiatric evaluations, a social history, a report from the Harris County Juvenile Probation Department, and declarations from four new witnesses, and hiring a mitigation specialist. ROA.645–736, 963–75. As stated, the district court recognized the importance of additional investigation, which is why the court approved funds four times the statutory cap. The circumstances of Speer's case refute his argument, and any comparison to *Wiggins* falters for the reasons asserted in Section II, *supra*.

Second, without citing any case law, Speer argues that "the federal judiciary has recognized the need to improve the provision of investigative and expert services in capital habeas cases," and that "[c]ontrary to the magistrate judge's use of $7,500 as a 'norm' for expenses," federal judges consider that figure to be outdated. Pet. at 38. Of course, this is irrelevant to Speer's case given that the district court did not limit him to the statutory cap and granted him four times that amount. Moreover, he cites to a report claiming that "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.* (citing 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 31–32, Table 8 (Sept. 2010), https://www.uscourts.gov/sites/default/files/fdpc2010.pdf (last visited May 11, 2022). But the data he refers to apparently concerns total expenditures for experts in capital murder *trials*. See Report at 24–33. If it does include federal habeas proceedings, there is no breakdown for those costs. Speer also provides no such data since 2004, let alone since *Ayestas*. Most of all, *Ayestas* did not address or raise any concerns about the statutory cap, and even if it did, it would not apply in Speer's case.

Third, again without citing any precedent, Speer argues that "under the Fifth Circuit's view," a district court can deny a petitioner the ability to investigate trial counsel's failure to present mitigating evidence and then "fault the petitioner for failing to marshal enough mitigating evidence to show that counsel's errors would have prejudiced the petitioner." Pet. at 39. Speer fails to explain how this conclusory argument pertains to the decision to grant funding under *Ayestas*. At any rate, this is again irrelevant to Speer's case because he was clearly not denied that ability.

Fourth, Speer states that "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." Pet. at 39–40. He claims that certiorari review is needed to "remed[y] harshly unequal treatment for capital petitioners depending on who represents them." Pet. at 35. But Speer has never complained about his current federal habeas counsel, nor would he

have any grounds for a complaint. And neither *Ayestas* nor the Fifth Circuit's holding address this issue.

In sum, whatever value there may be to Speer's multiple policy arguments, they are irrelevant in this context. The Fifth Circuit's decision does not contravene *Ayestas*, and Speer's claim does not warrant certiorari review.

CONCLUSION

For these reasons, the Court should deny Speer certiorari review.

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