**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

## SUPPLEMENTAL BRIEF


KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

ERICH DRYDEN
Assistant Attorney General
*Counsel of Record*

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
*erich.dryden@oag.texas.gov*

*Counsel for Respondent*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Rules**



**Other Authorities**

## SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, the Director files this supplemental brief to address the Court's recent decision in *Shinn v. Martinez Ramirez*, ___ S. Ct. ___, 2022 WL 1611786 (U.S. May 23, 2022). In *Martinez Ramirez*, the Court held "that, under [28 U.S.C.] § 2254(e)(2), 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." *Id.* at *9. That is because "under § 2254(e)(2), a prisoner is 'at fault' even when state postconviction counsel is negligent." *Id.* at *10. So "a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements." *Id. Martinez Ramirez* confirms what the Director argued below and in the Director's brief in opposition (pp.19–20)—that § 2254(e)(2) forecloses merits relief and presents another reason why the district court correctly denied additional funding for Speer to investigate his ineffectiveness claim.

### I. *Martinez Ramirez* Forecloses Relief on the Merits Because It Settles That Speer's Evidence Is Barred by § 2254(e)(2).

The Fifth Circuit determined that a no-prejudice finding offers the simplest resolution of Speer's ineffectiveness claim. App'x B at 5 ("we conclude that Speer's inability to establish prejudice from any alleged failure to develop and use mitigation evidence presents the most straightforward resolution"). The Director agrees that Speer's ineffectiveness claim plainly fails on the merits. Nevertheless, *Martinez Ramirez* amply demonstrates why Speer's claim also fails as a matter of law. *Martinez*

*Ramirez* affirms that all the evidence that Speer developed for the first time in federal court is barred by § 2254(e)(2). *Martinez Ramirez* explains that "when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise admits or reviews new evidence for any purpose, it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in § 2254(e)(2) are satisfied." 2022 WL 1611786, at *12. Similarly, if § 2254(e)(2) applies and is not satisfied, "a federal court may not hold an evidentiary hearing—or otherwise consider new evidence—to assess cause and prejudice" or use such a hearing to make an "end-run around the statute" and backdoor evidence into merits consideration. *Id*.

Even assuming that Speer's ineffectiveness claim is new and defaulted (which the Director disputes, *see* Brief in Opposition at 13–18), Speer does not show that habeas relief could be premised on the state-court record alone, or that his claim falls within the exceptions to § 2254(e)(2). Reply at 2–4. He does not rely on any new constitutional rule, and his *Martinez*[1] theory necessarily forecloses any argument that his claim relied on "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). Additionally, even if Speer could satisfy one of those two conditions, he could not demonstrate that his new evidence "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." *Id*. § 2254(e)(2)(B). Speer is not claiming to be innocent, nor is he challenging his conviction. *See*, *e.g.*, *Thompson*

[1] *Martinez v. Ryan*, 566 U.S. 1 (2012).

*v. Davis*, 916 F.3d 444, 458 (5th Cir. 2019) ("Here, the disputed factual predicate concerns potential error during Thompson's punishment retrial. Even if Thompson were to prevail on the claim, his guilty verdict would remain untouched.").

Speer appears to concede that § 2254(e)(2) bars his new evidence. Reply at 2–4 ("not a single fact was developed in state court"). Instead, Speer's Reply now attempts to move the goalposts and asserts that § 2254(e)(2) is unconstitutional. *Id.* But if that were true presumably the Court would not have omitted that glaring fact in *Martinez Ramirez*—the definitive § 2254(e)(2) case—or in any of the cases where the Court considered § 2254(e)(2) over the years. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 420 (2000). Moreover, Speer offers no case where a court has held that § 2254(e)(2) is unconstitutional, and the Director is unaware of none.[2] Additionally, Speer did not properly raise the constitutionality of the statute to the court of appeals in his primary briefs below. *See* Appellant's Brief at 67–69; Appellant's Reply at 23–28. Accordingly, the Director would assert that Speer's constitutionality argument is forfeited. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted).

---

[2] This Court has long recognized that the authority to grant habeas relief is controlled by statute and that judgments about its scope are for Congress to make. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Indeed, the *Felker* Court upheld the constitutionality of restrictions on successive habeas petitions contained in § 2244(b). These restrictions—limiting review to new rules of law and previously undiscoverable evidence establishing innocence—mirror the ones in § 2254(e)(2) and "are well within the compass" of the complex and evolving mix of equitable principles, statutory developments, and judicial decisions that comprise habeas corpus. *Id.*

Regardless, Speer's argument is a non-starter. He argues that "AEDPA[3] 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." Reply at 3. But § 2254(e)(2) does not completely foreclose evidence—it has exceptions built directly into it. And even when it does foreclose evidence, it only does so when the petitioner has "failed to develop the factual basis of a claim in State court proceedings." The refusal to consider evidence that is not introduced in a procedurally correct manner is commonplace in the law. Indeed, holding that § 2254(e)(2) is unconstitutional would call into question § 2254(d)(1), which "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). It would similarly call into question AEDPA's exhaustion requirement, which, like § 2254(e)(2), requires that a state prisoner's claims must first be presented to the state court before they may be considered in the federal forum unless certain exceptions are met. 28 U.S.C. § 2254(b). Speer had an opportunity to present his evidence in state court—he merely failed to take advantage of it and then failed to meet one of the exceptions that would excuse his earlier omission. *Ford v. Wainwright*, 477 U.S. 399, 413 (1986) ("'[t]he fundamental requisite of due process of law is the opportunity to be heard'") (citation omitted). Speer's arguments that (1) the ineffectiveness of trial and state habeas counsel denied him this opportunity, and (2) he must be allowed to adduce new evidence to meet his

3 The Antiterrorism and Effective Death Penalty Act of 1996.

burden under *Martinez* to evade his default, *see* Reply at 3–4, just blithely rehash the contentions rejected in *Martinez Ramirez*.

Next, Speer argues that the Court should find the Director's own (e)(2) argument forfeited. Specifically, he states that "the State failed to timely assert the § 2254(e)(2) procedural bar in district court" and only raised it on appeal. Reply at 2. But the Director raised § 2254(e)(2) in district court in his objections to the magistrate's report and recommendations.[4] ROA.2134–38. He also raised it in his response to Speer's Federal Rule of Civil Procedure 59(e) motion. ROA.2315–17. He reurged it in his COA response before the Fifth Circuit. *See* COA Response at 60–61. He reurged it again in his Fifth Circuit merits brief. *See* Appellee's Brief at 19–31. He then raised it to this Court. *See* Brief in Opposition at 19–20. The Court cannot fairly find waiver when the Director raised this issue in the district court, the Fifth Circuit, and this very Court.

Furthermore, the Director has maintained that § 2254(e)(2)'s application cannot be forfeited. *See* Appellee's Brief at 30–31. Section 2254(e)(2), just like § 2254(d)(1), "contains unequivocally mandatory language" addressed to the courts. *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015), abrogated by *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (quotation marks omitted); *see Langley v. Prince*, 926 F.3d 145, 162 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2676 (2020) ("a State's lawyers cannot waive or forfeit § 2254(d)'s standard"). Section 2254(e)(2) commands that "the court shall not" consider evidence outside the state record unless its

[4] Speer's argument to the contrary thus collapses to an assertion that the objection was not "timely." Reply at 2.

conditions are satisfied. 28 U.S.C. § 2254(e)(2). Thus, its limit may not be forfeited. *Ward*, 777 F.3d at 257 n.3; *see also McGehee v. Norris*, 588 F.3d 1185, 1194 (8th Cir. 2009) (Section 2254(e)(2)'s requirements not excused in absence of express waiver). Moreover, the same concerns for finality and comity that lead courts to sua sponte raise bars to relief in federal habeas proceedings—*see*, *e.g.*, *Day v. McDonough*, 547 U.S. 198, 207–09 (2006) (statute of limitations may be raised sua sponte); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (non-retroactivity may be raised sua sponte); *Magouirk v. Phillips*, 144 F.3d 348 (5th Cir. 1998) (explaining that "comity" animates this determination)—apply to § 2254(e)(2)'s limit on outside evidence. *See Williams*, 529 U.S. at 436–37 ("Principles of exhaustion are premised upon recognition by Congress and the Court that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings.").

Finally, even if the Director did not appropriately raise § 2254(e)(2) in the district court, the Court may exercise its discretion to forgive the alleged waiver. *Martinez Ramirez*, 2022 WL 1611786, at *5 n.1. Indeed, the Director makes a stronger case for forgiveness of this purported forfeiture than Arizona in *Martinez Ramirez*, having raised the issue in the district court in the Director's objections. Application of the statute is also clearcut in Speer's case—meaning there is no need to return the case to the court of appeals if this (nonexistent) forfeiture is forgiven.

In sum, because Speer's claim is based on new evidence developed and presented for the first time in federal court, § 2254(e)(2)'s bar on that evidence

necessarily defeats it. Certiorari review may therefore be denied on this basis in addition to the others previously raised in the Director's brief in opposition.

## II. *Martinez Ramirez* Precludes Additional Funding.

*Martinez Ramirez* further demonstrates why Speer is not entitled to funding under 18 U.S.C. § 3599(f) to develop facts outside of the state-court record: any evidence he develops for the first time in federal court would be barred by § 2254(e)(2). *See* Brief in Opposition at 35, 37 (noting the previously briefed procedural bars would preclude relief on the merits). *Martinez Ramirez* admonishes that federal courts should first determine whether evidence can be considered for the purposes of habeas relief before allowing development of that evidence. *Martinez Ramirez*, 2022 WL 1611786, at *12–*13. Here, Speer will not "be able to clear [the] procedural hurdle[]" of § 2254(e)(2), and the "contemplated services" will not help Speer "win relief." *Ayestas*, 138 S. Ct. at 1094. Because any new evidence generated cannot be considered in evaluating the merits of his underlying claim under § 2254(e)(2), Speer does not show additional funding is warranted beyond the already excessive $30,000 that he received, especially where the district court approved four times the amount specified in the statute, admonished Speer it would not approve more than $30,000, and observed that $45,000 would exceed the norm in capital habeas cases. App'x B at 12.

## CONCLUSION

For the reasons set forth above, as well as in the Director's brief in opposition, the Fifth Circuit correctly affirmed the district court's denials of habeas relief and additional funding. Speer's petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

Erich Dryden
ERICH DRYDEN
Assistant Attorney General
*Counsel of Record*

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
Fax: (512) 320–8132
*erich.dryden@oag.texas.gov*

*Attorneys for Respondent*