No. 21-7082

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO THE BRIEF IN OPPOSITION

I. This case may provide a vehicle to resolve an important constitutional question about the application of this Court's decision in *Shinn v. Martinez Ramirez.*

On Monday, May 23, the Court issued its decision in *Shinn v. Martinez Ramirez*, No. 20-1009, 596 U.S. ___ (May 23, 2022). In *Martinez Ramirez*, the Court considered the proper interpretation of 28 U.S.C. § 2254(e)(2), which imposes limitations on the development of the factual basis of any claim that a petitioner has "failed to develop … in state court proceedings." The Court held that "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." Slip op. at 13. The Court held that this bar applied equally to procedurally defaulted claims of ineffective assistance of trial counsel that would be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), due to initial state post-conviction counsel's ineffective assistance. Slip op. at 15-19.

Speer's petition is entirely dependent on the availability of relief under *Martinez* and *Trevino*. *See* App. 5a. Under Texas law, Speer was appointed state habeas counsel to investigate and raise claims, including ineffective assistance of trial counsel. Tex. Code Crim. Proc. art. 11.071, § 2(a). Speer's state habeas counsel conducted no extra-record investigation during initial state habeas proceedings. App. 69a. State habeas counsel neither raised the federal habeas claim of ineffective assistance of trial counsel in Speer's initial state post-conviction proceedings, nor did he develop a single fact that would support the claim. App. 66a.

Although the State failed to timely assert the § 2254(e)(2) procedural bar in district court, the State raised it on appeal. *See* ROA.1554-1603; ROA.2134-38; ROA.2269; Br. for Appellee 19-25. Speer therefore suggested that the Court consider whether to hold his petition pending resolution of *Martinez Ramirez*. Pet. i-ii.

Speer now urges the Court to grant certiorari on the questions Speer originally presented. Speer acknowledges that this Court may "forgive the State's forfeiture" of the (e)(2) defense "before the District Court," *Shinn v. Martinez Ramirez*, No. 20-1009, Slip op. at 6 n.* (May 23, 2022), and may in its discretion address the issue. If this Court grants certiorari on the questions presented and believes it is appropriate to forgive the State's forfeiture of the (e)(2) defense, then Speer submits that this Court should join the question of the constitutionality of 28 U.S.C. § 2254(e)(2) as applied under the circumstances of Speer's case.

Although this Court interpreted § 2254(e)(2) in *Martinez Ramirez*, whether that provision complies with due process as applied to the facts of a case remains still an open question. Section 2254(e)(2) denies due process of law to habeas petitioners who are entitled to relief on constitutional claims of ineffective assistance of counsel that may be heard under *Martinez* and *Trevino*. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard . . . at a meaningful time and in a meaningful manner.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972)). "Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and

present evidence, must never be totally foreclosed." *Townsend v. Sain*, 372 U.S. 293, 312 (1963)*, overruled in part by Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992).

Congress entitled prisoners convicted in state court the remedy of habeas corpus for violations of their constitutional rights. 28 U.S.C. § 2241; *id.* § 2254(a). Because *Martinez* and *Trevino* remain vital components of the doctrine of procedural default, *see Martinez Ramirez*, slip op. at 15, 18-19, a district court is still required to adjudicate the question of cause and prejudice to overcome a procedural default of a claim of ineffective assistance of trial counsel. And if the petitioner satisfies the showing of cause and prejudice, the district court must likewise adjudicate the constitutional merits of the ineffectiveness claim. Yet, in a case like Speer's, in which not a single fact was developed in state court, Congress has prohibited the district court from receiving any evidence from the party who must bear the burden of proof on both the question of cause and the constitutional merits. *Id.* at 13; *id.* at 21 ("[A] federal court may not hold an evidentiary hearing—or otherwise consider new evidence—to assess cause and prejudice under *Martinez*."). AEDPA deprives Speer of the opportunity to present evidence or be heard in support of a claim even though Congress has extended him a forum in which to adjudicate the claim.

This departure from due process is especially intolerable in a case in which a petitioner lacks any mechanism for enforcement of the "bedrock" Sixth Amendment right to effective assistance of counsel. *Martinez*, 566 U.S. at 12. It is beyond dispute that Speer must be given a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation of the Constitution.'"

Boumediene v. Bush, 553 U.S. 723, 779 (2008) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)). But Speer has no state or federal remedy to raise his constitutional challenge. The State appointed ineffective state post-conviction counsel who developed no facts that could support a claim of ineffective assistance of trial counsel in the only proceeding in which Speer could meaningfully raise the claim. *See Trevino*, 569 U.S. at 428.[1] Although in theory Speer may secure consideration of his claim in federal court under *Trevino*, § 2254(e)(2) ensures that Speer may not develop the facts necessary to excuse the procedural default or secure relief on the merits in federal court. *See supra*. Speer thus lacks any mechanism to enforce his constitutional right to effective assistance of counsel. *See Martinez*, 566 U.S. at 10–11 (noting that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, *no court* will review the prisoner's claims") (emphasis added).

Because this Court has concluded that the clear text and purposes behind Congress's enactment of AEDPA compel *Martinez Ramirez*'s construction of § 2254(e)(2), it is now unavoidable that federal courts must confront the question whether the statute offends due process. This Court should grant certiorari on the questions presented by the petition and, if it deems it appropriate, address the question of (e)(2)'s constitutionality as applied to the circumstances of Speer's case.

[1] Texas law provides post-conviction applicants no pre- or post-deprivation remedy for trial ineffectiveness claims that were not raised or developed because of the ineffectiveness of initial state post-conviction counsel. *See Ex parte Ruiz*, 543 S.W.3d 805, 825 (Tex. Crim. App. 2016); Tex. Code Crim. Proc. art. 11.071.

In the alternative, this Court should grant, vacate, and remand the judgment in Speer's case for the reasons set forth in the Petition and instruct the Court of Appeals to consider whether to forgive the forfeiture and whether (e)(2) may be applied consistent with due process in these circumstances.

II. The double-edged evidence rule employed by the Fifth Circuit and several other circuits is incompatible with this Court's precedent.

Speer contends that the double-edged inquiry applied by the Fifth Circuit and other circuits is a one-way ratchet, resulting in a rejection of a defendant's IAC mitigation claim in nearly all cases. The State argues that this Court's precedent supports that result, that all of Speer's mitigating evidence can be taken to be aggravating instead, that there is no circuit split on this question, and that, in any event, its case that Speer was a future danger was so strong that no mitigation case could have overcome it. The State is wrong on all counts.

The State accuses Speer of "downplay[ing]" this Court's decisions "recognizing that mitigating evidence can likewise be aggravating." BIO 9. But it is the State that misreads this Court's precedent to defend the Fifth Circuit's wayward rule.

Speer readily acknowledges the obvious (as this Court has): different jurors will make different moral judgments from testimony about a defendant's character and background. Pet. 21-22; *see Burger v. Kemp*, 483 U.S. 776, 794 (1987) (approvingly quoting lower court: "Mitigation … may be in the eye of the beholder." (cleaned up)). Is the fact that 4-year-old Speer was "kicked out of daycare," and received no social work or psychological treatment, BIO 21, evidence of incorrigibility or suggestive of lifelong difficulties that his parents and schools failed to help him

cope with? The State shares the view expressed by the trial prosecutor in *Brewer v. Quarterman*: "And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason." 550 U.S. 286, 291 (2007). *See* BIO 29-31.

Capital jurors can give weight to the new evidence as they see fit. *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982). Some jurors might agree with the State's moral judgment, but some may "str[ike] a different balance"—as this Court's own cases finding prejudice recognize. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

But this is a truism, not a legal rule. For the Fifth Circuit and district court, the fact that Speer's mitigation evidence "could all be read by the jury to support, rather than detract, from his future dangerousness" was a legal principle on which to rest a no-prejudice finding. App. 40a (quoting *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002)), App. 74a (same); App. 9a ("Although much of [Speer's new evidence] might have painted him in a sympathetic light, some of it also could be viewed as additional evidence of future dangerousness."). Under this rule, 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) (emphasis added).

This Court's precedents hold the opposite: a habeas court may not short-circuit *Strickland*'s prejudice analysis simply by recognizing the possibility that some jurors might view mitigating evidence as having an aggravating aspect. In *Rompilla v. Beard*, this Court rejected that view: [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." 545 U.S.

374, 393 (2005). In *Williams v. Taylor*, this Court found prejudice even when the evidence might further support the jury's finding of future dangerousness. 529 U.S. 362, 398 (2000) (finding state court's prejudice determination unreasonable under 28 U.S.C. § 2254(d)(1)).

The State attempts to divine a basis for the double-edged doctrine in this Court's precedents, but the State badly misreads the case law. *See* BIO 24-25. As the petition explained (Pet. 23-24), *Wong v. Belmontes* is not a pathbreaking case ratifying the double-edged evidence rule. It is a one-off case finding no prejudice where the new mitigating evidence would have guaranteed the admission of extremely aggravating evidence that a prosecutor had excluded in exchange for the defendant not "opening the door." 558 U.S. 15, 19 (2009). Nor does *Cullen v. Pinholster* support the rule. 563 U.S. 170 (2011). That case's demand for "clearly mitigating" facts is a product of the Court's application of the § 2254(d)(1) mandate that the state court's work receive deference, not a direct application (and modification) of *Strickland*. *Id.* at 201-02. *Wiggins* did not examine the double-edged quality of evidence "in its prejudice inquiry," as the State insists, BIO 25; it plainly employed the term in the conventional way this Court had done before—in assessing whether counsel performed deficiently.[2]

[2] "[G]iven the strength of the available evidence, a reasonable attorney might well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases." *Wiggins,* 539 U.S. at 535.

The overall effect of the double-edged evidence doctrine employed by the Fifth Circuit and its peers is to narrow to a null set the universe of prejudicial mitigation evidence. Requiring a petitioner to show that his evidence would be universally acclaimed as mitigating is a far cry from what *Strickland* actually requires: a "reasonable probability" that a single juror might vote for a sentence of life after considering the totality of the evidence. *Wiggins*, 539 U.S. at 537.

The State quibbles that Speer could do more to show the depth of the division among the courts over this rule. BIO 24. But the State concedes that "considerable precedent" shows that several circuits have joined the Fifth Circuit in repeatedly relying on an entrenched double-edged evidence rule. *Id.* It is equally clear that the double-edged evidence rule has been sharply repudiated by other courts. Judge McConnell's opinion for a Tenth Circuit panel is illustrative. *See Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008); *see also Andrews v. Davis*, 944 F.3d 1092, 1121 (9th Cir. 2019) (en banc) ("[C]oncerns about the possible double-edged nature of some of the mitigating evidence or about possible rebuttal evidence do not diminish the significance of the available evidence"). Because other circuits correctly recognize that the two-edged quality of mitigating evidence is not legally dispositive, these other circuits simply dispense with the double-edged sword metaphor altogether.

The State falls back to an alternate proposal: whatever the merits of the double-edged evidence analysis, the State's case in aggravation is just too overwhelming to have ever resulted in a life sentence. BIO 31-32. This gambit must fail. First, as a matter of fact, juries have voted for life sentences for defendants who

committed far more aggravated murders than Speer stands convicted. *See* Pet. 31-33 (collecting evidence from real capital sentencing juries). Second, the Fifth Circuit's view—that Speer's inability to defeat a finding of future dangerousness rendered him incapable of showing prejudice, App. 11a—is in flat contradiction of *Williams*. A jury that hears the "graphic description of [a defendant's] childhood, filled with abuse and privation" and "cognitive deficits" "might well" reach a different decision on a defendant's "moral culpability," *even if* that new evidence does not "overcome a finding of future dangerousness." *Williams*, 529 U.S. at 398; *see also id.* at 368-69 (discussing Williams's extensive violent criminal history).

And finally, Speer's trial attorneys failed to make any mitigation case at all. The State cannot have its cake and eat it too, by arguing both that Speer's offense was terrible and the case for him being a future threat strong, while also that trial counsel was reasonable for not attempting to make a case for life. *See* BIO 31 n.9. It beggars reason to argue that it is reasonable strategy to let the jury retire having heard only the case for death.

III. This is an excellent vehicle to address the questions presented.

This Court may reach the merits of the constitutional and statutory questions presented in this case—just as the Fifth Circuit has done. The State rehashes procedural objections it could not persuade the Fifth Circuit to adopt and calls them "vehicle" problems. BIO 10-22. The fact that the State launched a fusillade of meritless and waived objections below and the Fifth Circuit overlooked them indicates that the petition offers a strong (not weak) vehicle to reach the questions Speer presents.

First, the idea that Speer's claim is "successive" is wholly unsupported. BIO 11-13. Neither the district court nor the court of appeals adopted it. Speer's claim was raised in an amended petition as part of his initial habeas proceedings. "[A]n amended petition, filed after the initial one but before judgment, is not second or successive." *Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020). The Fifth Circuit provided Speer the opportunity to amend his petition in district court by raising ineffective-assistance-of-counsel claims and alleging his state habeas counsel's ineffectiveness as cause to overcome any procedural default. The remand order said the Fifth Circuit "retain[ed] jurisdiction in *the remainder* of the case"—i.e., jurisdiction to review the misconduct and speedy-trial claims that had already been certified for appeal—and gave the district court jurisdiction to consider the rest of the case. App. 84a. The panel could only have ordered the district court to "consider" "claims [Speer] may raise" "in the first instance" by re-opening the judgment on the initial habeas proceedings. *Id.*[3]

Second, the State's argument that *Pinholster* and 28 U.S.C. § 2254(d) bar the claim is misbegotten. BIO 13-18. Begin with what the State omits: Applying settled precedent from this Court and the Fifth Circuit, the district court found that Speer's claim had not been presented to the state courts and so had not been adjudicated by any state court. App. 65a-66a. The district court properly concluded that the claim was unexhausted and procedurally defaulted. The § 2254(d) relitigation bar, which

[3] *See* Hon. Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 Brook. L. Rev. 727, 734 (2005) ("Whenever the panel wants a district court to take any further action in the case, jurisdiction must be restored to the district court.").

concerns only claims "adjudicated on the merits in State court proceedings," did not apply. In turn, *Pinholster*, which limited the evidence that may be considered in reviewing a claim subject to § 2254(d), was also inapt. The Fifth Circuit did not disturb the district court's determination.

To be a vehicle problem, the determination would need to depart from settled law. But precisely the opposite is true: the State makes a novel and far-fetched argument to overturn decades of this Court's precedent in an attempt to stave off review. The State seeks to invalidate this Court's longstanding precedent that a claim has not been fairly presented to—or adjudicated by—a state court when no material facts were presented to it. *See* BIO 18. The State claims that the "factual-exhaustion doctrine" (that is, the fair-presentation requirement) was eliminated when Congress passed AEDPA. *Id.* To the contrary, Congress reaffirmed the habeas statute's exhaustion requirement, 28 U.S.C. § 2254(b)(1), with the passage of AEDPA, and this Court has continued to apply its fair-presentation requirement in cases decided after AEDPA. *See Baldwin v. Reese*, 541 U.S. 27, 33 (2004) (faulting petitioner for failing to present even "a factual description supporting the claim" to state appellate court); *Johnson v. Williams*, 568 U.S. 289, 302 n.3 (2013) (noting that presumption that a claim has been adjudicated on the merits can be rebutted when the claim was not fairly presented to state courts).

The State also seems to claim that *Pinholster* altered the boundary between claims adjudicated in state court and new, unadjudicated claims. BIO 18-19. But *Pinholster* expressly disavowed that very thing. The *Pinholster* Court acknowledged

a dispute between the parties about whether new evidence adduced in federal court "fundamentally changed [petitioner's ineffectiveness] claim so as to render it effectively unadjudicated." *See* 563 U.S. at 187 n.11. But the Court declined to reach that issue, *id.*, and refused to "decide where to draw the line between new claims and claims adjudicated on the merits," *id.* at 186 n.10; *see also id.* at 216 n.7 (Sotomayor, J., dissenting).

The State's remaining procedural objections were waived below and so could not pose a vehicle problem. As explained in Part I of this reply, if this Court deems it appropriate, it could forgive the State's forfeiture and grant certiorari to address the important constitutional questions that would necessarily be raised by applying § 2254(e)(2)'s bar in this case.

The State also waived its statute of limitations defense because it mentioned the issue glancingly in an argument made in the alternative, buried in a footnote. ROA.1573. *See* Rule 5(b), R. Governing §§ 2254 & 2255 Cases 5(b). Even if a court resuscitated this forfeited defense, Speer would be entitled to adequate "notice and an opportunity to present [his] position[ ]." *Day v. McDonough*, 547 U.S. 198, 210 (2006). And were the issue even a live one, Speer's claim was timely raised. Under Federal Rule of Civil Procedure 15(c)(1) and *Mayle v. Felix*, 545 U.S. 644 (2005), Speer's amended petition "relates back" to the date of his timely filed initial habeas petition. *See* ROA.29. Speer's amended petition expanded on the legal theory that prior federal counsel (who labored under a conflict of interest) had "attempted to set

out," Fed. R. Civ. P. 15(c)(1)(B), and supported the bare allegations of trial counsel's failures with significant new evidentiary support. ROA.1660-1737.[4]

IV. The Fifth Circuit's refusal to apply *Ayestas* warrants summary reversal or merits review.

On Speer's second question, there can be no squaring the Fifth Circuit's decision shutting off Speer's access to reasonably necessary investigative services with this Court's holding in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). Even though *Ayestas* mandated that courts were "require[d] … to consider" case-specific factors to determine whether services were reasonably necessary under 18 U.S.C. § 3599(f), *id.* at 1094, the Fifth Circuit concluded instead that *Ayestas* didn't apply to Speer's particular request because it was not his first. App. 12a (holding *Ayestas* "can inform" inquiry and there is "no requirement that [the district court's] order include the 'claim-by-claim' analysis that Speer seeks"). The State now adds its own theory: courts may ignore *Ayestas* for any request that exceeds $7,500. BIO 35. The Fifth Circuit's view (articulated only 3 years after this Court rebuked the Fifth Circuit's outlier interpretation of § 3599(f)) and the State's corollary underscore the importance of answering the question presented: did *Ayestas* really mean it when it told courts they are "require[d] … to consider" three case-specific factors when

[4] There is no inconsistency between this relation-back conclusion and the non-exhaustion determination made by the district court. The doctrines of exhaustion and relation back are fundamentally different. Relation back in habeas provides fair notice to a responding party by requiring the amended claim be "tied to a common core of operative facts." *Felix*, 545 U.S. at 664. But exhaustion, which is rooted in principles of federalism and comity, requires "more than notice." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The State provides no legal support for its conflation of these doctrines. BIO 21-22.

determining whether requested services were "reasonably necessary," or are district courts free to disregard those factors sometimes?

The State's theory that *Ayestas* contained an implicit dollar cap on its holding derives from a misreading of *Ayestas* and 18 U.S.C. § 3599(g)(2), the provision that requires a court to obtain authorization from the chief circuit judge whenever the amount of funding requested for services exceeds $7,500. Because expert and investigative services often exceed $7,500 (*see* Pet. 38), the mine run of requests under § 3599(f) will also trigger (g)(2). If that were all it took to render *Ayestas*'s requirement inert, *Ayestas* would be of exceptionally narrow scope.

In fact, *Ayestas* itself concerned a funding request over $7,500. There, the petitioner requested $20,016. *See* 138 S. Ct. at 1087. If the (g)(2) inquiry superseded the (f) determination, then *Ayestas*'s own holding would have been purely advisory.

What's more, this Court recognized that the (g)(2) determination is solely entrusted to the discretion of the chief circuit judge or her designee. 138 S. Ct. at 1092. In this case, Chief Judge Stewart expressed no reservation about funding services above the $30,000 Speer received, approving his last request "without prejudice to the submission of additional funding requests based upon the results of the ongoing investigation." ROA.2642. Speer was stymied from developing the facts of his ineffective assistance claim by the district court's misapplication of § 3599(f).

Neither the Fifth Circuit's number-of-requests rationale nor the State's funding-above-$7,500 adjunct excuses the failure to heed the rule of *Ayestas*.

And the district court's error was beyond consequential. The State, which bears no burden to develop facts in habeas proceedings and does not rely on the court for investigative services, contends that Speer received "more than his share of extra-record investigation." BIO 38. Yet there are significant gaps in the record caused by the district court's arbitrary denial of services. This incomplete record directly contributed to the court's no-prejudice finding.

For example, despite stark evidence of head injuries, childhood trauma, learning deficits, and psychological issues, ROA.2644, Speer was denied the opportunity to develop evidence from a mental health expert following consultation and evaluation, App. 78a. Without new mental-health evidence, the Fifth Circuit and State derive damaging inferences from the questionable mental-health evidence in the incomplete record, especially the testimony of psychologist Walter Quijano from Speer's juvenile criminal case. App. 8a (discussing double-edged dependent personality disorder of "doctor"); BIO 23, 30. Dr. Quijano is the same man who provided odious testimony about defendants' heightened risk of violence based on their race and ethnicity. *See Buck v. Davis*, 137 S. Ct. 759, 769-71 (2017). Speer should not have been forced to argue for prejudice with an incomplete record and the unreliable opinion of a discredited expert.

CONCLUSION

This Court should grant certiorari to resolve these important questions.

Respectfully submitted,

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