

No. 17-8977

IN THE
Supreme Court of the United States

PAUL SLATER,
Petitioner,

v.

LORIE DAVIS, 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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JENNIFER W. MORRIS
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
Jennifer.Morris@oag.texas.gov

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Paul Slater was found guilty of capital murder and sentenced to death. He alleged in state habeas proceedings that trial counsel was ineffective for failing to request a lesser-included-offense instruction for murder and for failing to investigate and present mitigating evidence. Then, in federal habeas proceedings, Slater reasserted the same claims and supplemented them with new evidence. Slater also requested a stay to return to state court to relitigate his claims with the new evidence or, alternatively, to expand the federal habeas record. The district court declined to stay proceedings, and the Fifth Circuit found that it was within its discretion to do so. Both lower courts found that *Pinholster*¹ barred consideration of Slater's new evidence. In a routine application of *Strickland*² and 28 U.S.C. § 2254(d)(1), the lower courts found state court's denial of Slater's claims reasonable beyond debate.

Slater now seeks a writ of certiorari because the lower court applied *Pinholster* to his claims and declined to issue a certificate of appealability (COA). The questions before the Court are thus:

- (1) May a petitioner circumvent *Pinholster*'s bar on new evidence by introducing new evidence?
- (2) Must a district court grant a stay to allow petitioner to return to state court to raise claims the state court will not consider, or, alternatively must a district court allow a petitioner to expand the federal record even though *Pinholster* bars consideration of new evidence?
- (3) Should a writ of certiorari issue where the lower court applied the correct standard of review and the petitioner merely disagrees with the result?

¹ *Cullen v. Pinholster*, 563 U.S. 170 (2011).

² *Strickland v. Washington*, 466 U.S. 668 (1984).

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BRIEF IN OPPOSITION

Lorie Davis, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, respectfully submits this brief in opposition to the petition for writ of certiorari filed by Paul Wayne Slater.

STATEMENT OF THE CASE

I. Slater's Capital Murder Trial

The district court summarized the evidence presented at guilt-innocence:

On July 19, 1995, Eric Washington left Wharton, Texas with \$3,000 to buy six ounces of crack cocaine. After picking up Roddrick Martin and Glenn Andrews, Washington drove to a carwash in southwest Houston. Washington parked his car near the vacuum cleaner. A short time later a Cadillac with two men inside circled the carwash and pulled into a wash bay. Martin and Andrews got into the back seat of the Cadillac. Within minutes, Martin and Andrews had been shot and Washington had fled the scene.

Fire department personnel responded to a call about gunfire, [and found] Martin and Andrews lying in the car wash bay. Both men had been shot several times. Andrews was pronounced dead at the scene and Martin died en route to the hospital. Responders found two small stacks of bills totaling \$200 lying on the ground near Martin.

On August 9, 1995, the police stopped a Cadillac driven by teenager Julius Woods. A subsequent search revealed trace evidence of blood inside the car. A bullet strike marred an interior panel. Over a month later, Slater showed up at the police station with his aunt. Slater provided the police a videotaped statement in which he admitted that he and Woods met the victims to engage in a drug deal. Slater also admitted that he shot the victims. In his statement, however, Slater disclaimed any intent to rob or kill the victims. Slater said that, as he was sitting in the front passenger seat at the carwash, one of the men in the back drew a weapon. Slater claimed that he then grabbed his own 9mm pistol and started shooting. Slater said that Woods never fired any shots. He also said that Washington, who had been waiting in the other vehicle, also started firing a weapon and that one of his bullets may have hit the victims. Slater claimed that, before driving away, he left the victim's guns and a bag of cash at the carwash.

The State of Texas charged Slater with committing capital murder during the course of a robbery. [ROA.867].³ The prosecution elected to proceed under Texas’s law of parties which allowed for Slater’s capital-murder conviction as a party “if the offense [was] committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.” [ROA.925–26]; *see* Tex. Penal Code Ann. §§7.01, 7.02.

Slater retained attorney Charles Freeman to represent him at trial. Slater’s confession served as the backbone of his defense. The defense portrayed the crime as a drug deal gone bad, with Slater reflexively shooting when the buyers brandished weapons. . . . [W]hile initially intending to focus the defense on both the lack of a robbery and self-defense, decisions made by Freeman and by Slater shaped the manner in which the jury should consider Slater’s confession.[⁴] In the end, the defense attempted to convince the jurors that Slater accurately described the crime in his police statement.

The State also relied on Slater’s confession to the crime, supplemented with evidence contradicting the self-serving elements of his narrative. The State emphasized Washington’s eyewitness testimony in which differed in important aspects from the account given by Slater. Washington testified that the drug buyers did not have weapons. Washington testified that Martin was carrying money in the front of his shorts, though the police never recovered any on his body. Washington saw one occupant get out and open the trunk. At that point, Washington became momentarily distracted until he heard gunshots. Washington looked up to see the driver of the Cadillac firing a pistol into the back seat. The passenger was outside the car also, firing into an open back door.

Forensic evidence confirmed the portions of Washington’s testimony that differed from Slater’s police statement. Bullets recovered from the autopsies were from two different weapons, disputing Slater’s statement that Woods did not fire a gun. The trajectory of the bullet strikes and

³ The State indicted Slater for capital murder under three theories: (1) killing both Andrews and Martin during the same criminal transaction; (2) shooting Andrews during a robbery or attempted robbery; or (3) shooting Martin during a robbery or attempted robbery. [ROA.867]. Slater was arraigned only on the charge of causing Martin’s death in the course of committing or attempting to commit a robbery. [ROA.3923].

⁴ Slater did not request an instruction on murder and the jury was not instructed on self-defense.

the victims' wounds refuted Slater's description of having shot from the passenger seat. No weapons were found in the carwash.⁵

Slater v. Davis, No. 4:14-cv-3576, 2017 WL 1194374, at *1–2 (S.D. Tex. 2017).

II. Evidence at Punishment

A. The State's case

The State presented evidence that Slater would be a future danger based on his commission of four extraneous crimes:

Elwin Whitaker of the Houston Police Department testified that on February 11, 1991, he bought several rocks of crack cocaine from Slater while working undercover operations for the narcotics division. ROA.4694–701.

Four days later, on February 15, 1991, Slater along with several other young men, approached fifteen-year-old Timothy Johnson in a church parking lot. ROA.4604–05. One of the boys with Slater took a swing at Johnson, striking him in the face. ROA.4606–07. Slater pulled out a gun and hit Johnson in the back of the head. ROA.4608. Johnson ran, but Slater chased him and shot him in the buttocks. ROA.4587, 4610–11. Slater then turned and walked toward Myron Cloyd, the youth pastor with his gun still drawn. ROA.4580, 4588–90. When Cloyd dove to the ground, Slater ran and got in a car and drove away. ROA.4590. Johnson was taken to Ben Taub Hospital and had surgery for the gunshot wound to his intestines and bladder, had a colostomy for nine months, and then had additional surgery. ROA.4592, 4610–12.

⁵ One of Slater's friends told police that Slater admitted that he had intended to rob the victims. The friend said that Slater told her that "there were no real drugs, that some dude had some wax and was trying to rip [Andrews] off for his money." [ROA.4207–08].

On June 3, 1994, Slater was a passenger in a vehicle stopped by the police for traffic warrants. ROA.4635–39. Three people were in the vehicle, but Slater was the only one in the back seat. ROA.4638–39, 4645. Officer Ruben Arias testified that he had become suspicious and concerned when he saw Slater moving from one side of the vehicle to the other, looking back at Arias, and leaning forward down as if he was reaching for something or putting something down. ROA.4639–40. After the driver was arrested, Officer Arias saw a ski mask and a hockey goalie mask near Slater’s feet. ROA.4645–48. Under the backseat where Slater was sitting, the officer found an UZI machine gun and a .38 revolver. Both were loaded. ROA.4651–52.

On June 21, 1995, Barbara Boss’s home was burglarized and all her small appliances were taken. Police recovered some of the property at an EZ Pawn Shop after Slater pawned the items. ROA.4662–64, 4669–72.

Finally, J.D. Coons of the Harris County Sheriff’s Department testified that he believed Slater posed a continuing threat to the inmates and institutional security based on his review of Slater’s disciplinary file at the Harris County jail. ROA.4796.

B. The defense’s case in mitigation

The defense called Slater’s mother, Barbara Wiley, during the punishment phase. Mrs. Wiley testified that a car hit Slater when he was five years old, which resulted in a head injury requiring surgery. ROA.4812. She also explained that Slater had an IQ of 63, functioned at a fourth- or fifth-grade level, and did not do well academically. ROA.4811–12.

III. Course of State and Federal Proceedings

Slater's capital conviction and death sentence were initially affirmed by the Texas Court of Criminal Appeals (CCA) on direct review. ROA.6091–126; *Slater v. State*, No. AP-72,623 (Tex. Crim. App. Apr. 15, 1998) (unpublished).

In 1998, Slater filed a state habeas application. ROA.4961–5065. Among other claims, Slater asserted that he was deprived of effective assistance of trial counsel because Freeman (1) did not request an instruction on murder and self-defense during guilt-innocence; and (2) did not present evidence of his brain impairment or learning disability during punishment. ROA.4991–5011. In March 2014, the trial court entered findings of fact and conclusions of law recommending that relief be denied. ROA.6042–85. The CCA adopted the findings and conclusions and denied relief. ROA.4941–42; *Ex parte Slater*, No. WR-78,134-01, 2014 WL 6989189 (Tex. Crim. App. Dec. 10, 2014) (unpublished).

Slater filed a federal habeas petition on September 4, 2015. ROA.63–199. In it, he reasserted the above-mentioned ineffective-assistance claims and supplemented them with new evidence. He also added a new claim that Freeman was ineffective for criticizing the jury during his punishment summation. Applying *Pinholster*, the district court declined to consider Slater's new evidence for the claims the state court had rejected on the merits and denied relief. ROA.384–85, 392 n.24. Because he did not raise his summation claim in state court, the district court found it unexhausted and procedurally barred. The district court declined to issue a COA. ROA. 396–409. It also declined Slater's request for a stay so that he could return to state court to reassert his exhausted claims and to raise his unexhausted claims. ROA.375.

Slater then sought a COA in Fifth Circuit for his ineffective-assistance claims. He also argued that the district court abused its discretion in declining to stay proceedings and in declining to allow him to expand the federal record. Br. of Appellant in Supp. of COA (COA app.), *Slater v. Davis*, 715 Fed. Appx. 432 (2018) (No. 17-70011). The Fifth Circuit denied his request for COA. It agreed with the district court that that *Pinholster* barred consideration of new evidence for his adjudicated claims and that the claims were meritless. It also agreed with the district court that the new claim was unexhausted and procedurally barred. *Slater v. Davis*, 715 Fed. Appx. at 435–38. Finally, it found that the district court properly exercised its discretion in denying a stay because a stay would have been futile in this case. *Id.* at 439. Slater then filed this petition for writ of certiorari with the Court.

REASONS FOR DENYING THE WRIT

Slater fails to present any “compelling reason” to grant review. He raises two ordinary *Strickland* claims and challenges the lower court’s routine application of *Pinholster* to same. Spinning his ordinary claims into an ambitious legal argument, he identifies a tension between this Court’s pre-AEDPA and AEDPA precedent. But there is no circuit split here. Nor is there an important issue that warrants review. See Sup. Ct. R. 10. As can be seen below, the Fifth Circuit faithfully applied this Court’s controlling law to the facts of this case. Certiorari should be denied.

I. The Fifth Circuit Properly Applied *Pinholster* to Slater’s Claims that the State Court Adjudicated on the Merits.

Slater asserted in state habeas proceedings that he was deprived of effective assistance of trial counsel because Freeman (1) did not request an instruction on the

lesser-included offense of murder during guilt-innocence; and (2) did not present evidence of his brain impairment or learning disability during punishment. ROA.4992–5001, 5006–10. The state habeas court denied relief on both claims. SHCR ROA.6055–66.

In federal habeas proceedings, Slater raised the same claims but supplemented them with new evidence. Because the review of adjudicated claims is governed by § 2254(d), both the district court and the Fifth Circuit correctly found that Slater’s new evidence cannot be considered. *Slater v. Davis*, No. 4:14-cv-3576, 2017 WL 119374, at *10 (S.D. Tex. Mar. 30 2017); *Slater v. Davis*, 717 Fed. Appx. at 437. *Pinholster*, 563 U.S. at 181 (“We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”). The lower court’s analysis reflects a straightforward application of *Pinholster* that does not warrant this Court’s review.

A. *Pinholster* bars the use of *all* new evidence to attack a state court’s merits adjudication.

Slater argues that the lower courts incorrectly applied *Pinholster*. He weaves *Hillery*’s pre-AEDPA factual-exhaustion principles together with *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), to assert that a district court “must” consider evidence that was not before the state court if that evidence fundamentally alters a claim. *See* Cert. Pet. 15 (citing *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)). But Slater cannot overcome *Pinholster*’s bar on new evidence by introducing new evidence.

The first premise of Slater’s argument is that *Hillery* survives *Pinholster*. See Cert. Pet. 15–16. But *Hillery*’s factual-exhaustion rubric is a remnant of pre-AEDPA jurisprudence. Prior to AEDPA, no deference was given to state-court legal determinations. To protect comity, however, petitioners were limited in the type of new evidence on which they could rely in federal court. Petitioners could introduce new evidence, but only if it “merely . . . supplement[ed]” the evidence presented in state court, and not if it “fundamentally alter[ed] the legal claim already considered by the state courts.” *Hillery*, 474 U.S. at 260.

AEDPA replaced this exhaustion-based limit with a flat prohibition on the introduction of new evidence to attack a state-court merits adjudication. See *Pinholster*, 563 U.S. at 187 & n.11. Applying § 2254(d)(1), this Court clarified that, for claims adjudicated on the merits in state court, *all* new evidence is barred. Once a court determines—based on the state-court record—that the petitioner is not entitled to relief under § 2254(d), the “analysis is at an end.” *Id.* at 201 n.20. The Fifth Circuit’s refusal to consider new evidence under these circumstances is consistent with and, in fact, required by this Court’s precedent. See e.g., *Clark v. Thaler*, 673 F.3d 410, 417 (5th Cir. 2013) (holding that even if new evidence is unexhausted, the court’s task is to consider “only the record that was before the state habeas court”).⁶

Allowing Slater’s claim to be reborn through new evidence is incompatible with AEDPA and *Pinholster*. And as this case shows, after *Pinholster*, the only purpose

⁶ Nor does it follow, as Slater suggests, that because federal courts used to be permitted to consider supplemental evidence, they now must consider evidence that is more than supplemental.

served by the old factual-exhaustion rubric is an illicit one: evading AEDPA's bar on new evidence by judicially creating a "new" claim that is treated as unexhausted. The factual-exhaustion rubric was intended to promote comity and federalism, not to undermine them.

B. Even under *Hillery*, Slater's "new evidence" does not render his claims unexhausted and eligible for the *Martinez/Trevino* exception.

Even if Slater were permitted to use this Court's pre-AEDPA comity measures to end-run comity, his claims would still fail. Slater's "new evidence" does not "fundamentally alter" his claims, such that they are rendered unexhausted and subject to exception under *Martinez* and *Trevino*.

Working from *Hillery*, the Fifth Circuit has explained that to fundamentally alter a claim, the new evidence must "ris[e] to the level of a '180 degree turn.'" *Anderson v. Johnson*, 338 F.3d 382, 389 n.26 (5th Cir. 2003). For that reason, the appellate court rejected the argument that new "direct proof" of what was previously only supported by indirect proof creates an unexhausted "new" claim. *Id.* In other words, "additional evidentiary support" is not enough. *Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014).

1. Slater's new evidence attacking Freeman's character does not "fundamentally alter" his lesser-included instruction claim.

In connection with his complaints about Freeman's decision not to request the murder and related self-defense instructions, Slater attempts to undermine Freeman's credibility and, thus, Freeman's statement that he deferred to Slater on

the issue. To do so, Slater presents Judge McSpadden’s opinions about Freeman and a footnote from an affidavit Freeman filed in an unrelated case *seven years after* Slater’s trial. Cert. Pet. 19. This new evidence does not as Slater contends “destroy[] Freeman’s credibility.” Cert. Pet. 18. Whatever Judge McSpadden’s opinion and whatever inconsistent statements Freeman may have made in his lifetime,⁷ the record in this case shows that Freeman did, as he attested, have a lengthy discussion with Slater about his jury instruction options. *See* Part III *infra*. Moreover, Freeman’s credibility—or lack thereof—has no bearing on the prejudice prong of the analysis. *See Slater v. Davis*, 717 Fed. Appx. at 435; Part III *infra*.

Slater’s attack on counsel’s character does not “fundamentally alter” his claim. It is a run-of-the-mill defamation of the sort that petitioners all too often resort to. If petitioners are allowed to evade AEDPA’s procedural proscriptions through such tactics, they will. And *Pinholster* will be rendered obsolete for such claims.

2. Slater’s cumulative evidence of brain impairment and learning disability does not “fundamentally alter” his mitigation claim.

Slater’s “new evidence” in support of his claim that Freeman was ineffective for failing to present evidence of his brain impairment and learning disability during

⁷ The cited footnote does not prove that Freeman’s affidavit in this case was false. At best, it proves that Freeman was less deferential to his clients’ strategic input in 2002 than he was in 1995. It would hardly be unlikely for a lawyer to modify his approach after seven years of experience in his profession. But even that would be a stretch, as Freeman’s statement in the Moussaoui pleading pertained to the Moussaoui case. All cases involve different facts, different clients, and different strategic balances. Where the potential benefit-to-consequence balance is a close call, defense counsel might reasonably look to the client to make the final decision. That Freeman told a Virginian court he would not to defer to an erratic Al Qaeda terrorist on presumably distinct legal issues does not prove that Freeman never deferred to any of his clients.

punishment is cumulative of that proffered in state habeas proceedings. The state habeas court reviewed an evaluation by Dr. Walter Quijano showing a cognitive learning disorder; an evaluation by Dr. John Largen revealing an IQ of 77, finding memory impairments and diminished academic function, and stating that the test results were commensurate with organic brain impairment; and a school report, showing that at age twelve, Slater functioned at a second- or third-grade level. ROA.5064–65, 5255. Slater’s “new evidence”—a neuropsychologist’s evaluation⁸ and additional school records—“does not ‘fundamentally alter’ [his] state claim; it merely [supports] what he ha[d] been asserting all along.” *Anderson*, 338 F.3d at 388.

3. Slater’s already-adjudicated claims are not eligible for the *Martinez/Trevino* exception.

Slater argues that state habeas counsel’s failure to proffer the evidence that his current counsel now proffers constitutes cause and prejudice under *Martinez* and, thus, requires de novo review. Cert. Pet. 20–25. But *Martinez* is not so broad.

This Court held in *Martinez* that an otherwise procedurally defaulted ineffective-assistance *claim* may be heard by a federal habeas court where it was not properly raised in the state habeas court due to state habeas counsel’s ineffective representation. 566 U.S. at 17. As later explained in *Trevino*, the exception was born of the concern that a defendant might otherwise be “depriv[ed] . . . of *any opportunity at all* for review of an ineffective-assistance-of-trial-counsel claim.” 569 U.S. at 428 (emphasis added).

⁸ ROA.349–65.

Slater's adjudicated claims do not implicate this concern. The merits of his lesser-included-offense and mitigation claims have been reviewed and adjudicated in state and federal habeas proceedings. And as the Fifth Circuit has properly held, *Martinez* and *Trevino* do not apply to claims that were adjudicated on the merits: "[O]nce a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an exception to *Pinholster*'s rule that bars a federal court from considering evidence not presented to the state habeas court." *Escamilla*, 749 F.3d at 395. Slater's strained attempt to circumvent *Pinholster* does not warrant this Court's review.

II. District Courts Are Not Required to Grant Either a Futile Stay or Futile Discovery.

Slater asserts that federal district courts must grant requests for stays to allow petitioners to return to state court to raise successive claims the state court will not consider. Or alternatively, federal district courts must allow petitioners to expand the record to develop exhausted and unexhausted claims. Cert. Pet. 12–15. His arguments are unsupported in law—not to mention wasteful and dilatory.

A. The district court was within its discretion when it denied Slater's request to stay proceedings for a futile trip to state court.

Slater argues that the district court abused its discretion when it denied his request for a stay and that the Fifth Circuit erred when it declined to grant a COA on the issue. Cert. Pet. 12–14. Essentially, he asserts that district courts "must" stay and abate proceedings for every unexhausted claim and for some exhausted claims too. *See id.* at 12. But he is wrong.

Under limited circumstances, a federal habeas court may retain jurisdiction over meritorious claims and stay proceedings pending exhaustion of state remedies on other claims. *Rhines v. Weber*, 544 U.S. 269, 275–77 (2005). A stay “is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.” *Id.* at 277. Even with good cause, a “district court would abuse its discretion if it were to grant [a petitioner] a stay when his unexhausted claims are plainly meritless.” *Id.* If the preceding factors are met, a “district court’s discretion in structuring a stay is limited by the timeliness concerns reflected in AEDPA.” *Id.*

Slater asked the district court to stay proceedings so that he could return to state court to exhaust a new claim and to relitigate exhausted claims. ROA.93, 346–47. Applying *Rhines*, the district court denied Slater’s request. It explained that the CCA would apply its abuse-of-the-writ doctrine to prohibit a successive state habeas application, as Slater had failed to make any viable argument that might allow successive state review. ROA.375 n.8. The Fifth Circuit agreed with the district court, finding that Slater lacked a remedy under Texas law. *Slater v. Davis*, 717 Fed. Appx. at 438.

Slater does not challenge the lower courts’ determinations. He cannot: Since he could have raised his claims⁹ in his initial state application, Texas Code of Criminal Procedure article 11.071, § 5(a) prohibits their consideration. Likely

⁹ Slater *did* raise his lesser-included-offense and mitigation claims in state court.

knowing a trip to state court will be futile, Slater shifts the focus to argue that federal courts cannot make such determinations. Cert. Pet. 13–14.

But the lower courts were not, as Slater contends, reinterpreting state law or deciding a purely state-law issue when they concluded that no avenues of relief were available to Slater in state court. Federal courts faced with mixed petitions routinely decide whether state remedies remain available or whether unexhausted claims are defaulted because the state court would find them procedurally barred. *E.g.*, *Woodford v. Ngo*, 548 U.S. 81, 92–93 (2006) (absence of a state avenue of relief satisfies the exhaustion requirement for federal review); *Gray v. Netherland*, 518 U.S. 152, 161–62 (1996) (same); *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (claims are defaulted when petitioner fails to exhaust state remedies and “the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred”) (quoting *Coleman v. Thompson*, 501 U.S. 722, 734 n.1 (1991)). And while *Rhines* may not explicitly require federal courts to determine whether a state avenue of relief remains available, it does require district courts to consider a claim’s likelihood of success in state court and AEDPA’s timeliness concerns. *See Rhines*, 544 U.S. at 277.

Slater’s claims would be “plainly meritless” in state court because the CCA would not consider them. *See Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010) (quoting *Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005)). As the lower courts properly found, the only purpose of a stay in this case—where a return to state court

would necessarily be futile—is delay. The district court’s denial of a stay was well within its discretion. As such, review is not warranted.

B. The district court was within its discretion in declining to allow Slater to develop a record that *Pinholster* prohibits consideration of.

Slater moved in district court to expand the record pursuant to Rules 6 and 7 to show that state habeas counsel was ineffective (1) in failing to proffer the evidence he now proffers in support of his lesser-included-offense and mitigation claims and (2) in failing to exhaust his summation claim. *See* ROA.91–92. Specifically, he sought to take depositions to determine whether state habeas counsel was ineffective. The district court did not grant his request. *See* ROA.384–85, 392 n.24 (declining to consider new evidence). Slater now asserts that district courts “must” allow petitioners to expand the record to develop their exhausted and unexhausted claims in federal court. Cert. Pet. 14–15. But again he is wrong.

The federal habeas rules only permit discovery for “good cause.” Rule 6, Rules Governing Section 2254 Proceedings for the United States District Courts. This requires a showing “that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to [habeas] relief.” *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

As discussed *supra* in Part I, federal habeas review of Slater’s lesser-included-offense and mitigation claims is limited to the state-court record. *Pinholster*, 563 U.S. at 185. As such, the discovery Slater seeks for those claims can serve no purpose. *See Kyle v. Gansheimer*, 2011 WL 44566363, at *2 (N.D. Ohio Sept. 29, 2011) (“Allowing

further factual development in this case would be futile because the Court could not consider any of the newly discovered evidence on review.”); *Coddington v. Cullen*, 2011 WL 2118855, at *3 (E.D. Cal. May 27, 2011) (“However, petitioner could not answer the inexorably related question of—why permit discovery if it cannot be used? Put another way, how could a district court ever find good cause for federal habeas discovery if it could not be put to use in federal court at an evidentiary hearing or otherwise.”). There is no “good cause” for developing evidence that cannot be considered.

What remains is Slater’s unexhausted claim which, curiously, he fails to identify. Instead, he conflates his claims, calls them “substantial,” and states his entitlement to discovery therefor. *See* Cert. Pet. at 12, 14–15. But when disentangled, it becomes clear that discovery for Slater’s unexhausted claim would also be futile. The unexhausted claim Slater refers to is his summation claim—in which he complains that Freeman was ineffective for criticizing the jury during his punishment summation. *See* ROA.127–131; *Slater v. Davis*, 717 Fed. Appx. at 438 n.5. Because this claim is entirely record-based, the lower courts were able to review its substance and whether *Martinez* might excuse its default. Based on the underlying merits of his summation claim, the district court found that Slater failed to show that state habeas counsel’s representation provided cause and prejudice to overcome the procedural bar. ROA.396–404. The Fifth Circuit agreed. *Slater v. Davis*, 717 Fed. Appx. at 438 (“Slater’s habeas counsel was not deficient in failing to raise the claim and that the underlying merit would not have altered the outcome of the habeas proceeding.”). At

this point, then, there is nothing state habeas counsel can say to revive Slater's record-based claim. There is no "good cause" for expanding the record for a record-based claim.

III. It is Not Debatable that the State Court's Denial of Slater's Lesser-Included-Offense Claim was Reasonable.

Slater argues that Freeman was ineffective in not requesting an instruction on the lesser-included offense of murder, which would have allowed the jury to receive an instruction on self-defense. Cert. Pet. 28–33. Reviewing the state court's adjudication of this claim, the district court denied relief on the merits. ROA.375–92. And the Fifth Circuit properly denied a COA. *Slater v. Davis*, 717 Fed. Appx. at 435–36. Review is not warranted.

A. Standard of review for ineffective-assistance claims

The standard of *Strickland v. Washington*, 466 U.S. 668 (1984), governs ineffective-assistance-of-counsel-trial-counsel claims. *See Pinholster*, 563 U.S. at 189. To prove ineffectiveness, an inmate must establish that counsel's actions or omissions were deficient and that such deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687.

To establish deficiency, an inmate must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance applies. *Id.* at 689. An inmate's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Even if deficient performance can be established, an inmate must still affirmatively prove prejudice. To do so, he must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. And it is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Rather, counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). “Even under de novo review, the standard for judging counsel’s representation is a most deferential one.” *Harrington v. Richter*, 562 U.S. 86, at 105 (2011). And, under § 2254(d), “because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). As such, “[e]stablishing that a state court’s application of *Strickland* was unreasonable . . . is all the more difficult. The standards created by *Strickland* and [AEDPA] are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” *Richter*, 562 U.S. at 105 (citations omitted).

B. State habeas adjudication

Slater’s claim is based on the version of the crime that he provided in his statement to police. ROA.4530–49. In his statement, he admitted that he shot both Martin and Andrews and that the other individual with him, Julius Woods, did not

shoot anyone. ROA.4532, 4537. Slater stated that Woods drove him to the car wash to make a drug deal, ROA.4531–32, that some boys had called wanting to buy four or five ounces of crack cocaine, ROA.4531, 4535, and that Slater had a 9mm automatic but Woods did not have a weapon. ROA.4530, 4533–34. According to Slater, after he took cocaine from the trunk of the car and showed it to the buyers, one of the boys pulled out a gun and started shooting. ROA.4531–33, 4536–37. Slater stated he turned around to the backseat and started shooting, ROA.4532, 4537, 4545, the buyers jumped out of the car and ran, ROA.4533–34, and Slater drove away without taking any money or guns. ROA.4532, 4546–48.

From the beginning of trial, Freeman indicated that a focus of the defense's case would be a claim of self-defense. ROA.1157–58, 1327, 1360, 1418. But the jury could only acquit Slater in that circumstance if it found that Slater had not committed robbery and that he had murdered Martin in self-defense. Alternatively, the defense could forego the lesser-included murder instructions, in the hope that the jury would acquit on capital murder because no predicate robbery had occurred.

After both parties rested, Freeman had a private conversation with Slater before the parties finished discussing the jury charge on guilt-innocence. ROA.4323. The transcript indicates that Freeman and Slater had a long discussion:

THE COURT: All right. Mr. Freeman, according to the clock on the wall, you and Mr. Slater have had an opportunity to visit for about 35 minutes. Insofar as your discussion is concerned—obviously I don't know what it is or what it was—but is there anything further insofar as the charge is concerned that has evolved from your discussion?

MR. FREEMAN: I mean, we have been fully discussing it, your Honor. We had not quite reached a—we reached a tentative decision, but I was

not satisfied that it was an informed decision on his part. Tentative decision was to not change my initial statement to the Court.

THE COURT: You are the lawyer.

MR. FREEMAN: The reason I'm saying that it's not informed is I'm not certain he understands the consequences of that decision. I'm trying to make that clear to him.

THE COURT: I will let you visit with him from right there for five minutes.

ROA.4323.

After further discussion, Freeman's concerns were apparently alleviated, as he informed the court that Slater would not be requesting the lesser-included instruction.¹⁰ The court removed the instruction from the charge. ROA.4324–26. Freeman made several requests and objections to the charge. ROA.4326–44, 4348–58. The court asked both parties whether a self-defense instruction should be included:

And frankly, I have a question about it and I have no books to read, so I'm in the dark.
[. . .]

What I want to know out of both sides is what is your position and why as to whether [self-defense] should or should not be there.

[. . .]

All I want is an answer to that one question, and whatever you agree to that's a deal, because what I can do is have a charge made up to include it and a charge without it

¹⁰ After a short recess, the trial court asked Freeman, "The answer is?" to which the record reflects Freeman replied, "Came." ROA.4324. This is likely a typographical error. The record that follows, however, makes it clear that Slater decided to forego a lesser-included-offense instruction on simple murder.

ROA.4341–43.

The State objected to the inclusion of a self-defense instruction. ROA.4348–49. Apparently hedging against the strategy, Freeman argued for its inclusion. ROA.4354–57. Specifically, he argued that, historically, the instruction had been included in capital murder cases and that the exclusion of such in this case violated the Texas constitution. ROA.4349–53. The court rejected Freeman’s request, noting that such an instruction would have been appropriate only if the jury had been charged on murder. ROA.4354. To that, Freeman responded, “I understand.” ROA.4354. But he went on to state his objection, arguing that the parties charge made self-defense relevant, even in a robbery-capital murder case. ROA.4354–57.

In state habeas proceedings, Slater argued that Freeman provided ineffective assistance in not requesting a jury instruction on murder and self-defense. ROA.4991–5001. Freeman provided an affidavit, confirming the story the record tells: It was Slater who elected to forego the lesser-included-offense instruction. Freeman explained that Slater “surprisingly, albeit expressly, elected to pursue an ‘all-or-nothing-at-all’ strategy.” ROA.5156. Freeman reported that he “reluctantly acquiesced to [Slater’s] apparently sober decision to ‘roll the dice’ on the issue of . . . guilt without any lesser included offense . . . in the trial court’s final charge.” ROA.5157. Freeman further stated that he had advised Slater of the legal consequences of his election privately in the open court room. ROA.5157.

Twelve years after his trial—and ten years after Freeman died—Slater filed an affidavit contradicting Freeman’s affidavit. ROA.5569–70. Slater stated that he

“did not understand” what Freeman had explained to him at trial, and that it was Freeman’s decision not to request the lesser-included instruction. ROA.5569. Perhaps forgetting that he “did not understand,” Slater went on to state that Freeman told him the jury would be able to consider self-defense if capital murder were the only charge submitted. ROA.5569.

The state court denied habeas relief after finding that counsel did not perform deficiently in declining to request an instruction for murder. ROA.6063–66, 6079–80. Based on Freeman’s credible affidavit, the state court found that Freeman advised Slater of the legal consequences of not submitting the lesser-included murder instruction. ROA.6063. The state habeas court found Slater’s affidavit was not credible. ROA.6064.

C. Slater fails to demonstrate that the Fifth Circuit erred, or that such errors warrant review.

Applying the double deference created by *Strickland* and § 2254(d), the district court denied relief and a COA on Slater’s claim. ROA.375–92. The Fifth Circuit also denied a COA:

Freeman filed an affidavit in which he stated he made this decision in deference to Slater’s preference to take an all-or-nothing approach, hoping the jury would find the evidence insufficient to support the robbery element of capital murder. Then Slater would go free rather than giving the jury the “easier” option of convicting him of murder. Freeman died two years after filing the affidavit. Slater did not file his affidavit until ten years after Freeman had died.

Slater has not presented clear and convincing evidence that would rebut the state court’s finding that Freeman’s affidavit was reliable and Slater’s was not credible. *See* 28 U.S.C. § 2254(d)(1). Nor has he shown that the district court’s finding under [*Strickland*] is debatable among jurists of reason.

The State's evidence rebuts Slater's contention that a self-defense instruction would have resulted in a reasonable probability of acquittal on this ground. The evidence supporting self-defense is Slater's videotaped statement, the same evidence he presented to negate the robbery element of capital murder and the jury found unconvincing. Further, the record reflects that Freeman and Slater had a lengthy discussion about what request the defense should make for jury instructions. An all-or-nothing approach does not fail [*Strickland*], even given the risk it entails. The district court's finding in this regard is not debatable.

Nor is it debatable that Freeman was permitted, if not required, to follow Slater's decision. *Autry v. McKaskle*, 727 F.2d 358, 362 (5th Cir. 1984). A pre-trial psychological evaluation did not reveal evidence of "a mental disease on or about the time of the alleged offense." And a "competency evaluation found that Slater understood the rudimentary concerns of his criminal trial." Thus, in light of the record at the state habeas court, the district court's finding on the merits is not debatable.

Slater v. Davis, 717 Fed. Appx. at 435–36.

1. Freeman was not deficient.

Slater argues that the Fifth Circuit erred. He complains that no competent defense attorney would have done what Freeman did. But it is not objectively unreasonable to try to disprove the robbery, and possibly obtain an acquittal, when the self-defense theory was not based on stronger evidence. Considering the facts of this case, the all-or-nothing approach was a good option, albeit unsuccessful in the end. Disproving robbery would have allowed Slater to walk on the capital murder charges, but not on the lesser-included charge of murder. To be acquitted on the lesser offense of murder, a jury would have had to find that Slater had killed Martin in self-defense.

As the CCA put it on direct appeal, Slater’s “unsupported claim of self-defense was inconsistent with the physical evidence found at the scene of the offense.” *Slater v. State*, No. AP-72,623, slip op. at 35–36. In fact, the only evidence supporting Slater’s self-defense theory was his own self-serving statement to the police that “the dudes pulled a gun.” ROA.4531. All the other evidence—including other statements from Slater—disproved self-defense: Eric Washington testified that neither of the victims were carrying a gun when they got into Slater’s car. ROA.3989. No guns were recovered from the scene, rendering Slater’s already unbelievable story—that he left the victim’s gun at the scene¹¹—impossible. *See* ROA.4548. Moreover, Slater admitted to the police that the victims did not fire any shots. ROA.4533.¹² Even so, Slater shot the victims repeatedly from behind as they turned away from him and his gun. *See* ROA.4078–86. Thus, when Slater left the carwash, it makes sense that he did not report the incident. He left Roddrick Martin and Glenn Andrews to die, because that is what he intended. Acquittal based on self-defense was not a possibility in this case and abandoning it was reasonable. *See Druery v. Thaler*, 647 F.3d 535, 539–40 (2011 5th Cir.).

Slater goes on to argue that Freeman was deficient because he requested a self-defense instruction after he forewent the lesser-included-offense instruction. He creates the impression that Freeman did not understand the consequences of the all-or-nothing strategy. Cert. Pet. 29. But the record refutes Slater’s deductions: During

¹¹ *See, e.g.*, ROA.3954–55.

¹² Slater’s assertion that Washington fired shots does not support a self-defense theory against Martin and Andrews.

voir dire, Freeman questioned a venireperson on self-defense, and when the State objected, Freeman explained that self-defense could come up “with lesser included offenses” (i.e., not “robbery murder/capital murder”). ROA.1327–28. That Freeman later attempted to hedge against the all-or-nothing strategy does not mean that he did not understand the law. It means he was acting as an advocate. In response to the court’s inquiry as to whether a self-defense instruction should be included, Freeman said “yes.” He then provided legal bases for his response to preserve the issue for appeal. Contrary to Slater’s assertions, “competent lawyer[s]” often attempt to push the envelope in this way.

Slater next asserts that Freeman was deficient for deferring to his decision to forego the murder instruction because he (Slater) did not understand the consequences. COA App. 29–30. But just before trial, Slater was evaluated and found to be competent to stand trial. ROA.886–88. In fact, a psychologist reported: “Mr. Slater demonstrates the ability to consult with his attorney with a reasonable degree of rational understanding and he demonstrates both a rational and factual understanding of the proceedings against him.” ROA.888. The report also provided a more comprehensive history of Slater’s intellectual functioning, including IQ test scores of 83 and 85. ROA.887. Slater’s alleged “intellectual impairments” do not demonstrate that he did not understand Freeman’s explanation of the legal consequences of the strategy pursued. Further, the record shows that Freeman was cognizant of Slater’s limitations, and, notwithstanding, apparently came to believe that Slater understood the consequences of his decision. ROA.4324–26.

2. Slater was not prejudiced.

On page 21 of his brief, Slater asserts that “no one can say what a . . . jury [instructed on murder and self-defense] would have done.” Cert. Pet. 21. Ten pages later, he resolves the issue in his favor: “there is a reasonable probability that the jury would not have convicted him of capital murder.” Cert. Pet. 31. His argument is conclusory and fails to appreciate the evidence adduced at trial. *See supra* pp. 27–28. Given all of the evidence before the jury, no reasonable probability of a different result flows from Slater’s decision to forego the lesser-included and self-defense instructions.

The district court’s disposition of Slater’s lesser-included instruction claim is neither debatable nor worthy of review.

IV. It is Not Debatable the State Court’s Denial of Slater’s Mitigation Claim was Reasonable.

Slater argues that Freeman was ineffective at the punishment phase because he did not present evidence of his organic brain impairment and learning disabilities. Cert. Pet. 33–40.¹³ Reviewing the state court’s adjudication of this claim, the district court denied relief on the merits, and the Fifth Circuit denied a COA. ROA.392–96; *Slater v. Davis*, 717 Fed. Appx. at 436–37. Slater argues that the district court’s denial of his claim is debatable. It is not.

¹³ Slater attempts to support his mitigation claim with his unexhausted and procedurally defaulted claim challenging Freeman’s summation during punishment. Cert. Pet. 33–34, 39. But he should not be able to obtain review of his defaulted claim by commingling it with a procedurally viable claim. Because Slater does not challenge the lower court’s denial of his summation claim, it should not be considered.

A. Standard of review for ineffective-assistance mitigation claims

An ineffective-assistance claim alleging a deficient mitigation investigation is governed by *Strickland. Wiggins v. Smith*, 539 U.S. 510, 521 (2003). That standard is laid out in detail above, *see supra* Part III.A, but, generally, it requires an inmate to prove deficient performance—representation falling below an objective standard of reasonableness—and prejudice—a reasonable probability that the proceeding would have been different but for counsel’s errors. *Wiggins*, 539 U.S. at 521. “Judicial scrutiny of counsel’s performance must be highly deferentialA court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 669.

In the context of mitigation investigations, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. The petitioner in a postconviction proceeding must present what background evidence should have been discovered but for counsel’s deficient investigation, and prove that “there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigation circumstances did not warrant death.” *Id.* at 695.

B. Background

Prior to Slater's trial, Freeman filed a motion entitled Accused's Third Motion for Expert Assistance: Behavioral Scientist, in which he requested funds to retain a mental health expert. ROA.874.¹⁴

Three months later, Dr. Silverman met with Slater to conduct sanity and competency evaluations. ROA.883–88, 5161. In April 1996, Dr. Silverman submitted his findings to the court, indicating that Slater was both competent and sane. ROA.883–88. Dr. Silverman's evaluations were based on a clinical interview and Slater's medical records from the Children's Division of the Harris County Mental Health Mental Retardation Authority. ROA.883, 886. During the interview with Dr. Silverman, Slater said that he dropped out of school in the ninth grade due to difficulty with the work; he also reported being suspended numerous times for fighting. ROA.886. When asked about his medical history, Slater indicated that he had suffered a head injury as a child, when he was struck by a car. ROA.887.

With regard to Slater's mental status, Dr. Silverman reported:

Mr. Slater was alert and oriented for person and place but only partially oriented for time. . . . His memory appeared to be reasonably intact for immediate, recent, and remote events.

Records from the Children's Division of Harris County Mental Health Mental Retardation Authority (MHMRA) indicate that Mr. Slater received a psychiatric evaluation by Robert Woodham, M.D. on May 31, 1991, in reference to a charge of assault with a deadly weapon. Dr. Woodham concluded that Slater was competent to stand trial at the same time. He also received a psychological evaluation on June 4, 1991,

¹⁴ The trial court did not rule on Freeman's motion immediately. When it heard the motion several months later, it indicated that it would grant funding if provided more information. ROA.1168. By that time, however, Dr. Silverman had already provided a comprehensive evaluation of Slater. ROA.883–88.

conducted by Glen Edmiston, M.S., and supervised by Ed Friedman, Ph.D. He obtained an IQ score of 83 on the Cattell Culture Fair Intelligence Test and an IQ score of 85 on the Test of Non-Verbal Intelligence 2 (TONI-2). He received an IQ score of 63 on the Peabody Picture Vocabulary Test (PPVT) and standard scores of 65 in Reading, 68 in Spelling, and 67 Arithmetic on the Wide Range Achievement Test-Revised (WRAT-R).

ROA.884, 887. Dr. Silverman concluded that there was no “evidence of mental disease or . . . defect . . . of the type, nature or severity to prohibit Mr. Slater from knowing whether or not the alleged behavior was wrong.” ROA.884.

C. State habeas court’s adjudication

Slater argued in state habeas proceedings that Freeman was ineffective for failure to investigate and present mitigating evidence of psychiatric evaluations indicating mild intellectual disability and possible chronic brain disorder. ROA.5007–12. In support of his claim, he presented a 1998 neuropsychological evaluation conducted by Dr. Walter Quijano. ROA.5060–65. Dr. Quijano indicated that he found a “[p]ersonality change due to head injury; disinhibited and aggressive type,” as well as a “cognitive disorder” and a “learning disorder.” ROA.5064.

The state court ordered Freeman to file an affidavit in response to Slater’s allegations of ineffective assistance. Freeman explained that he believed Slater’s mental dysfunction “was a double-edged sword that . . . tended to ameliorate [Slater’s] blameworthiness for the charged offense and indicate that he was, indeed, likely to be a continuing threat to society.” ROA.5160. In his affidavit, Freeman referenced Silverman’s clinical report and its findings, stating that they were consistent with his professional opinion. ROA.5161.

The state court rejected Slater's claim. ROA.1086–89; ROA.6077–79. It found that Freeman had reviewed Slater's educational, health, and juvenile records, as they were all made available in the State's file. ROA.6055. The state's file included records from the Texas Youth Commission (TYC), Brownswood State School, Slater's pretrial sanity and competency evaluations from Dr. Silverman with references to prior psychological evaluations and IQ scores contained in Slater's Orchard Creek Hospital records, medical records from the Children's Division of the Harris County Health Mental Retardation Authority (MHMRA). ROA.6055–61. The state court determined that the testimony that could have been offered by Slater's state habeas expert, Dr. Quijano, was largely cumulative of Slater's other records. ROA.6061–62. Finally, the court concluded that Freeman's decision not to present the records was reasonable because they "would have presented to the jury a picture of [Slater] as a violent person who chooses not to conform his behavior, rather than presenting 'a wealth of mitigation evidence.'" ROA.6063.

D. Slater fails to demonstrate that the Fifth Circuit erred, or that such errors warrant review.

Applying the double deference created by *Strickland* and § 2254(d), the district court denied relief. ROA.392–96. The Fifth Circuit found the district court's denial of relief undebatable:

The state habeas court found, and the district court agreed, that Freeman adequately investigated Slater's possible mental-health issues and learning disability. Though further investigation may have added support to this claim, it would not have uncovered anything that was not available to Freeman at trial. Freeman had access to reports on Slater's mental condition, including a pre-trial report by Dr. Edward Silverman and records from Orchard Creek Hospital. Silverman's report

mentioned Slater's head injury and acknowledged prior IQ scores ranging from 63 to 80. The report concluded that there was no evidence that would have kept Slater from ascertaining the wrongfulness of his conduct. The hospital records also "produced mixed results."

Freeman stated he then made the strategic call that the mixed evidence could be aggravating rather than mitigating. The decision not to present such mixed evidence has been found reasonable in several other cases. *See, e.g., Rodriguez v. Quarterman*, 204 Fed. Appx. 489 (5th Cir. 2006); *Hopkins v. Cockrell*, 325 F.3d 579 (5th Cir. 2003). This led the state habeas court to conclude that Freeman was not ineffective for failing to present the evidence to the jury.

That decision was unaltered by the state habeas court's analysis of [Dr. Quijano's report, Dr. Largen's report, and the affidavit from Slater's mother]. The evidence was cumulative and differed "only in detail, not in mitigating thrust" from the evidence Freeman already had. Given the deference owed to counsel's strategic decision, and that the available evidence presented a "double-edged sword," we decline to issue a COA on this claim.

Slater also presented two new pieces of evidence in the district court, an evaluation from neuropsychologist Paul Schulz and additional school records. But because of the bar of *Pinholster*, we do not consider that evidence. Even if we looked at it under *Martinez* as Slater urges, it would not alter the conclusion about Freeman's performance. The new evidence is cumulative of information contained in previous school reports and in Quijano's evaluation.

As the district court noted, Slater does not suggest a reasonable probability of a different result had Freeman prepared a different defense. The jury was presented with extensive evidence of future dangerousness: Slater was caught selling crack cocaine; he shot a teenage boy at a church event; during a traffic stop Slater was in the back seat with a machine gun and a revolver, and he was found pawning electronics from a burglarized home. The jury also considered testimony from Slater's mother about his head injury and school performance as mitigating evidence. In the face of this evidence, jurists of reason would not find the district court's disposition of this claim debatable.

Slater v. Davis, 717 Fed. Appx. at 437 (internal citations omitted).

1. Freeman was not deficient.

Slater argues that the Fifth Circuit erred in denying a COA. He challenges the state court's findings on deficiency: Because Freeman did not explicitly state in his affidavit that he read Dr. Largen's report, Slater concludes that he must not have. Cert. Pet. 35. But Slater's speculations are insufficient to rebut the state court findings. *See* § 2254(e)(1).

In any event, the record refutes Slater's speculations, as it indicates that Freeman reviewed the State's file and that Largen's report was in that file. *See* ROA.1163, 5245, 5247–63. When the state habeas court ordered Freeman to file an affidavit more than four years after the trial, it asked him to “summarize[e] the actions taken to represent” Slater, “including pre-trial preparation, witness preparation, and trial strategy and responding to allegations of ineffective assistance of counsel contained in [Slater's] application for writ of habeas corpus.” ROA.5103. The cover page for the affidavit was similarly general: “[T]he court orders that CHARLES FREEMAN . . . file an affidavit in response to allegations made in the petition for post conviction writ” ROA.5106. So Freeman answered: He attested that he had filed a motion to appoint experts, including a mental health expert. ROA.5160. He recounted Dr. Silverman's contemporaneous evaluation and report. ROA.5161. And he explained why he ultimately decided not to put on evidence of Slater's mental dysfunction. ROA. 5160.

That Freeman did not mention or summarize a report he had reviewed several years prior—which was largely duplicative of the report he did mention—could be

attributed to the fact that he was not asked whether he reviewed the report. Largen's report was not the only psychological report included in the State's file, nor was it remarkable. ROA.5247–63. A report from Dr. Stafford diagnosed Slater with "conduct disorder" and concluded that "[i]t would be difficult to effect serious change in [Slater's] behavior, inasmuch as [Slater] denied altogether the behavior which he is charged and insists that his only problem is attitude of anger toward certain other people." ROA.5250. Dr. Stafford further indicated that Slater had "conduct disorder," was "aggressive," and had "organic mental impairment." ROA.5257. Dr. Largen similarly reported that Slater's test scores were commensurate with organic brain impairment and described the condition as often involving "disinhibitory control over emotional reactions," as well as impulsive behavior. ROA.5255. Slater's condition was predicated to "have an exacerbatory role on behavioral control." ROA.5255. Given the substance of the reports, Freeman's statement that the evidence was double-edged makes sense. His failure to independently identify one of multiple authors whose report he declined to use at trial is not clear and convincing evidence that he did not read the report.

Slater goes on to argue that Freeman's "double-edged" explanation is belied by the fact that he presented evidence from Wiley regarding his low IQ and head injury. But presenting evidence of mental infirmities through one's mother is necessarily less risky than doing it through a doctor—especially in this case. Wiley was not qualified to testify to the alleged medical consequences of Slater's injury. Because of that, Freeman was able to elicit mitigating aspects of the evidence, while avoiding the risk

of exposing the aggravating aspects—i.e., that Slater’s head injury made him both aggressive and disinhibited.

Contrary to Slater’s allegations, his case is not like *Wiggins* or any of the other cases he cites. *See* Cert. Pet. 35–36. In fact, the cases he cites involve conclusive evidence—often admissions—that trial counsel did not conduct a mitigation investigation or failed to uncover a crucial piece of evidence. *Rompilla v. Beard*, 545 U.S. 374, 385–87 (2005) (trial counsel did not examine—or even make reasonable efforts to examine—available file on defendant’s prior conviction for similar offense); *Porter v. McCollom*, 558 U.S. 30, 40 (2009) (trial counsel did not interview any witnesses or order any records—essentially conducting no mitigation investigation). That simply is not the case here. Freeman investigated Slater’s psychological history and made a strategic decision not to put on doctors whose reports had indicated “that [Slater] was, indeed, likely to be a continuing threat to society.” ROA.5160. A tactical decision not to pursue and present potentially mitigating evidence on grounds that it is double-edged is objectively reasonable and, thus, does not amount to deficient performance.

But Slater disagrees with Freeman’s strategy. He asserts that Freeman could have called Dr. Largen and elicited mitigating aspects of the report without eliciting the aggravating aspects. Cert. Pet. 37. He goes on to speculate that the prosecutor “may not have elicited that information on cross-examination.” *Id.* But Slater’s argument fails to appreciate the adversarial nature of trial and assumes that the prosecutor would not have performed one of her core responsibilities. Reasonable

defense counsel would not have made such a gamble. But more importantly, Slater's argument fails to afford the deference that AEDPA and *Strickland* require. To meet his burden, Slater must show that the state court's determination is "so lacking in justification" that it is "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 101. In other words, Slater must show that the state court's determination was not merely wrong, but so wrong that no reasonable jurist could think it was right. Slater's speculations about what the prosecutor might have done—if he were not doing his job—do not get him there. With Freeman's explanation that he did not put on the evidence because it was double-edged, and with the very double-edged nature of the evidence Slater proposes, there is room for fairminded disagreement at the very least.

2. Slater was not prejudiced.

Slater argues that the lower court erred in its prejudice analysis, because, he alleges, it improperly considered whether the aggravating evidence was sufficient to support a death sentence. Cert. Pet. 37. But the lower court's analysis reflects a careful "reweighing [of] the aggravating evidence against the totality of available mitigating evidence," as this Court has instructed. *See Wiggins*, 539 U.S. at 534. Nor did the lower court apply the wrong standard, as Slater contends, when it considered whether there was "reasonable probability of a different result." *See Strickland*, 466 U.S. at 694 ("defendant must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceedings would have been different"); *Wiggins*, 539 U.S. at 536 ("We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.").

Slater's latest attempt to minimize his violent crimes and victims is unconvincing. *See* Cert. Pet. 38. As the lower court set out in its opinion, the State's case for future dangerousness was strong: Slater had been dealing crack-cocaine since at least 1991. He shot a teenage boy at a church event and then approached the pastor with his gun drawn. When, on another occasion, he was pulled over and found "sitting near . . . loaded weapons," as he puts it, the weapons were an UZI machine gun and a .38 revolver, and an officer watched him lean forward toward them. ROA.4639–40, 4651–52. Slater was a violent criminal and had a long rap sheet to show for it.

When considered alongside the aggravating evidence, Quijano's and Largen's reports and Slater's school records do not create a reasonable probability of a different result. They show that Slater was not highly intelligent and that he may have suffered from permanent brain damage that made him aggressive. Such evidence would not have changed the jury's appraisal of Slater's moral culpability, though it very well may have affected their appraisal of his future dangerousness. *See Foster v. Schomig*, 223 F.3d 626 (7th Cir. 2000) (quotation omitted) (Sentencers "may not be impressed with the idea that to know the cause of the viciousness is to excuse it; they may conclude instead that when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate.").

The state court's denial of review was reasonable. It is neither debatable nor worthy of review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jennifer Morris
JENNIFER MORRIS
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
jennifer.morris@oag.texas.gov

Counsel for Respondent