No. 23-635

In the Supreme Court of the United States

STEVEN LAWAYNE NELSON, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

To ensure that federal habeas review, "does not serve as a substitute for ordinary error correction through appeal," the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes "several limits on habeas relief" designed to "promote federal-state comity." *Shinn v. Ramirez*, 596 U.S. 366, 377, 378 (2022). One such limit is AEDPA's relitigation bar, which forbids a federal court to grant habeas relief for claims "adjudicated on the merits in State court" unless the prisoner can meet two narrow exceptions. *See* 28 U.S.C. § 2254(d).

After Steven Nelson was sentenced to death for the brutal murder of Pastor Clinton Dobson, he unsuccessfully sought habeas relief in state court, including on the ground that his trial counsel rendered ineffective assistance of counsel during the sentencing stage. Nelson reasserted that ineffective assistance claim in his federal habeas petition but argued that it was a "new" claim not subject to AEDPA's relitigation bar because he now asserted additional examples of ineffectiveness.

The questions presented are:

1. Whether a prisoner can aggregate alleged instances of ineffective assistance of counsel to satisfy the *Strickland v. Washington*, 466 U.S. 668 (1984), deficient performance and prejudice requirement in state court but then disaggregate those theories to create new, unadjudicated claims and thereby circumvent § 2254(d)'s strict limitations on federal-court review.

2. Whether the Fifth Circuit erred in concluding that Nelson suffered no prejudice by any sentencing-phase errors of his trial counsel when overwhelming evidence directly connected him to the murder of Pastor Dobson, established future dangerousness, and evidenced few, if any, countervailing mitigating factors.

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INTRODUCTION

In March 2011, Steven Nelson brutally murdered Pastor Clinton Dobson in a church office while he burglarized the church. Nelson bound, beat, and ultimately suffocated the Pastor with a plastic bag, and savagely beat (but did not manage to kill) Pastor Dobson's elderly secretary, Judy Elliott, beyond recognition. While Dobson and Elliott were laying bloody and viciously beaten—but still alive—Nelson robbed them, absconding with Elliot's car, Dobson's laptop and cellphone, and several of Elliot's credit cards, leaving them to die.

Multiple powerful pieces of physical evidence—fingerprints, decorative fragments of Nelson's belt, the victims' blood on the top of his shoes, his possession of the fruits of the robbery, and incriminating text messages—directly linked Nelson to the murder. And in fact, at his capital murder trial Nelson took the stand and put *himself* at the scene. Though he admitted to robbing Dobson and Elliot as they lay beaten or dying, he improbably insisted that he had only agreed to serve as a "lookout" for two friends, Anthony Springs and Claude Jefferson, who intended to burglarize the church but that he had no inkling a death could result. Yet this theory could not account for the fact that Springs and Jefferson had corroborated alibis and that no physical evidence tied either to the scene. The jury thus convicted Nelson of capital murder, and that same jury later sentenced him to death after hearing further evidence of his depredations while awaiting trial, including his strangulation of a mentally handicapped fellow inmate.

After his conviction, Nelson unsuccessfully sought habeas relief in state court, including on the ground that his trial counsel rendered ineffective assistance of counsel under the standards set forth in *Strickland v.*

Washington, 466 U.S. 668 (1984), at the sentencing stage (but not the guilt-innocence stage) by failing to investigate and present mitigation evidence. Nelson thereafter turned to federal court, re-asserting his *Strickland* claim but adding additional examples of alleged sentencing-stage ineffective assistance, including his trial counsel's failure to investigate and present evidence of the supposed involvement of Springs and Jefferson in Pastor Dobson's murder.

The district court and then the Fifth Circuit denied habeas relief. Those courts held that Nelson's sentencing-stage *Strickland* claim had already been "adjudicated on the merits in State court" so AEDPA's relitigation bar, 28 U.S.C. § 2254(d), foreclosed relief unless Nelson could satisfy its exceptions—an argument he never tried to make. Alternatively, even if AEDPA's relitigation bar was inapplicable, those courts held that Nelson's underlying *Strickland* claim failed on the merits because Nelson could not show that he was prejudiced by any sentencing-stage errors by trial counsel. Either way, Nelson was not entitled to habeas relief.

Nelson offers no grounds that would warrant this Court's intervention. Nelson strains to identify a circuit split where there is none. The Fourth and Eleventh Circuit, like the Fifth Circuit, agree that a habeas petitioner may not present new evidence or legal theories in federal court to convert an adjudicated claim into an unadjudicated one and thereby skirt AEDPA's strictures. To the extent that the Ninth Circuit had previously adopted a more lenient rule, it has since recognized that such a rule has been undermined by this Court's decision in *Shinn v. Ramirez*, 596 U.S. 366 (2022). And even if this Court thought it worth exploring when (if ever) new federal-court evidence can transform an old claim into a new one for purposes of AEDPA's relitigation bar, this case is a

poor vehicle because the Fifth Circuit's decision is supported by an independent ground justifying the denial of habeas relief—namely, that Nelson's *Strickland* claim fails on the merits anyway because he cannot show prejudice given the overwhelming case against him. Nelson's attempt to refashion that vehicle problem as a separate question presented fails.

STATEMENT

I. Nelson's Conviction and Sentence

A Texas jury convicted Nelson and sentenced him to death for the horrific capital murder of Pastor Clinton Dobson. Nelson murdered Dobson in Dobson's own church; a bloody passage of scripture was found by Dobson's side. 32RR233.[1] Nelson struck Dobson many times with multiple foreign objects before tying Dobson up and suffocating him with a plastic bag placed over his head. 36RR23-24, 39-41. Nelson also beat Dobson's elderly secretary, Judy Elliott, within an inch of her life—so badly that her husband, who first discovered the grisly scene, did not recognize her. 32RR74, 77, 79, 82, 129, 137; *see also Nelson v. State*, No. AP-76,924, 2015 WL 1757144, at *1 (Tex. Crim. App. Apr. 15, 2015).

A. Nelson's jury convicted him based on overwhelming physical and circumstantial evidence connecting Nelson to the crime. Nelson's fingerprints were at the scene. 34RR238-40. Distinctive decorative fragments from a belt Nelson was wearing when arrested were found on and around Dobson's body. 34RR84, 89, 100, 140-41, 146-48. The blood of Dobson and Elliott was on the top of Nelson's shoes. 35RR189-93. Shortly after the murder, Nelson, alone, possessed Elliott's car and Dobson's

[1] "RR" refers to the Reporter's Record from Nelson's capital murder trial.

iPhone and laptop. 33RR88-89, 91, 93, 95, 101-03, 126; 36RR96. Soon after, Nelson, still alone, was using Elliott's credit cards to go on a shopping spree in a local mall. 33RR207-08, 210-18, 220-21; 34RR14, 16, 20-28, 121-22. Nelson then sent a series of incriminating text messages. "One asked to see the recipient because '[i]t might be the last time.' Another said, 'Say, I might need to come up there to stay. I did some sh*t the other day, Cuz.' A third said, 'I f*cked up bad, Cuz, real bad.'" *Nelson*, 2015 WL 1757144, at *2. Nelson also bragged about the murder to an acquaintance. 35RR126-29, 138, 143.

Nelson's trial counsel faced long odds in defending him. Not only was there a mountain of direct evidence tying him to Dobson's murder, but, against counsel's advice, Nelson insisted on testifying. 36RR52-53. The story Nelson would tell—and thus the story his counsel needed to avoid contradicting—was that he was present *outside* the church while two others murdered Pastor Dobson. According to Nelson, he waited outside while two others went into the church; Nelson then entered, saw Dobson and Elliott face-down and bleeding (but still alive), robbed them, and went back outside. 36RR71-74. He then went back in and saw that Pastor Dobson had been killed. 36RR75-76, 86. According to Nelson, he knew that a robbery would take place in the church but had no inkling that his accomplices would kill anyone. 36RR87.

But Nelson's story foundered on numerous pieces of contradictory evidence. As the prosecution pointed out, Nelson's story could not account for, among other things, the presence of the victims' blood *on the top* of Nelson's shoes. 37RR28. And Nelson's explanation of how pieces of his belt could break off at the crime scene was no explanation at all—he merely insisted that the police had planted the belt on him. 36RR110-11. Likewise, the two others Nelson blamed for Dobson's murder—Anthony

Springs and Claude Jefferson—each had alibis. Multiple witnesses as well as phone records supported Springs's alibi.[2] Thus, after police originally suspected that Springs was involved, the State cleared him. Jefferson's alibi was that he was in class, which was also supported by phone records.[3] What is more, Nelson's counsel knew three other troubling facts: (1) Nelson's original story of Dobson's murder to the police did not mention Jefferson, ROA.2158-59;[4] (2) Jefferson had testified against Nelson before the grand jury and was ready to testify against him again at trial, 1CR192;[5] 3CR597; 32RR20-21; and (3) Springs had told police that Nelson confessed to killing Dobson, ROA.2155; 6RR29; *cf.* 34RR178 (Nelson's counsel declaring, "I can't call Mr. Springs, I think it's obvious why").

So rather than go on the offensive as to Springs and Jefferson and risk the State's calling the two as witnesses and further connecting Nelson to the murder, Nelson's counsel chose a lighter touch, using suspicion of Springs and Jefferson to show various weaknesses in the

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[2] Various witnesses provided testimony establishing that Dobson must have been murdered between 11:10am and 1:00pm. *See Nelson*, 2015 WL 1757144, at *1. Two witnesses placed Springs in Venus, Texas, 30 miles away during that time. 35RR14-18, 31-33. Springs's phone records supported those witnesses' testimony. *See, e.g.*, 35RR51, 59 (Springs' phone was in a different town at 12:13pm and 1:23pm on the day of the murder).

[3] On both days that week Jefferson had class from 11:00am to 12:20pm, including during the time of Dobson's murder, his usually active phone goes silent from just after 11:00am until after 12:20pm. ROA.2184, 87.

[4] "ROA" refers to the record on appeal in the Fifth Circuit.

[5] "CR" refers to the Clerk's Record from the Texas Court of Criminal Appeals in Nelson's direct appeal of his conviction.

State's case to undermine its overall credibility. The State's theory was that Nelson, and Nelson alone, committed this murder. In turn, defense counsel challenged this so-called "lone assassin theory." *See, e.g.*, 37RR20. For instance, Nelson's counsel elicited testimony that the police had "filed a case against Anthony Springs," 34RR153, and that an hour or two after the murder, Nelson did not look like he had been in an altercation. 33RR170-71. Nelson's counsel likewise attacked Springs's and Jefferson's alibis. *See, e.g.*, 35RR56-62 (establishing that Springs's phone records could not prove his location between 11:00pm the night before the murder and 12:13pm the day of); 35RR146-149 (suggesting that someone may have signed a class sign-in sheet on Jefferson's behalf). Nelson's counsel also established that the police had recovered DNA from the crime scene that did not match the two victims, Nelson, or Springs, *see, e.g.*, 35RR205, suggesting that another perpetrator may have been involved, *see* 37RR12-13, but the State had never obtained Jefferson's DNA, 34RR157-59; 37RR18-19. Finally, Nelson's counsel established that the victims' wounds could have been inflicted by more than one perpetrator. *See, e.g.*, 36RR39-42.

B. Nelson's counsel also faced a daunting task at sentencing, as the aggravating evidence against Nelson was equally overwhelming. Nelson's slaying of Pastor Dobson was just one incredibly egregious instance of a pattern of violent and destructive behavior. Nelson brutally murdered Dobson while serving probation for aggravated assault with a deadly weapon against a paramour. 36RR106, 115; 39RR88-92. And while awaiting trial for Dobson's murder, Nelson murdered *again*; this time Johnathan Holden, a mentally challenged fellow inmate who Nelson strangled with a blanket. *Nelson*, 2015 WL 1757144, at *6; 40RR17-21, 128-32. "It took four minutes

for Holden to die" and "[a]fterwards" Nelson "did a 'celebration dance' in the style of Chuck Berry,' 'where he hop[ped] on one foot and play[ed] the guitar.'" *Nelson*, 2015 WL 1757144, at *6. The murder of Holden was merely the most serious of Nelson's jail infractions—he also engaged in several altercations with jail officers, vandalized jail property multiple times, smuggled weapons into the jail, and assaulted other inmates. *Id.* at *6-7; 38RR52-56, 62, 64-68, 82; 39RR107, 134-36; 40RR90-91, 93, 154-56; 41RR65-68, 77-79, 89-92, 96-97.

To sentence Nelson to death, his jury had to make three findings required by Texas's death-penalty statute: (1) that Nelson posed a "continuing threat to society" (future dangerousness); (2) that Nelson "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken" (anti-parties); and (3) a lack of "mitigating circumstances" to warrant a life sentence (mitigation). Tex. Code Crim. Proc. art. 37.071, §§ 2(b), (e)(1); *see* ROA.2299-2300. Nelson's counsel attacked each element.

To attack the first, Nelson's counsel challenged the State's evidence connecting Nelson to the murder of his fellow inmate. Nelson's counsel, for example, vigorously cross-examined the primary eyewitness as well as the medical examiner who declared the inmate's death a homicide rather than a suicide. *See* 40RR32-47, 144-50. Nelson's counsel also put on witnesses to rebut the State's evidence. *See* 43RR16-19 (jail officer); 43RR28-36 (pathologist).

To attack the second, Nelson's counsel offered additional DNA evidence suggesting an unidentified perpetrator could have killed Dobson. Nelson's counsel put on their own DNA expert who independently tested the

items gathered from the crime scene using more powerful equipment than was available to the State. 43RR50-51, 58-59. The expert testified that the tape used to restrain Elliott contained DNA from three persons, Elliott, and two unknown contributors—persons other than Dobson, Nelson, or Springs. 43RR53-56. The expert further testified that the electrical cord used to restrain Dobson contained his DNA and an unknown contributor—persons other than Elliott, Nelson, or Springs. 43RR57-58. Another expert testified that DNA from a hair recovered at the crime scene did not match the victims, Nelson, or Springs. 43RR99-102.

To attack the third, Nelson's counsel sought to reduce his moral culpability through numerous witnesses, attempting to show that Nelson's violent tendencies resulted from psychological abnormalities and a troubled childhood. Nelson's counsel retained an expert who testified that Nelson's biology and environment predisposed him to severe aggression and violence from as early as the age of three. 43RR245-54, 257-59. Nelson's counsel cross-examined witnesses to establish that Nelson's violence at a young age showed that his violence was not simply a choice—it was the product of a difficult home life and distorted mental functioning. *See, e.g.*, 38RR25-26, 30-33, 92-93; 39RR19, 30-32. Nelson's counsel put on a fact witness who described Nelson's struggles to control his behavior as a child and testified that Nelson was prescribed various drugs as a child to treat an attention disorder and seizures. 43RR119-25. That same witness opined that Nelson would have turned out differently if he had more structure as a child—his father was in prison and his mother provided little structure or emotional support. 43RR126-27. Finally, Nelson's counsel called Nelson's mother, sister, and brother. Nelson's family described abuse at the hands of Nelson's often-

absent and alcoholic father, which Nelson witnessed, and Nelson's frequent headaches and insomnia as a child. 43RR140-41, 147-50, 159, 185-86, 189-90, 227. Nelson's sister also testified that Nelson's mother was often absent from the home. 43RR223-24, 229-30.

The jury sentenced Nelson to death. The Texas Court of Criminal Appeals ("CCA") unanimously affirmed the verdict and sentence. *See Nelson*, 2015 WL 1757144, at *1. And this Court denied Nelson's petition for a writ of certiorari. *See Nelson v. Texas*, 577 U.S. 940 (2015).

II. Nelson's Collateral Attacks on His Conviction and Sentence

A. State Habeas Proceedings

Nelson next sought state-habeas relief, and John W. Stickels was appointed counsel. *See* 1SHCR2.[6] Stickels filed a 104-page state-habeas application on Nelson's behalf that raised 17 grounds for relief. 1SHCR19-122. Among those grounds was a claim under the Sixth Amendment that Nelson's trial counsel had inadequately prepared for the sentencing phase of his trial. 1SHCR49. That *Strickland* claim asserted that Nelson's trial counsel had not made reasonable efforts to investigate and present mitigating evidence. 1SHCR49-58.

The state habeas trial court recommended denying relief—noting that trial counsel made "a well-reasoned strategic decision based on a thorough investigation, their professional judgment, the available witness testimony, and their reliance on well-qualified experts about how best to present" the sentencing-phase case. Pet.App.168a. The CCA denied relief, adopting the trial court's findings. Pet.App.144a-145a.

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[6] "SHCR" refers to the Clerk's Record from the CCA in Nelson's state-habeas proceedings.

B. Federal Habeas Proceedings

Nelson, represented by new counsel, then sought habeas relief in federal court. Nelson again challenged his trial counsel's sentencing-stage preparation but identified additional avenues he claimed his trial counsel should have explored. In "a single IAC sentencing claim alleging deficient investigation of sentencing-phase evidence," ROA.3740-41, Nelson argued that his trial counsel should have done more to investigate the circumstances surrounding the murders of Dobson and Holden and to gather mitigating evidence. ROA.1725-63. Nelson maintained that this insufficient investigation "deprived the jury of powerful information showing that Mr. Nelson's life should be spared." ROA.1724. On the *Strickland*-prejudice prong, Nelson likewise relied on the combined effect of trial counsel's failure to investigate the circumstances surrounding the murders of Dobson and Holden and to gather mitigating evidence in an attempt to show that a different result was likely had trial counsel been effective. ROA.1763-72.

The district court rejected Nelson's sentencing-phase *Strickland* claim. Pet.App.110a-125a. The court first concluded that Nelson had not procedurally defaulted his claim, because he presented the same ground for relief in state court. Pet.App.112a-113a. The district court rejected Nelson's suggestion that by supplementing a claim adjudicated on the merits in state court Nelson could create a new claim and avoid AEDPA's relitigation bar, which Nelson had not attempted to overcome. Pet.App.113a. The district court went on, in the alternative, to reject Nelson's claim on the merits. Pet.App.113a-125a.

Nelson then petitioned the Fifth Circuit for a Certificate of Appealability ("COA"). Nelson continued to

pursue a single "IAC-Sentencing claim" attacking trial counsel's performance at sentencing. *See* Petitioner-Appellant's Application for a Certificate of Appealability ("COA") and Brief in Support 13-33, *Nelson v. Davis*, No. 17-70012 (5th Cir. Oct. 27, 2017). A panel of the Fifth Circuit granted Nelson's COA request in part. *See* Pet.App.33a-86a. The court first split Nelson's *Strickland* claim into three separate ineffective assistance claims, Pet.App.39a-77a, and then held that reasonable jurists could debate whether Nelson's freshly minted "IATC-Participation" claim was new and had merit, and whether state-habeas counsel was ineffective in failing to raise it, Pet.App.64a-75a. The court of appeals carried the question of *Strickland* prejudice with whether Nelson was entitled to funding under 18 U.S.C. § 3599(f). Pet.App.75a-77a.

Upon review of the merits of his appeal, the Fifth Circuit affirmed the district court's denial of habeas relief. Pet.App.1a-23a. The Court held that Nelson's so-called "IATC-Participation" claim was not a "new" claim but rather the same *Strickland* claim that had been adjudicated on the merits in state court. Pet.App.12a-18a. Because that single *Strickland* claim had already been "adjudicated on the merits" in state court, that claim was subject to AEDPA's relitigation bar, 28 U.S.C. § 2254(d)—which Nelson never argued he could overcome. Pet.App.17a-18a. Alternatively, the Fifth Circuit held that even if Nelson's federal-court *Strickland* claim was "new" and therefore not subject to AEDPA's relitigation bar—and even if he could also overcome any procedural default of that claim—Nelson would *still* not be entitled to habeas relief because he was not prejudiced by any deficient performance by trial counsel. Pet.App.18a-23a.

Nelson thereafter filed a petition for rehearing en banc, which was denied without so much as a vote. *See* Pet.App.202a.

REASONS FOR DENYING THE PETITION

I. Nelson's *Strickland* Claim Does Not Warrant This Court's Review.

AEDPA respects "our system of dual sovereignty" and the principles of federalism and comity undergirding it, by greatly restricting the availability of federal habeas relief for those convicted of crimes in state court. *Shinn*, 596 U.S. at 375 (citing *Printz v. United States*, 521 U.S. 898, 918 (1997), and *Brown v. Davenport*, 596 U.S. 118, 132-33 (2022)).

A state prisoner seeking issuance of a writ of habeas corpus from a federal court must first "exhaus[t] the remedies available in the courts of the State" before seeking federal habeas relief. 28 U.S.C. § 2254(b)(1). This burden is typically satisfied by a prisoner "raising [their] federal claim before the state courts in accordance with state procedures." *Shinn*, 596 U.S. at 378 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)). When a petitioner's claim has been "adjudicated on the merits in State court" a federal court may not award habeas relief unless the prisoner can overcome AEDPA's daunting relitigation bar—which requires the prisoner to show either (a) that the state court's decision "was contrary to, or involved an unreasonable application of," law clearly established by this Court, or (b) that the decision "was based on an unreasonable determination of the facts" in light of the state court record, 28 U.S.C. § 2254(d)(1),(2).

If, however, a prisoner fails to raise his federal claim in state court he has "procedurally defaulted" the claim and a federal court may not entertain it unless the prisoner "can demonstrate cause for the default and actual

prejudice as a result of the alleged violation of federal law." *Shinn*, 596 U.S. at 379 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Although attorney error does not ordinarily establish cause to excuse a procedural default, in *Martinez v. Ryan*, this Court recognized a "narrow" exception to that rule in circumstances where state habeas counsel rendered ineffective assistance and where the State requires prisoners to raise the underlying claim for the first time in state habeas proceedings. 566 U.S. 1, 9 (2012). If a prisoner successfully satisfies the *Martinez* exception, then AEDPA's relitigation bar does not apply because there has been no state-court "adjudicat[ion] on the merits," 28 U.S.C. § 2254(d), and a federal habeas court will review the prisoner's *Strickland* claim under a more deferential *de novo* standard, Pet.App.11a (citing *Hoffman v. Cain*, 752 F.3d 430, 437 (5th Cir. 2014)).

Following *Martinez*, state prisoners like Nelson were incentivized to take a narrow view of the scope of their state-court *Strickland* claims in order to construe their federal-court *Strickland* claims as procedurally defaulted in the hopes of obtaining plenary review of their claim in federal court free of AEDPA's strictures. And prior to this Court's decision in *Shinn* two Terms ago squelching the practice, that plenary federal-court review may have even entailed a fresh evidentiary hearing in federal-court. *See, e.g.*, 596 U.S. at 373.

In this case, the Fifth Circuit applied AEDPA's framework and concluded that, because the sentencing-phase *Strickland* claim raised in Nelson's federal habeas petition was the same claim as the sentencing-phase *Strickland* claim he raised in state court, Nelson had not procedurally defaulted the claim and it was subject to AEDPA's relitigation bar. But because Nelson never argued he could satisfy the relitigation bar's standards, he

was not entitled to habeas relief. Nelson's petition points to nothing that would warrant this Court's intervention. No circuit split exists because each of the circuits at issue recognizes that a habeas petitioner cannot convert an old claim into a new one—and thereby evade AEDPA's relitigation bar—by merely offering new evidence to a federal court that supplements or enhances the old claim. And more fundamentally, the Fifth Circuit's holding that Nelson's *Strickland* claim was subject to AEDPA's relitigation bar was correct.

A. No live circuit split exists over how to determine whether a "claim" is subject to AEDPA's relitigation bar.

Nelson's primary argument for review (at 14-21) is that the Fifth Circuit's determination that his *Strickland* claim had been "adjudicated on the merits in State court" and is thus subject to AEDPA's relitigation bar, 28 U.S.C. § 2254(d), "breaks from the tests" for "claim-sameness" in the Fourth, Ninth, and Eleventh Circuits. Specifically, Nelson argues (at 17) that while the latter three circuits "honor the basic rule that federal-court and state-court claims are different when there are 'new, material factual allegations that place 'the claim[s] in a 'significantly different legal posture,'" "[t]he Fifth Circuit stands alone in rejecting it."

Not so. The Fifth Circuit, consistent with both the Fourth Circuit and Eleventh Circuit, held that a habeas petitioner may not offer new evidence and legal theories in federal court to reframe a claim already adjudicated in state court as a "new claim" that is not subject to AEDPA's relitigation bar. And while the Ninth Circuit has historically adopted a different rule that allows habeas petitioners to circumvent AEDPA's relitigation bar by offering new evidence presented for the first time in

federal court, a more recent panel of the Ninth Circuit has recognized that this Court's recent decision in *Shinn* has seriously undermined, if not overruled, that approach. To the extent any circuit split existed it is now stale in the light of *Shinn*—and consequently unworthy of this Court's attention.

1. As the Fifth Circuit explained, "[g]enerally, determining whether the § 2254(d) relitigation bar applies is straightforward." Pet.App.12a. "On the one hand, the relitigation bar does not apply where the prisoner fails altogether to present a certain claim in state court." Pet.App.12a-13a (citing *Trevino v. Thaler*, 569 U.S. 413, 416-17 (2013)). "On the other hand, the § 2254(d) limitations do apply in cases where a prisoner fairly presented the substance of his federal claim to the state courts." Pet.App.13a (cleaned up and citation omitted); *see Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But where, as here, "the support for the prisoner's federal claim evolves across the state and federal proceedings, determining whether § 2254(d)'s relitigation bar applies is more difficult." Pet.App.13a. Although this Court "has not identified 'where to draw the line between new claims and claims adjudicated on the merits,'" Pet.App.13a (quoting *Cullen v. Pinholster*, 563 U.S. 170, 186 n.10 (2011)), in this case the Fifth Circuit concluded that a habeas petitioner cannot evade the relitigation bar's strictures by merely proffering "new evidence" or "legal theories" and arguing that they "fundamentally alter[] a claim already adjudicated in state-court proceedings," Pet.App.13a-15a.

Both the Fourth and Eleventh Circuits follow the same rule. For example, the Eleventh Circuit has long "held that a habeas petitioner 'cannot convert his previously asserted 'claim' into a wholly new 'claim' merely by coming forward with new supporting evidence or even

new legal arguments.'" *Sears v. Warden GDCP*, 73 F.4th 1269, 1285-86 (11th Cir. 2023) (per curiam) (quoting *In re Hill*, 715 F.3d 284, 292 (11th Cir. 2013)); *see also In re Dailey*, 949 F.3d 553, 558 (11th Cir. 2020) ("new evidence does not a new claim make"); *In re Everett*, 797 F.3d 1282, 1291 (11th Cir. 2015). Indeed, even if a habeas petitioner "has some new evidence," as long as his federal habeas petition asserts "the same 'federal basis of relief from the state court's judgment,'" AEDPA's relitigation bar will apply. *In re Hill*, 715 F.3d at 292 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005)).

Likewise, the Fourth Circuit routinely applies the rule that a federal habeas court may not consider "new *evidence* supporting a claim that was in fact presented in state court," in order to sidestep AEDPA's relitigation bar. *Vandross v. Stirling*, 986 F.3d 442, 451 (4th Cir. 2021). Instead, "so long as 'the prisoner has presented the substance of his claim to the state courts,' the presentation of additional facts does not mean that the claim was not fairly presented." *Moore v. Stirling*, 952 F.3d 174, 183 (4th Cir. 2020) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986)). That is, "[w]hen new evidence only elaborates on the evidence presented in state court, the claim is not fundamentally altered into a new, and unexhausted, claim." *Id.* "Without a change to the nature of the claim, the type or quantum of evidence supporting it d[oes] not fundamentally alter the claim." *Id.* "This standard is not satisfied with bits of evidence but requires critical evidence that makes [a habeas petitioner's] claim both stronger *and* significantly different." *Id.* at 183 n.8; *see also Mahdi v. Stirling*, 20 F.4th 846, 898-99 (4th Cir. 2021) (explaining that "the presentation of additional facts does not mean that the claim was not fairly presented").

Contrary to Nelson's contention (at 20-21), had his case come before either the Fourth or Eleventh Circuits those courts would have come to the same conclusion as the Fifth Circuit, because his federal-court *Strickland* claim merely offers new facts—additional instances of alleged sentencing-phase ineffectiveness—in support of an old sentencing-phase *Strickland* claim. As the Fifth Circuit explained "[i]n both the state and federal habeas proceedings, Nelson raised a single ineffective assistance of counsel claim related to trial counsel's performance at sentencing," Pet.App.16a, and "[t]here is no dispute that the 'asserted federal basis for relief from [the] state court's judgment of conviction' is the same," Pet.App.16a (quoting *Crosby*, 545 U.S. at 530)—the Sixth Amendment right to counsel based upon the purported sentencing-phase errors of his trial counsel. Merely "point[ing] out more instances of trial counsel's alleged deficient performance at sentencing in the federal court claim," however, is "not enough to fundamentally alter the" *Strickland* claim. Pet.App.16a-17a.

The Eleventh Circuit deploys the same type of analysis, applying this Court's decision in *Crosby* to ascertain the "federal basis of relief from the state court's judgment" asserted in the federal habeas petition and then applying the principle that "coming forward with new supporting evidence or even new legal arguments" does not suffice. *In re Hill*, 715 F.3d at 292. So does the Fourth Circuit, which—like the Fifth Circuit—holds that "new evidence [that] only elaborates on the evidence presented in state court" and adds to the "type or quantum of evidence" does not "fundamentally alter the claim." *Moore*, 952 F.3d at 183. Those rules, applied here, doom Nelson's attempt to skirt the relitigation bar in any of these three circuits because Nelson's additional theory of sentencing-phase ineffective assistance of counsel

merely "elaborates" on, and increases the "quantum"—but not the "nature"—of, the evidence in support of the claim presented in state court. *Id.*

2. In contrast to his description of the law in the Fourth and Eleventh Circuits, Nelson correctly observes (at 19-20), that the Ninth Circuit has historically applied a different rule. Beginning ten years ago with a fractured en banc opinion, the Ninth Circuit held that a habeas petitioner *can* present a "new claim" that is not subject to AEDPA's relitigation bar by offering "new allegations and evidence" of ineffective assistance of trial counsel that were not presented in state court. *Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (en banc); *but see id.* at 1329 (Callahan, J., concurring in part and dissenting in part) (arguing that the petitioner's "present claim of trial counsel IAC simply adds additional factual allegations to his initial claim of trial counsel IAC," but "additional factual allegations do not state a new claim"). Later Ninth Circuit panels, bound by this en banc decision, have followed suit. *See, e.g.*, *Poyson v. Ryan*, 879 F.3d 875, 896 (9th Cir. 2018).

But critically, more recent decisions in the Ninth Circuit have recognized that this Court's decision in *Shinn* casts serous doubt upon key components of *Dickens*, including its capacious standard for determining when new evidence transforms an old claim into a new one. *See Creech v. Richardson*, 59 F.4th 372, 387-88 (9th Cir. 2023); *see also Bearup v. Shinn*, No. 16-cv-03357-PHX-SPL, 2023 WL 1069686, at *3 (D. Ariz. Jan. 27, 2023). As one panel recently observed, only "*[p]rior to the Supreme Court's decision in* Ramirez," could "a claim previously presented to a state court . . . become a new unexhausted (and procedurally defaulted) claim if new evidence presented to the district court under *Martinez* either 'fundamentally alter[ed] the legal claim already

considered by the state courts' or 'place[d] the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it.'" *Creech*, 59 F.4th at 388 (quoting *Dickens*, 740 F.3d at 1318) (emphasis added).

To the extent that the Ninth Circuit's outlier decision in *Dickens* did conflict with the precedents of its sister circuits, any such split is stale and likely non-existent following *Shinn* and *Creech*. At a minimum, further percolation in the Ninth Circuit would be warranted should there be any remaining doubt about whether *Dickens* survives *Shinn*. But granting review in a case involving a Fifth Circuit decision that *aligns* with the holdings of its sister circuits (and this Court's decision in *Shinn*) is a poor vehicle for correcting errant precedent from another circuit.

3. Ultimately Nelson's claim of a circuit split appears to rest on a mistaken premise: that the Fifth Circuit held that new evidence presented in support of a federal-court claim could *never* fundamentally alter a claim previously presented in state court such that the old claim has become a new one. *See, e.g.*, Pet. 24 ("the decision below says *twice* that a federal-court claim that is a fundamental alteration of a state-court claim is still the same claim."). From that premise, Nelson argues (at 17-20) that the Fifth Circuit's decision conflicts with other circuits' acknowledgement that "in limited circumstances, 'new evidence [can] 'fundamentally alter' the 'substance' of the claim so as to make the claim a new one' that was not presented to the state court." *Vandross*, 986 F.3d at 451 (quoting *Moore*, 952 F.3d at 182); *see also Sears*, 73 F.4th at 1286 n.10 (same). But Nelson misreads the Fifth Circuit's decision to find a categorical statement where none exists.

Citing this Court's decision in *Pinholster*, the Fifth Circuit recognized the possibility that a federal-court claim could have "evolved" from state court to present "a new claim altogether." Pet.App.13a (citing *Pinholster*, 563 U.S. at 186 n.10). The Fifth Circuit simply held that neither of the two Fifth Circuit cases Nelson cited demonstrated that a habeas petitioner can make that showing in the context of a *Strickland* claim by producing new evidence of ineffectiveness for the first time in federal court. Pet.App.13a-15a. The court did not, however, foreclose the possibility that an old state-court claim could be fundamentally altered by a new federal-court one. For example, the court acknowledged that "a *Strickland* claim is specific to a particular stage of a proceeding," thus indicating that a federal-court *Strickland* claim that challenges trial counsel's performance during a different "stage of a proceeding" than in state court could constitute a fundamentally altered claim. Pet.App.17a. Likewise, the court recognized that because "a *Brady* claim is specific to particular pieces of material evidence allegedly suppressed by the prosecution," a federal-court *Brady* claim that challenges a different "item" of suppressed evidence than the state-court *Brady* claim would be a fundamentally altered claim not subject to AEDPA's relitigation bar. Pet.App.17a; *see also Pinholster*, 563 U.S. at 186 n.10.

Regardless, any dispute about the vitality of the fundamental-alteration exception is purely theoretical because the Fifth Circuit *did* consider whether "the new participation aspect of [Nelson's] ineffective assistance claim fundamentally alters the ineffective assistance claim [Nelson] litigated in the state proceedings." Pet.App.15a. It merely concluded that Nelson's federal claim did *not* fundamentally alter his state court one—a bottom-line conclusion that the Fifth Circuit's decision

shares with the out-of-circuit cases that Nelson claims establish a conflict of authority. *See, e.g.*, *Vandross*, 986 F.3d at 451 (rejecting argument that offering supplemental evidence of counsel's deficient performance and resulting prejudice in federal court fundamentally altered a state-court *Strickland* claim); *Moore*, 952 F.3d at 184-85 (holding that presenting affidavits providing additional mitigation evidence in federal court did not "fundamentally alter" state-court claim). So even if this Court were persuaded to weigh in on whether the "fundamental alteration" test is an appropriate tool for determining "where to draw the line between new claims and claims adjudicated on the merits," *Pinholster*, 563 U.S. at 186 n.10, this case does not provide an appropriate vehicle to do so, since the Fifth Circuit held that Nelson could not meet that standard anyway.

B. The Fifth Circuit correctly held that Nelson's *Strickland* claim was "adjudicated on the merits in State court" and barred by AEDPA.

Review of Nelson's *Strickland* claim is also independently unwarranted because the Fifth Circuit correctly held that his *Strickland* claim is subject to—and barred by—AEDPA's relitigation bar.

1. AEDPA's relitigation bar forbids a federal court to grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" unless a state prisoner can demonstrate one of two narrow exceptions is applicable. 28 U.S.C. § 2254(d). This "standard is difficult to meet . . . because it was meant to be": "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (quoting

Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)).

Nelson has never argued that he can satisfy the relitigation bar's exacting standards with respect to the *Strickland* claim he advanced in state court. Instead, he argues that the *Strickland* claim he presented in his federal habeas petition is not subject to the relitigation bar in the first place because it is a different "claim" than the one he presented in state court. Not so.

The scope of a "claim" under section 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." *Crosby*, 545 U.S. at 530. So if the state court rejected "an asserted federal basis for relief," *id.*, it adjudicated the claim that asserted that federal basis for relief—whatever the particular facts alleged. It is well settled that "identical grounds may often be proved by different factual allegations." *Sanders v. United States*, 373 U.S. 1, 16 (1963). "[A] claim of involuntary confession predicated on alleged psychological coercion," for example, "does not raise a different 'ground' than does one predicated on alleged physical coercion." *Id.*

The Fifth Circuit faithfully applied these precedents in a straightforward manner to conclude that the *Strickland* claim presented in Nelson's federal habeas petition was the same claim as the one rejected in his state-habeas proceedings. As the court explained, "[i]n both the state and federal habeas proceedings, Nelson raised a single ineffective assistance of counsel claim related to trial counsel's performance at sentencing." Pet.App.16a. There was "no dispute that the 'asserted federal basis for relief from [the] state court's judgment of conviction'"—that Nelson's Sixth Amendment right to counsel was

violated by prejudicial trial errors at the sentencing phase of his capital murder trial—"is the same." Pet.App.16a (quoting *Crosby*, 545 U.S. at 530). And this analysis did not change simply because "Nelson pointed out more instances of trial counsel's alleged deficient performance at sentencing in the federal court claim." Pet.App.16a-17a. After all, "identical grounds"—here, ineffective assistance of trial counsel at sentencing—"may often be proved by different factual allegations." *Sanders*, 373 U.S. at 16.

2. Nelson's chief argument in response (at 21-23) is that the Fifth Circuit should have adopted a "broad[]" interpretation of the word "claim" to conclude that any time a habeas petitioner can come up with a new factual theory to support a previously asserted legal claim for relief, he has asserted a new claim that is not subject to AEDPA's relitigation bar. But Nelson misunderstands the nature of a *Strickland* claim.

As the Fifth Circuit explained, a "*Strickland* claim is specific to a particular stage of a proceeding." Pet.App.17a; *see also Yick Man Mui v. United States*, 614 F.3d 50, 56 (2d Cir. 2010) (observing that "a single prosecution can give rise to ineffective assistance claims *arising at every stage of the case*, based on different events, and involving different counsel"). That is why courts define a "claim" as "a challenge to a particular *step* in the case, such as the introduction of a given piece of evidence, the text of a given jury instruction, *or the performance of counsel*." *Brannigan v. United States*, 249 F.3d 584, 588 (7th Cir. 2001) (second emphasis added). In other words, as Judge Easterbrook has explained, "ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed." *Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005); *cf. Jennings v. Stephens*,

574 U.S. 271, 282 (2015) (treating three separate ineffective assistance of counsel theories as one claim because, "[w]hether prevailing on a single theory or all three" each theory "sought the same, indivisible relief"). "Just as one who makes and loses a contention that a confession is involuntary because of physical coercion cannot start over by adding an allegation of psychological coercion, one who makes and loses a contention that counsel was ineffective for four reasons cannot start over by choosing four different (or four additional) failings to emphasize." *Peoples*, 403 F.3d at 848.

For these reasons, Nelson is wrong to argue (at 23) that the courts of appeal hold a "broadly shared understanding" that "different allegations of deficient performance are distinct facts that form different Sixth Amendment claims." It is the opposite. *See Dansby v. Hobbs*, 766 F.3d 809, 840 (8th Cir. 2014) (claim alleging that counsel should have "located witnesses to testify" about mitigating factors was "materially indistinguishable" from state-court claim that counsel should have "call[ed] certain [known] witnesses"); *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) (per curiam) (claim alleging that counsel abused alcohol during trial was "the same legal claim" as claim alleging that counsel failed to investigate PTSD defense); *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"). However many reasons a petitioner may offer why counsel's performance was deficient under *Strickland* during a particular stage of a proceeding, those reasons all support a single claim.

II. This Case Is a Poor Vehicle for Reviewing the Applicability of AEDPA's Relitigation Bar to Nelson's *Strickland* Claim.

Even if the applicability of AEDPA's relitigation bar presented a question worth investing this Court's limited resources, this case presents a poor vehicle for considering it, because the Fifth Circuit's decision rests on an alternative and independent ground for denying habeas relief that does not warrant this Court's review. Cutting through the question whether Nelson could overcome any procedural default of his purportedly "new" *Strickland* claim under the *Martinez* exception,[7] the Fifth Circuit proceeded straight to the merits of that *Strickland* claim and concluded that Nelson could not show that any deficient performance by trial counsel prejudiced him at sentencing. Pet.App.18a-23a.

As a consequence, even if Nelson were correct that his *Strickland* claim is "new" and therefore not subject to AEDPA's relitigation bar, *but see supra* at 21-24, Nelson would still not be entitled to reversal of the Fifth Circuit's decision—and therefore the issuance of habeas relief—unless he were also to convince this Court to grant review and reverse on the Fifth Circuit's workaday application of *Strickland*. Nelson offers no sound reason for the Court to do so, and his effort to reframe this vehicle problem as a separate question presented worth this Court's time fails.

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[7] For many of the same reasons that his underlying *Strickland* claim fails, *a fortiori* Nelson cannot rely on *Martinez* to excuse any procedural default by arguing that his state habeas counsel was ineffective for failing to raise it. *See generally* Brief for Appellee 19-42, *Nelson v. Davis*, No. 17-70012 (5th Cir. July 22, 2020) ("Brief for Appellee").

A. The Fifth Circuit's decision rests on an independent ground for denying habeas relief that does not merit this Court's review.

1. To demonstrate ineffective assistance of counsel under the familiar *Strickland* standard, a petitioner must "show both that his counsel provided deficient assistance and that there was prejudice as a result." *Richter*, 562 U.S. at 104. But where "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed," *Strickland*, 466 U.S. at 697, as the Fifth Circuit did here, Pet.App.18a.[8]

To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Yet "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. And the court must "consider *all* the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam).

2. Nelson argues that, had his trial counsel investigated the alleged involvement of Springs and Jefferson in Pastor Dobson's murder and presented that theory at the sentencing phase, it would have convinced at least

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[8] For the avoidance of doubt, *see* Pet. 34, the Director does not agree that Nelson could meet the deficient-performance prong of *Strickland* either. Instead, as described below, Nelson's trial counsel rendered constitutionally sound sentencing-phase assistance, and none of the "red flags" Nelson identifies (at 34-35) required further investigation. *See* Brief for Appellee, *supra*, at 22-36.

one juror to spare Nelson's life by voting differently on one of the three statutory special issues prerequisite to imposing a death sentence. *See* Pet. 35-36; *see* Tex. Code Crim. Proc. art. 37.071, § 2(b). The Fifth Circuit properly rejected this conjecture on the ground that even with such an investigation and evidentiary presentation "the State's case for death on each special question would have remained unassailable." Pet.App.20a.

Consider first the "anti-parties" special issue, which asks the jury to determine whether Nelson "actually caused" Dobson's death or "anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071, § 2(b)(2). The Fifth Circuit rightly observed that "the State adduced a mountain of uncontroverted evidence that strongly suggested Nelson's *direct participation* in Dobson's murder"—including his fingerprints and decorative fragments of his belt at the scene (indicative of a struggle), the victims' blood on the *top* of his shoes, his possession of the fruits of the robbery, and incriminating text messages—while "no physical evidence linked Springs or Jefferson with Dobson's murder." Pet.App.20a (emphasis added). In the light of that physical evidence directly linking Nelson to the murder, evidence that he had *help* carrying it out would not "have made any difference in how the jury answered the anti-parties question." Pet.App.21a. That is, Nelson does nothing to explain how merely adding accomplices to his crime could create a "substantial" "likelihood of a different result" at the punishment phase. *Richter*, 562 U.S. at 112.

Nelson fares even worse on the "future dangerousness" and "mitigation" special issues, which required the jury to assess whether Nelson poses a "continuing threat to society" and whether other mitigating circumstances warrant a "sentence of life imprisonment without parole

rather than a death sentence." Tex. Code Crim. Proc. art. 37.071, §§ 2(b)(1), (e)(1). By his own account, Nelson "participated in the aggravated robbery of a church during which that church's ecclesiastical leader was brutally and senselessly murdered." Pet.App.22a. Worse yet, "[w]hile in custody and awaiting trial for Dobson's murder, Nelson murdered a fellow inmate"—and thereafter did a "celebration dance" to commemorate that slaying—"engaged in several altercations with jail officers, repeatedly vandalized jail property, and smuggled weapons into jail." Pet.App.22a. And his own forensic psychologist testified that he exhibited signs of "antisocial personality disorder" and that he shares "many characteristics of a psychopath." Pet.App.22a. It simply beggars belief to argue, as Nelson does (at 36), that presentation of hypothetical evidence of Springs and Jefferson involvement in Pastor Dobson's savage murder would have "undermined the jurors' perceptions of Nelson's personal moral culpability and reduced their appraisal of his future dangerousness." Overwhelming evidence of Nelson's additional depraved acts—culminating in *an additional murder*—precluded such a possibility.

B. Nelson's counterarguments are meritless.

Faced with this "unassailable" case for imposition of the death penalty on each of the three special issues, Pet.App.20a, Nelson's petition studiously ignores the unfavorable facts entirely before pivoting to an argument that the Fifth Circuit should have allowed him further fact development before denying him relief. Each argument is a makeweight.

First, Nelson focuses on (at 28-30) the anti-parties special issue and argues that the Fifth Circuit's analysis misinterpreted state law in a manner that would render Texas's death-penalty statute unconstitutional under the

Eighth Amendment. Specifically, Nelson argues (at 29-32) that the Fifth Circuit misinterpreted what it means to "anticipate that a human life would be taken" when it held that evidence of Springs's and Jefferson's involvement in Pastor Dobson's murder would not have changed the jury's conclusion that Nelson could have "anticipated" Pastor Dobson's death even if he was merely serving as a "lookout." Several problems undermine this argument.

As an initial matter, Texas's death-penalty statute permits a jury to impose a death sentence not only if a defendant "anticipated that a human life would be taken" but also if "the defendant actually caused the death of the deceased." Tex. Code Crim. Proc. art. 37.071, § 2(b)(2). Nelson has no answer for the Fifth Circuit's conclusion that "a mountain of uncontroverted evidence . . . strongly suggested Nelson's *direct participation* in Dobson's murder," which would have allowed imposition of a death sentence under the latter prong of the anti-parties special issue—regardless of whether evidence that Springs and Jefferson helped him were introduced. Pet.App.20a-21a (emphasis added); *accord Thomas v. State*, No. AP–77,052, 2018 WL 739093, at *20-21 (Tex. Crim. App. Feb. 7, 2018) (sentencing jury could answer the anti-parties instruction in the affirmative based upon evidence of petitioner's direct involvement in the murder). Nelson's focus on the Fifth Circuit's alternative conclusion that evidence of Springs's and Jefferson's assistance would not have created a reasonable probability of changing the jury's verdict even under the "anticipated" prong either, Pet.App.21a-22a, is misplaced.

Regardless, Nelson's argument (at 29-32) that the Fifth Circuit misapplied the phrase "anticipated that a human life would be taken," Tex. Code Crim. Proc. art. 37.071, § 2(b)(2), is wrong. The Fifth Circuit

addressed that statutory language in the context of explaining that "Nelson's own testimony severely compromised any chance for trial counsel to persuade the jury to spare Nelson's life on the anti-parties front." Pet.App.21a. That is because even on Nelson's own account of the facts, he acted first as a lookout, then voluntarily entered the church, made no effort to aid the bleeding victims, instead stole the victims' property while they were incapacitated and left them defenseless against the other assailants, drove the getaway vehicle—Elliott's stolen car—after seeing Pastor Dobson dead and assuming Elliott was dead, sold the victims' stolen property, and later used Elliott's credit card. 36RR71, 73-74, 76, 96, 109. This set of facts goes well beyond "bare" after-the-fact "factual awareness" that a life would be taken, *contra* Pet. 29—particularly since Pastor Dobson was not yet dead when Nelson entered the church, and Nelson chose to rob him while he was dying rather than provide assistance. As the Fifth Circuit explained, this callousness was more than sufficient to establish that Nelson "anticipated" Pastor Dobson's death—especially given that the *same* jury had already concluded, by finding Nelson guilty, that the murder "should have been anticipated as a result of the carrying out" of the robbery, 2CR394. *See* Pet.App.21a.

Nelson can resist this conclusion only by improperly making the unfounded logical leap (at 26, 28) that, had trial counsel investigated Springs's and Jefferson's supposed involvement in Pastor Dobson's murder, it would have revealed that Nelson was a mere "lookout," while some combination of Springs, Jefferson, or both carried out the murder. Yet Nelson's federal-court ineffective assistance of counsel claim was premised on a different theory: that an investigation into Springs and Jefferson would have disproved the prosecution's "lone assailant

theory" and implicated Springs and Jefferson in the murder, ROA.1724-32—*not* that the investigation would have gone further and absolved Nelson of responsibility for the murder and relegated him to role of lookout. Indeed, there is good reason to doubt that any such investigation would have substantiated *that* theory, as both Springs and Jefferson were ready to, or did, implicate *Nelson* in the murder. *See supra* at 5; *cf.* Pet. 35 (suggesting that trial counsel should have "locate[d], contact[ed] or interview[ed] Jefferson . . . [or] Springs").

For these reasons, Nelson is wrong to suggest (at 28-30) that the Fifth Circuit's analysis on the "anticipated" prong of article 37.071 would render Texas's death-penalty statute unconstitutional under the Eighth Amendment. Nelson agrees that the Eighth Amendment only requires the State to "prove that the non-killing defendant had 'reckless indifference' to human life and 'substantial participation' in the underlying felony.'" Pet. 29 (quoting *Tison v. Arizona*, 481 U.S. 137, 154, 158 (1987)). That standard is easily met here, where—even setting aside the voluminous direct evidence tying Nelson to Pastor Dobson's murder—Nelson's own testimony proves he was both a major participant in the aggravated robbery of a church that led to Pastor Dobson's death and recklessly indifferent to human life. *Supra* at 3-4, 30.

Second, unable to contend with the facts already present in the state-court record, Nelson falls back (at 30-33) on the argument that the Fifth Circuit should have permitted him to develop additional facts to supplement the state-court record. The Fifth Circuit properly rejected this request.

For one, any federal-court factual development would be improper. As this Court recently explained, "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." *Shinn*, 596 U.S. at 389. But "Nelson has never argued that he could meet those requirements." Pet.App.12a n.2. And it is for that reason the Fifth Circuit affirmed the denial of Nelson's motion for investigative funding under 18 U.S.C. § 3599(f). *See* Pet.App.12a n.2. As Nelson acknowledges (at 31), an applicant for funding must show that the funding is "reasonably necessary for the representation of the defendant." *Ayestas v. Davis*, 584 U.S. 28, 35 (2018). But because Nelson cannot satisfy either of the exceptions in § 2254(e), he cannot use any new evidence that would be developed with that funding in federal court; it therefore cannot be "reasonably necessary" for his representation.

Nor did the Fifth Circuit err in concluding that the district court acted well within its discretion by concluding that Nelson was not entitled, under *Rhines v. Weber*, 544 U.S. 269 (2005), to return to state court to exhaust his "new" *Strickland* claim and develop the factual record there. Under *Rhines*, a district court should enter such a stay when "[1] the petitioner had good cause for his failure to exhaust, [2] his unexhausted claims are potentially meritorious, and [3] there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 278. But as shown above, Nelson's *Strickland* claim is far from "potentially meritorious." *Supra* at 26-28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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