CAPITAL CASE

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,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Petition addresses a deepening Circuit split over the preclusive effect, under 28 U.S.C. § 2254(d), of state decisions on ineffective-assistance-of-counsel (IATC) claims. In the Fourth, Ninth, and Eleventh Circuits, IATC claims sharing no factual allegations are treated as distinct claims. In the Fifth Circuit, there can be only one claim at each phase of a capital trial—so state merits adjudication of *any one* IATC allegation precludes federal habeas relief on *all* others. A claim that counsel failed to investigate childhood abuse bars a claim that counsel slept through sentencing. A claim that counsel failed to investigate the defendant's personal background precludes a claim that counsel failed to investigate the role of known accomplices. These claims are different not because of the "quantum" of evidence behind them or some minor legal "refram[ing]," but because they involve distinct allegations of trial counsel's deficiency. Under the Fifth Circuit's refashioned claim-sameness test, § 2254(d)'s preclusion rule reaches claims a state court never decided.

The Director admits the Circuits are divided, which alone warrants granting the Petition. He is also wrong that the Fifth Circuit is aligned with the Fourth and Eleventh Circuits against the Ninth: all of these jurisdictions recognize that two IATC claims are not the same under § 2254(d) merely because they both involve sentencing-phase deficiencies. Small wonder the Director devotes most of his brief to arguing prejudice, but he is wrong there too: the evidence developed at trial cohered with Nelson's testimony that he was a lookout, not a "lone assassin," and the

evidence of secondary participation *not* developed could have persuaded a juror to spare his life. The Petition should be granted.

A. The Fifth Circuit deepened a circuit conflict.

Even before the decision below, the courts of appeals used different tests to analyze claim sameness. In the Ninth Circuit, distinct sentencing-phase deficiencies give rise to different claims. *See Poyson v. Ryan*, 879 F.3d 875, 895-96 (9th Cir. 2018). In the Fourth and Eleventh Circuits, as long as the "heart" or "gravamen" of the allegations do not overlap, the allegations constitute different claims. *See* Pet. App. 17a-19a. Every single Fourth and Eleventh Circuit authority the Director cites deals with a scenario not present here: a federal habeas claimant who does no more than "enhance" IATC allegations that were resolved in state court. BIO 15-18.

The Director admits the Fifth Circuit "applied a different rule" from the Ninth Circuit's, *see* BIO 18, then argues the divide may resolve itself because Ninth Circuit law is in flux. BIO 18-19. It is not. The single Ninth Circuit case the Director cites, *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023), does not even mention *Poyson*, much less call it into question. At least seven district court cases have cited the operative *Poyson* rule since *Creech*. *See Morrissette v. Russell*, No. 3:21-cv-00189-ART-CLB, 2023 WL 5152643, at *2 (D. Nev. Aug. 9, 2023); *Fleming v. Hutchinson*, No. 2:20-cv-01983-CDS-EJY, 2023 WL 3947563, at *2 (D. Nev. June 7, 2023); *Coddington v. Martel*, No. 2:01-cv-01290, 2023 WL 3229948, at *48 n.17 (E.D. Cal. May 3, 2023); *Nunn v. Shinn*, No. CV-22-00287,

2023 WL 4748664, at *2 (D. Ariz. Apr. 13, 2023), *report and recommendation adopted*, No. CV-22-00287, 2023 WL 4746121 (D. Ariz. July 25, 2023); *Owens v. Gittere*, No. 3:21-cv-00307-MMD-CSD, 2023 WL 2787181, at *2 (D. Nev. Apr. 5, 2023); *Chew v. Samuel*, No. 2:21-cv-01667-MCS-MMA, 2023 WL 3432169, at *7 & n.2 (C.D. Cal. Mar. 10, 2023), *report and recommendation adopted*, No. 2:21-cv-01667-MCS-MMA, 2023 WL 4203508 (C.D. Cal. Apr. 19, 2023); *Hawkins v. Johnson*, No. 2:20-cv-01852-CDS-VCF, 2023 WL 2308150, at *3 (D. Nev. Mar. 1, 2023). *Poyson* remains good law.[1]

Against this backdrop, the Fifth Circuit ruled that, in all death penalty cases and for the purposes of § 2254(d), any sentencing-phase IATC theory is "the same claim" as any other sentencing-phase IATC theory. The Director argues that the Fifth Circuit's decision merely applies the principle that new evidence does not alone create a new claim. BIO 19-20. But the court of appeals goes much further, holding that all sentencing-phase IATC allegations—*no matter how unrelated*—are the same claim. Pet. App. 14a-15a. That is what sets the Fifth Circuit's rule apart: in other circuits, distinct bundles of IATC allegations form different claims.

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[1] The Director questions *Poyson* because it cited *Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014), which *Shinn v. Ramirez*, 596 U.S. 366 (2022), partially overruled. BIO 18-19. But *Poyson* did not cite *Dickens* on claim-sameness. *See* 879 F.3d at 879-80, 895-96. And *Ramirez* did not overrule *Dickens* on any issue bearing on claim-sameness.

The Fifth Circuit's rule is wrong. Section 2254(d) restricts litigation only of "claims" that are "adjudicated on the merits" in state court. Nothing about that text or the cases interpreting § 2554(d) supports a phase-based definition of "claim." The Director suggests that *Jennings v. Stephens*, 574 U.S. 271 (2015), treats three IATC theories as "one claim" (BIO at 23-24), but he misunderstands the court's reference to "indivisible relief," BIO at 24. *Jennings* actually proves Nelson's point: the opinion explicitly orders relief on one of the three distinct IATC-sentencing "claim[s]." *Jennings*, 574 U.S. at 283. *Yick Man Mui v. United States* (BIO at 23) is similarly at odds with the Director's position: "[L]ittle is served by a rule that causes an adjudication of a single ineffective assistance claim to preclude a later resort to the Sixth Amendment involving a different strategy, action, or inaction of counsel." 614 F.3d 50, 56 (2d Cir. 2010).[2]

This Court's decisions already repudiate the paradigm that the Fifth Circuit adopted. In *Ramirez*, the companion-case claimant likewise lost guilt-phase IATC claims on the merits in state court, leaving the Supreme Court to analyze a different bundle of guilt-phase IATC allegations—which this Court treated as a distinct claim. *See Ramirez*, 596 U.S. at 374.

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[2] *Peoples v. United States*, also cited by the Director (BIO 23, 24), is wrong as a matter of black-letter law. 403 F.3d 844 (7th Cir. 2005). Neither of the Supreme Court cases that *Peoples* cites for treating multiple IATC theories as a single claim even remotely supports that proposition, *id.* at 848 (citing *Bell v. Cone*, 535 U.S. 685, 697 (2002); *Strickland v. Washington*, 466 U.S. 668, 690 (1984)), and the Director's other cited authority rejects *Peoples* by name. *See*, *e.g.*, *Yick Man Mui*, 614 F.3d at 55.

Ramirez, in fact, is just one of many Supreme Court cases recognizing multiple, distinct IATC claims arising from the same phase of a trial. *See*, *e.g.*, *Smith v. Spisak*, 558 U.S. 139, 149 (2010) (addressing one of two sentencing-phase IATC claims as recited in *Spisak v. Mitchell*, 465 F.3d 684, 704 (6th Cir. 2006)); *Lockhart v. Fretwell*, 506 U.S. 364, 367 (1993) (adjudicating one of multiple sentencing-phase IATC claims recited in *Fretwell v. Lockhart*, 946 F.2d 571, 573 (8th Cir. 1991)). If those cases are right, the Fifth Circuit is wrong.

B. The Fifth Circuit's erroneous prejudice determination merits review.

The Petition's first question turns on whether Nelson's federal habeas petition asserted a claim challenging a deficiency of counsel distinct from that decided in state court, a fact the Director barely disputes. By granting certiorari, this Court will have the opportunity to provide an answer that resolves the Circuit split regardless of whether it reaches the Petition's second question.

But the Court should reach the second question. Although the Director tries to obscure the facts, it was premature to conclusively resolve prejudice against Nelson. Further claim development could make a life-altering difference in this case.

1. *The courts below erred in denying fact development and a* Rhines *stay*

The Fifth Circuit's prejudice determination was premature and incorrect. Pet. App. 26a-28a. By projecting an outcome on prejudice at summary judgment, the Fifth Circuit reached the merits on a record

lacking crucial facts.[3] This rush to summary judgment is particularly troubling because Nelson was entitled to the legal process that claimants would ordinarily use to fill the gaps in the summary-judgment record.

The Fifth Circuit's summary judgment ruling was procedurally improper in two respects. First, the court should not have rejected a *Rhines* stay, because it could not properly conclude that subsequent state litigation would be frivolous. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Second, the Fifth Circuit refused to authorize "reasonably necessary" fact development under 18 U.S.C. § 3599(f), thereby ignoring the "potential merit of the [IATC-Participation] claim[]." Pet. App. 30a-31a; *Ayestas v. Davis*, 584 U.S. 28, 46 (2018).[4]

The Director defends the premature summary judgment ruling on two grounds. First, he argues that the IATC-Participation claim is not even "potentially meritorious." BIO 32. That not only misreads the claim's potential merit on the current record, *infra* at

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[3] The Texas State Bar recently suspended state postconviction counsel's license for neglecting to perform reasonable services for clients in multiple capital murder and postconviction cases. *See State Bar of Texas*, Profile of John William Stickels, at https://www.texasbar.com/AM/Template.cfm?template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=188387, last accessed March 26, 2024.

[4] The district court denied fact development under the wrong, pre-*Ayestas* standard. Pet. App. 31a-32a. But rather than remanding for determination under the correct rule—preserving potential appellate review of that ruling for abuse of discretion—the Fifth Circuit decided the issue itself.

8-12, but also disregards that the federal-court record was shaped by improper restraints on fact development. BIO 32.[5]

The Director's second argument defends those restraints by contending that § 2254(e)(2), as interpreted by *Ramirez*, bars "federal-court factual development." BIO 31-32. But § 2254(e)(2) restricts evidentiary development only for claims that a claimant "failed to develop" in state court. Because a *Rhines* stay facilitates fair claim presentation to state courts, § 2254(e)(2) would not bar evidence on claims developed in that posture. That result follows from *Trevino v. Thaler*, where the claimant presented his IATC claim to state courts via a *Rhines* stay and this Court held that the claim could be developed in federal court. 569 U.S. 413, 419, 429 (2013). The *Trevino* claimant avoided § 2254(e)(2) by developing the factual content of his claim in the *Rhines* posture—the very posture in which this case sits. *Id.*; *see also House v. Bell*, 547 U.S. 518 (2006) (awarding factual development to claimant granted a *Rhines* stay on a procedurally defaulted claim).

Texas endorsed this exact approach to *Rhines* stays in *Ramirez* itself. The State submitted an amicus brief explaining how to square Arizona's requested rule—which the Court ultimately adopted—

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[5] The BIO also defends the rejection of § 3599(f) services, by claiming that § 2554(e)(2) would categorically bar all fact development, thereby making it impossible that services could qualify as "reasonably necessary." BIO 32. But whether § 2254(e)(2) would even apply to the IATC-Participation claim is not yet knowable. *See infra* at 7-8.

with *Trevino*: Texas insisted that a claimant who develops factual predicates with leave to exhaust under *Rhines* does not "fail to develop" those factual predicates. *See* Br. for Texas et al. as Amicus Curiae Texas, *Shinn v. Ramirez*, 141 S. Ct. 2620 (Mem.) (2021), No. 20-1009, at 19 (Jul. 22, 2021) (emphasis added).

This Court's settled precedent permitted Nelson the opportunity to develop a state-court record in support of this claim. The Director's arguments to the contrary ignore or misread those controlling authorities.

2. *The Fifth Circuit substantively erred on prejudice.*

The Director also argues that the unpresented evidence would not have affected any juror's resolution of the Texas special issues: (1) anti-parties, (2) future dangerousness, or (3) mitigating circumstances. BIO 27-28; Pet. App. 20a; Tex. Code Crim. Proc. Art. 37.071, § 2(b). To do so, the Director must brush aside evidence already in the record contradicting the State's "sole assassin" theory. Had trial counsel properly investigated that evidence, at least one juror might have voted for life.

The Director first says that evidence incriminating Springs and Jefferson would be nonprejudicial because they had alibis. BIO 5. But the Director has it backward—Springs's and Jefferson's alibis seemed credible only because they were not investigated.

Jefferson's "corroborated" alibi, BIO 1—that he was taking a quiz in class at the time—depended on trial counsel's disregard of low-hanging leads: He failed to request known video footage of the class and

never investigated correspondence from Jefferson's professor stating there was no quiz that day, ROA 2252. Nor did trial counsel investigate Jefferson's phone records, which show him on a call eight minutes into his 11 a.m. class (during the supposed quiz), ROA 2180-2243. Jefferson's answering an 11:08 a.m. call and then going silent is more consistent with a role in the crime than with the chemistry-quiz story. ROA 2184, 2187; BIO 5 n.3.

Trial counsel's investigation of Springs's alibi, furnished by biased witnesses, was no better. Springs's girlfriend (Duffer) and her best friend testified that Springs was with them in Venus, Texas, the night before the murder, ROA 3819; BIO 5 n.2. Their story contradicted Jefferson's aunt's grand jury testimony that all three men were at her house in Euless (35 miles from Venus) around noon on the day of the murder. 35RR117-18; BIO 5 n.2. Trial counsel never questioned the motives of Duffer, who was the mother of Springs's child and who the police suspected of lying, ROA 2161, or her friend, whose testimony was inconsistent at best. 35RR31, 38. As for Springs, the "phone records" that supposedly corroborated his alibi, BIO 5, say nothing about *Springs's* location the day of the murder because his SIM card was in *Duffer's* phone. Springs had multiple phones and regularly swapped his SIM card in and out of them—a fact trial counsel left unexplored. 35RR21-22, 56-27.

Next, the Director addresses prejudice by contending that Springs and Jefferson, if investigated and then called, would have provided testimony damaging to Nelson. *See* BIO 5, 31. That argument fails to dispel prejudice for at least two reasons. First, Nelson could

have used evidence of third-party involvement from sources other than Springs and Jefferson themselves. Second, to the extent Springs and Jefferson had testified, a constitutionally sufficient investigation would have prevented any attempt they made to pin the entire crime on Nelson.

The prejudice from the deficient accomplice investigation had effects on all special issues, particularly anti-parties.

Anti-Parties. An adequate investigation could have convinced at least one juror that Nelson did not "actually cause[]," "intend[] to kill," or "anticipate[]" the victim's death. Tex. Code Crim. Proc. Art. 37.071, § 2(b)(1)–(2).

There has never been a finding that Nelson "actually caused" or intended to cause Dobson's death, *contra* BIO 29. Nor can the anticipation-of-death prong justify the Fifth Circuit's prejudice determination. "Anticipati[on]" requires a "highly culpable mental state," *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999), far above "bare … factual awareness"—as the Director concedes. BIO 30. But the Director's defense of the Fifth Circuit's prejudice ruling just replicates its erroneous application of that "anticipation" standard. Both wrongly assume "anticipation" merely because Nelson entered the church, saw Dobson injured but alive, and stole personal effects without providing assistance. *Id.*

Those facts cannot establish "anticipation" *as a matter of law*. "Anticipation" is effectively a rule of *scienter* that requires "individual conduct constitut[ing] a conscious decision, more than mere will or intent, to

cause death" plus a "level of intention … toward reflection rather than like reaction[.]" Pet 29-30 (quoting *Harris v. Texas Dep't of Crim. Just.*, 806 F. Supp. 627, 635–36 (S.D. Tex. 1992)). In-the-moment awareness of Dobson's injuries plus a failure to render aid is not, within the statute, "anticipat[ion] that a human life would be taken." Tex. Code Crim. Proc. Art. 37.071, § 2(b)(2).

The BIO itself demonstrates that the evidence is consistent with Nelson's status as a secondary criminal actor. Every piece of evidence the Director cites can be explained by participation not warranting a death sentence under the Texas statute: Nelson's "fingerprints . . . at the scene" on a keyboard wrist rest from a computer he admits to grabbing, BIO 3; 34RR254; 36RR73-74; "decorative fragments from [his] belt," BIO 3, which are consistent with his having crawled under a desk to grab a bag, 36RR74; blood on top of his shoes, BIO 3, which is also consistent with his crawling on the floor, 36RR74; "incriminating text messages" suggesting regret, BIO 3, which correspond with his role as a lookout in a robbery turned unexpectedly violent; and finally, Nelson's "sole" possession of Elliot's and Dobson's property, BIO 3, which ignores both (1) evidence that Springs possessed and tried to sell Dobson's iPhone, ROA 2152-54, and (2) video footage of Springs and Jefferson present with Nelson at the mall where he used the stolen credit cards immediately after the crime, ROA 2155-56; *see also* Pet. App. 20a-21a (discussing similar evidence).

In short, none of the Director's evidence is inconsistent with Nelson's secondary role, and none shows "anticipation" under Texas law.

Mitigation/Future Dangerousness. For similar reasons, evidence that Springs and/or Jefferson committed the assault while Nelson played a minor role would have a reasonably probable effect on at least one juror's view of Nelson's future danger and culpability. It does not "beggar belief" to expect jurors to perceive "lone assassins" as more dangerous and culpable than secondary participants. *Contra* BIO 28.

The Director's arguments on mitigation and future dangerousness rely heavily on evidence about Jonathan Holden's in-prison death and its purported impact on jurors. BIO 6-7. But no jury ever found that Nelson killed Holden. 40RR7-32. While the Director cites the account of a jailhouse informant, the jury heard evidence that Holden died by suicide. 43RR31-32, 34-36. In light of the many weak spots in the Holden evidence and the other evidence on danger and culpability that appeared alongside it, there is a reasonable probability that trial counsel's failure to conduct an accomplice investigation affected the outcome of the other two special-issue inquiries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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