No. 22-6629

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH EDMUND GAVIN,
Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Petition presents three important and recurring questions regarding the application of 28 U.S.C. § 2254(d) on which the circuits are divided. On the first question, the existence of a split is all but admitted; the only real dispute concerns how lopsided the split is. *See* BIO 30 (acknowledging that the Ninth Circuit, unlike the Eleventh Circuit, "limit[s] its review to state courts' specific justifications"). On the second and third questions, the identified splits are not even addressed, much less challenged, by the Brief in Opposition. Instead, the State focuses its efforts on explaining why the court of appeals reached the correct result on the State's view of the evidence.

The State's fact-bound arguments are unavailing on their own terms, but more importantly, they are largely beside the point. The questions presented by the Petition reflect intractable divisions among the circuits regarding the standards for applying deference under section 2254(d). The questions are important, and the divisions identified call out for the kind of clarity that can only come from this Court. The answers to the questions presented are also dispositive in this case. On Gavin's ineffective assistance of counsel claim, for example, the only court ever to apply the correct standard for prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984)—requiring only a "reasonable probability" of a different outcome—found that, but for counsel's unprofessional errors, "a reasonable probability exists that [Gavin] would have been sentenced to life imprisonment rather than death." Pet.

App. 186a. If the Eleventh Circuit interpreted section 2254(d) as other circuits do, Gavin would not face a death sentence.

This case presents an excellent vehicle for resolving each of the questions presented. The Court should grant certiorari.

I. Certiorari Is Warranted to Resolve a Circuit Split Over Whether AEDPA Deference Extends Beyond a State Court's Articulated Reasons for Rejecting a Claim.

A. The Brief In Opposition Confirms the Existence of a Circuit Split on the Question Presented.

Courts are split as to whether federal habeas courts are limited in applying AEDPA deference only to the reasons the state court actually provides. As explained in the Petition, most courts, including at least the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits, have held that, where at least one state court supplies reasoning for rejecting the petitioner's claim, a federal habeas court can apply deference only to the state court's actual reasons. Pet. 13-15. In contrast, the Eleventh Circuit has squarely rejected this view, and the Fifth Circuit appears likely to reject it as well. *Id.* at 15-16.

In response, the State effectively concedes that a circuit split exists on this question. The State agrees that the Ninth Circuit "limit[s] its review to state courts' specific justifications," while the Eleventh Circuit does not confine itself to the particular justifications proffered by the state court. BIO 30. That alone confirms the existence of a split on this important and frequently recurring question.[1]

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[1] The State observes that the Ninth Circuit first held that AEDPA deference is limited to the state court's specific justifications "long before *Wilson* was decided and on a different legal rationale." BIO 30. But the point is—as the State expressly

That said, the acknowledged split is more lopsided than the State is willing to admit. Contrary to the State's suggestion (*see* BIO 30), the First, Second, Fourth, Sixth, and Seventh Circuits all follow an approach that is consistent with the Ninth Circuit's approach and inconsistent with the Eleventh Circuit's approach. For example, in *Thompson v. Skipper*, the Sixth Circuit explained that it "[h]ew[s] to *Wilson*" in interpreting AEDPA to "require[] a habeas court to review the actual grounds on which the state court relied," 981 F.3d 476, 480 (6th Cir. 2020) (internal quotation marks omitted), and that it therefore "independently 'reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.'" *Id.* (quoting *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)). The Sixth Circuit then proceeded to do just that. Along the way, the Sixth Circuit criticized the district court for upholding the state court's judgment by relying on a piece of testimony that "[t]he Michigan Court of Appeals . . . declined to rely on." *Id.* That is precisely the kind of error the Eleventh Circuit made here, and the Sixth Circuit's opinion makes clear that it, too—like the Ninth Circuit but unlike the Eleventh Circuit—insists that federal courts "confine themselves to the particular justifications proffered by the state courts whose decisions they [are] reviewing." BIO 30. Tellingly, Judge Nalbandian wrote a separate concurrence in *Thompson* to "emphasize" that, contrary to the majority, he believed that "the trial court did not

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acknowledges—that the Ninth Circuit applies the very rule Gavin advocates, in conflict with the Eleventh Circuit. *See id.* In any event, the rule remains entrenched after *Wilson*. *See Kipp v. Davis*, 971 F.3d 939, 952 n.10 (9th Cir. 2020) ("[W]e may look only to the reasoning of the California Supreme Court." (citing *Wilson v. Sellers*, 138 S. Ct. 1188, 1193-94 (2018))).

err in considering the additional evidence not mentioned by the Michigan court of appeal[s]," and that, in his view, *Wilson* did not require federal courts to "confine their habeas analysis to the exact reasoning that the state court wrote." *Thompson*, 981 F.3d at 483-84 (Nalbandian, J., concurring). In other words, Judge Nalbandian believed that the rule applied in the Eleventh Circuit (as opposed to the rule applied in his own court) is the correct one.[2]

Like the Sixth and Ninth Circuits, the First, Second, Fourth, and Seventh Circuits also limit AEDPA deference to only those reasons the state court actually provides. *See Porter v. Coyne-Fague*, 35 F.4th 68, 75 (1st Cir. 2022) (applying *Wilson*'s requirement that "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable" (quoting *Wilson*, 138 S. Ct. at 1192)); *Scrimo v. Lee*, 935 F.3d 103, 111-12 (2d Cir. 2019) ("consider[ing] the rulings and explanations of the trial judge" (citing *Wilson*)); *Richardson v. Kornegay*, 3 F.4th 687, 697 (4th Cir. 2021) ("Sitting as a federal habeas court, we must identify 'the particular reasons . . . why state courts

[2] The State notes that "the holding in *Wilson*—the narrow question of how a federal court should address a case where a lower court gave reasons for its decision, but a higher state court did not—is not at issue in this case." BIO 29. Notably, the State's narrow reading of *Wilson* represents one side of the circuit split and illustrates the lower courts' confusion about how best to read *Wilson* and how AEDPA deference works in cases such as this one, where the last state-court decision to adjudicate the claim on the merits contains reasoning. Other courts, as the Petition explained, do not read *Wilson* the same way. *See* Pet. 16-17; *accord Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1072 n.29 (11th Cir. 2022) (en banc) (Pryor, J., dissenting) (criticizing the en banc majority's interpretation of *Wilson*); *Thompson*, 981 F.3d at 480 n.1 (noting that "[i]n in the wake of *Wilson*, courts have grappled with whether AEDPA deference extends only to the reasons given by a state court (when they exist), or instead applies to other reasons that support a state court's decision," and comparing cases from multiple circuits).

rejected a state prisoner's federal claims'" (quoting *Wilson*, 138 S. Ct. at 1191-92)); *Winfield v. Dorethy*, 956 F.3d 442, 454 (7th Cir. 2020) ("Having found the state court's 'specific reasons' for denying relief, the next question is whether that explanation was reasonable thereby requiring our deference." (quoting *Wilson*, 138 S. Ct. at 1192)). Citing the Eleventh Circuit's decision in *Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025, 1040 n.9 (11th Cir. 2022) (en banc), the State attempts to recharacterize these decisions, asserting that they can be reconciled with the Eleventh Circuit's approach. *See* BIO 30. That assertion fails on its own terms.[3] But even if the State were right, it would simply mean that the acknowledged split is less lopsided than Gavin contends. It would not make the issue any less certworthy. *See* Sup. Ct. R. 10(a).

B. The Brief In Opposition Confirms That the Eleventh Circuit Deferred to a Reason the State Court Did Not Provide.

The State claims in passing that this case "does not present" this important and frequently recurring question on AEDPA deference, BIO 30, but its Brief in Opposition confirms that the opposite is true.

As the Petition explained, the Eleventh Circuit in the decision below identified the actual grounds on which the state court concluded that Gavin's trial

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[3] In her dissent in *Pye*, Judge Pryor explains why the en banc majority's attempts to harmonize its position with *Porter*, *Scrimo*, *Winfield*, and *Richardson* are misguided. *See Pye*, 50 F.4th at 1070-71 nn.22, 23, 25 & 26; *cf. Gish v. Hepp*, 955 F.3d 597, 603-04 (7th Cir. 2020) (noting, consistent with *Winfield*, that the Seventh Circuit "review[s] the specific reasons given by the state court and defer[s] to those reasons if they are reasonable" where the state court issues an "explanatory opinion" and then applying that rule by evaluating the "exact reasoning" of the Wisconsin Court of Appeals).

counsel's performance was not constitutionally deficient—(1) trial counsel's initial decision to hire Penland, the mitigation specialist, and (2) Gavin and his family's lack of cooperation—but did not hold that those grounds, whether considered individually or collectively, were reasonable and therefore entitled to deference under section 2254(d). Pet. 20. Instead, the Eleventh Circuit went beyond those grounds and determined that Gavin's claim failed because of a purported gap in the evidentiary record—a gap the state court never found. *Id.* In particular, the Eleventh Circuit asserted that Smith, Gavin's trial counsel, "conducted his own independent investigation" by "hir[ing] Dennis Scott, a private investigator," and—according to the Eleventh Circuit—"the record contains no information related to Scott's investigation or [ ] Smith's independent investigative efforts." *Id.* (quoting Pet. App. 35a). Accordingly, the Eleventh Circuit reasoned, "the record is incomplete concerning Gavin's counsel's investigation," and "[a]n incomplete or ambiguous record concerning counsel's performance . . . is insufficient to overcome the presumption of reasonable performance." *Id.* at 20-21 (quoting Pet. App. 35a). In the absence of that evidence, the Eleventh Circuit concluded, "the state court's determination . . . was not an objectively unreasonable application of *Strickland*." Pet. App. 36a-37a. But, as the Petition explained, the state court nowhere relied on any "independent investigation" by Smith or Scott to find that Gavin's counsel performed acceptably, and in fact Scott was a forensic investigator who worked on the *guilt*-phase portion of the case and *had nothing to do* with the mitigation investigation. Pet. 21.

The Brief in Opposition disputes none of this. *See* BIO 28-29, 30-31. In fact, the State simply omits these aspects of the Eleventh Circuit's decision when describing the Eleventh Circuit's opinion, instead noting only that the state court found that Gavin's trial counsel hired the mitigation specialist shortly after his appointment and that Gavin and his family were uncooperative. *See id.* at 30-31. There is thus no dispute that the Eleventh Circuit went beyond what the state court actually decided and applied AEDPA deference to a rationale on which the state court did not rely.[4]

The Court should grant certiorari to resolve the acknowledged split among the circuits regarding the first question presented by the Petition.

II. Certiorari Is Warranted to Resolve a Circuit Split Regarding Whether a State-Court Decision That Applies a Demonstrably Wrong Prejudice Standard Is Entitled to AEDPA Deference.

A. The Brief In Opposition Confirms the Existence of a Circuit Split on the Question Presented.

The Alabama Court of Criminal Appeals applied a demonstrably wrong prejudice standard when rejecting Gavin's *Strickland* claim when it held that "the admission of [the omitted mitigation] evidence *would not have changed* the verdict." Pet. App. 286a (emphasis added). The Brief in Opposition does not dispute that the Alabama Court of Criminal Appeals applied this standard, nor does it dispute that

[4] The State's repeated references to 28 U.S.C. § 2254(d)(2) and an "unreasonable determination of the facts in light of the evidence presented in the State court proceedings," BIO 23-25, are a red herring. It is undisputed that the state court did not find the gap in the record that the Eleventh Circuit hypothesized, and likewise undisputed that the state court did not rely on any independent investigation by Smith or Scott to find that counsel's performance was reasonable.

the Alabama Court of Criminal Appeals did not at any point articulate the correct burden of proof, which requires only "a *reasonable probability* that, absent [trial counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Pet. 25 (quoting *Strickland*, 466 U.S. at 695 (emphasis added)); *accord* BIO 31-33.

The Brief in Opposition also fails even to cite, much less discuss, *Williams v. Taylor*, where this Court explained that "[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding *would have been different*, that decision would be [contrary] to our clearly established precedent" and therefore not entitled to deference under section 2254(d). Pet. 25-26 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (emphasis added)); *accord* BIO 31-33. Likewise, the Brief in Opposition fails even to cite, much less discuss, *Vasquez v. Bradshaw*, 345 F. App'x 104, 111-12 (6th Cir. 2009), and *Mosley v. Atchison*, 689 F.3d 838, 850 (7th Cir. 2012), each of which recognizes that a state-court decision requiring the defendant to prove that the result "would have been different" if not for counsel's errors is "contrary to" *Strickland* and therefore is not entitled to AEDPA deference under section 2254(d). Pet. 26-28; *accord* BIO 31-33.

As the Petition explained, the Eleventh Circuit's decision here—which applied AEDPA deference to the state court's prejudice determination notwithstanding the state court's application of a demonstrably wrong standard—

split with the Sixth and Seventh Circuits, and clearly departed from this Court's precedent. Pet. 25-28. The State has no answer.

Ignoring all of this, the State claims that the Alabama Court of Criminal Appeals nevertheless "applied the correct standard for assessing prejudice under *Strickland*" because it "conducted *de novo* review of the trial court's prejudice holding, and after reweighing the omitted mitigating evidence against the evidence that was presented during the trial, it found that Gavin 'failed to establish that he was prejudiced by the alleged omission of the [ ] mitigating evidence.'" BIO 31 (quoting Pet. App. 286a). This argument is non-responsive. Everyone agrees that the court must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." *Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (per curiam) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam)). The dispute concerns what burden of proof the defendant must satisfy when the court conducts this weighing inquiry. The Alabama Court of Criminal Appeals applied a standard requiring Gavin to prove that the verdict "would have changed," whereas clearly established federal law required him to prove only a "reasonable probability" of a different outcome.[5] That is the error the Sixth and Seventh Circuits have recognized, but the Eleventh Circuit in the decision below did not.

[5] The only case (other than the decision below) that the State cites in its discussion of the prejudice standard (*see* BIO 31-32) is *Sears*, which confirms that the Alabama Court of Criminal Appeals applied the wrong standard. *See Sears*, 561 U.S. at 956 ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological

B. The Eleventh Circuit's Mistaken Application of Section 2254(d) Deference Is Outcome-Determinative Here.

The State suggests that the outcome on Gavin's *Strickland* claim does not depend on the proper standard of review, arguing that Gavin cannot satisfy the prejudice standard even under *de novo* review. BIO 32-33. In particular, the State claims that "there is no possibility . . . that had trial counsel presented mitigation such as that presented in the Rule 32 proceedings, the outcome of the penalty phase would have been different." *Id.* at 32. Of course, it is difficult to square the State's position on this score with the brute fact that the only court to apply the correct burden of proof found that, but for counsel's unprofessional errors, "a reasonable probability exists that [Gavin] would have been sentenced to life imprisonment rather than death." Pet. App. 186a. And the State ignores that even with constitutionally ineffective performance by counsel—which included making *affirmatively harmful* comments during closing argument and eliciting *affirmatively harmful* testimony from an unprepared witness who testified on Gavin's behalf (*see* Pet. 28-29)—two jurors still voted for life, which means Gavin needed to establish a reasonable probability of swaying only one more juror to change the result.

Moreover, without any citations to the record, the State simply ignores much of the powerful mitigating evidence that was omitted at trial and mischaracterizes

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impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a *reasonable probability* that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation." (emphasis added)).

the record. *See* BIO 33. As just one example,[6] the State ignores that Gavin had been incarcerated for 17 years for a prior conviction and had trouble adjusting to life outside of prison due to the effects of "institutionalization," but had adjusted well to prison and was not a safety risk inside, Pet. 9 (citing R.35-27:63, 70-71, 145-46)—evidence this Court has recognized can be important to a jury. *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (vacating death sentence due to exclusion of evidence that defendant was a "well-adjusted" prisoner and "would not pose a danger if spared (but incarcerated)").[7]

Given that trial counsel presented no substantive mitigation evidence at trial, that substantial mitigation evidence was reasonably available, and the fact that Gavin's jury voted 10-2 on the death sentence even after hearing an affirmatively harmful presentation from counsel, there can be no serious question the standard of review is outcome-determinative here. As the district court found,

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[6] As the district court found, if counsel had presented the evidence that Gavin produced at the Rule 32 hearing, the jury also would have heard evidence "that [ ] Gavin's parents' families had histories of drug abuse, alcoholism, prostitution, and incarceration; [ ] Gavin's siblings were gang members with histories of drug use, violence, and incarceration; [ ] Gavin's father . . . was physically abusive to [ ] Gavin's mother and to [ ] Gavin and his siblings; [ ] Gavin's mother was unable to take care of her adult responsibilities so [ ] Gavin tried to compensate for her shortcomings by committing crimes to get money to support the family; and that [ ] Gavin grew up in a gang-infested housing project in Chicago, living in overcrowded houses that were in poor condition, where he was surrounded by drug activity, crime, violence, and riots." Pet. App. 183a.

[7] The State argues that the omitted evidence in Gavin's case is not as persuasive as the omitted evidence in *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam). BIO 33. Even if the State were correct, those cases do not establish a constitutional floor for establishing prejudice on a penalty-phase *Strickland* claim.

“[t]he potentially mitigating evidence absent in the penalty phase of [ ] Gavin’s trial ‘bears no relation to the few naked pleas for mercy actually put before the jury.’” Pet. App. 186a (quoting *Rompilla v. Beard*, 545 U.S. 374, 393 (2005)).

III. Certiorari Is Warranted to Clarify Whether a State-Law Evidentiary Ruling Constitutes an “Adjudication on the Merits” of a Federal Constitutional Claim—A Question That Has Divided the Circuit Courts.

Gavin’s Sixth and Fourteenth Amendment rights to a fair and impartial penalty-phase jury were violated by the jury’s decision to recommend a death sentence before the penalty-phase trial had begun. Gavin has sought to vindicate his federal constitutional rights from the very first opportunity, but no court has ever adjudicated this claim on the merits. And in the published decision below, the Eleventh Circuit rejected his claim by applying AEDPA deference under section 2254(d) to a state-law evidentiary ruling. *E.g.*, Pet. App. 50a-51a.

The court of appeals was wrong to apply section 2254(d). As this Court has explained, “[t]he language of 28 U.S.C. § 2254(d) makes it clear that this provision applies only when a federal claim was ‘adjudicated *on the merits* in State court,’” *i.e.*, after the court has “heard and *evaluated* the evidence and the parties’ substantive arguments.” *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (internal quotation marks omitted). The Alabama Court of Criminal Appeals did *not* evaluate Gavin’s substantive arguments at all. Instead, it merely held that the underlying testimony “would have been inadmissible” under Alabama’s Rule of Evidence 606(b). Pet. App. 288a. Because the state court made clear that its decision rested on a state-law evidentiary rule, the “presumption that the federal claim was

adjudicated on the merits" is "rebutted," which means that Gavin's constitutional claim should have been "considered by the federal court[s] *de novo*." *Williams*, 568 U.S. at 301-02.

The Brief in Opposition only repeats the Eleventh Circuit's errors, without so much as acknowledging the "adjudication-on-the-merits requirement." *Id.* at 292. The State emphasizes *Richter*'s teaching that "§ 2254 bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)," and it argues that Gavin cannot satisfy section 2254(d). BIO 34. But the Petition presents the *antecedent* question whether section 2254(d) applies at all, which turns on whether (as *Richter* itself emphasizes) a federal constitutional claim was "'adjudicated on the merits' in state court." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). The State says nothing about whether the application of a state-law evidence rule constitutes an adjudication on the merits—as it plainly does not. At most, the Brief in Opposition asserts (without explanation) that the state court's reference to "Rule 606(b) of the Federal Rules of Evidence" shows that the court "addressed the merits of Gavin's claim." BIO 35. But the reference to an analogous federal evidentiary rule is no more an adjudication of a federal constitutional claim than a state-law evidentiary ruling is.

If Gavin had sought federal habeas relief in the Sixth or Seventh Circuits, he *would* have received *de novo* review of his federal constitutional claim. Both of those circuits recognize that state-court decisions resting on "state evidence law" do not adjudicate the merits of a "federal constitutional issue." *Harris v. Thompson*, 698

F.3d 609, 624-25 (7th Cir. 2012); *accord Couturier v. Vasbinder*, 385 F. App'x 509, 516 (6th Cir. 2010) (where state court found no "abuse of discretion" in exclusion of evidence, it "did not review the merits of [a] constitutional claim," which meant "AEDPA deference [did] not apply"). This conflict among the circuits—identified in the Petition (Pet. 32-33) but not substantively addressed in the Brief in Opposition—requires this Court's intervention. *See* Sup. Ct. R. 10(a).

The Sixth Circuit's recent decision in *Nian v. Warden, North Central Correctional Institution*, 994 F.3d 746 (6th Cir. 2021), provides particularly powerful evidence of the division among the circuits. There (as here), a habeas petitioner asserted a violation of his right to a fair and impartial jury under the Sixth Amendment, and (again, as here) the state court declined to consider the constitutional claim because a state-law evidence Rule 606(b) "required the juror's testimony to be excluded." *Id.* at 754. Here and in *Nian*, the state court did not reach "the 'intrinsic rights and wrongs . . . as determined by matters of substance' of [petitioner's] Sixth Amendment claim." *Id.* at 755 (quoting *Williams*, 568 U.S. at 302). In *Nian*, however, the Sixth Circuit correctly held that "the state court did not actually adjudicate Nian's claim on the merits and that AEDPA deference does not apply." *Id.* In Gavin's case, the Eleventh Circuit—in conflict with the Sixth Circuit—applied AEDPA deference under section 2254(d) over Gavin's argument that review should be *de novo*, as it plainly would be in the Sixth Circuit under *Nian*.

As this Court has explained, "[t]he requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks omitted). But Gavin's penalty-phase jury reached its verdict before the trial began—not based on any evidence developed at the penalty-phase trial, before even being instructed on the law that was supposed to govern its deliberations. Gavin has been unable to obtain even an *adjudication on the merits* of his constitutional claim, let alone the relief to which he believes he is entitled. The Court should grant certiorari and hold (consistent with the rule in the Sixth and Seventh Circuits) that a state-law evidentiary ruling does not trigger section 2254(d), thus clearing the path for consideration of Gavin's constitutional claim.

CONCLUSION

This Court should grant certiorari to review the important and unresolved questions of law presented by this capital case.

Respectfully submitted,

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