No. 19-6298

IN THE
Supreme Court of the United States

JOHN STEVEN GARDNER,
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

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CAPITAL CASE

QUESTION PRESENTED

Should this Court expend its time and resources on the routine application of the federal habeas standard of review to a ubiquitous claim ineffective assistance of trial counsel where the petitioner's complaints evince his nitpicking disagreement with the state court decision but not debate amongst reasonable jurists?

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BRIEF IN OPPOSITION

Respondent, Director Lorie Davis, respectfully submits this brief in opposition to the petition for a writ of certiorari filed by John Steven Gardner.

STATEMENT OF THE CASE

I. Facts of the Crime

At trial, the State showed that Gardner and Tammy "had a relatively short, but violent marriage." *Gardner v. State*, 306 S.W.3d 274, 281–82 (Tex. Crim. App. 2009). Gardner "dominated, threatened, and physically abused" Tammy. *Id.* at 282. Tammy's friend, Jacquie West, and Tammy's daughter from another relationship, Jessie, witnessed Gardner choke Tammy and put a gun to her head. *Id.* Jacquie and Jessie also "saw injuries on Tammy's face on various occasions." *Id.* Tammy told Jacquie that one large bruise was the result of Gardner hitting "her in the face with a hammer." *Id.*

Tammy also expressed concern that she would not get out of her marriage alive. *Id.* Candace Akins, her boss, "said that Tammy was constantly fearful, nervous, and in extreme financial difficulties," and wanted to leave her marriage, but "told Candace many times, 'I can't leave, he will kill me.'" *Id.* Tammy also told a neurologist's assistant that "her migraines were caused by physical injuries from her husband." *Id.* Tammy confided to the assistant, "'The only way I'm going to get out of this relationship is by being dead.'" *Id.* "She explained that [Gardner] had threated to kill her and her children if she left him." *Id.*

"[I]n December 2004, Tammy borrowed money from her company to file for divorce." *Id*. She told Gardner "to move out, so his parents came and took him and his belongings back to Mississippi." *Id*. Tammy perked up after the divorce filing. *Id*. She "marked her calendar for February 7, 2005, the day her divorce would become final, and she would go over to the calendar and say, 'You're almost there. You're almost there.'" *Id*. at 283.

Nevertheless, Tammy expressed doubt that the divorce would be finalized "because [Gardner] would kill her first." *Id*. Gardner would repeatedly call and text Tammy asking whether she was going through with the divorce. *Id*. On one occasion, after repeated phone calls, "[s]he told Jacquie, 'He's going to kill me' before the divorce becomes final." *Id*.

"On Sunday, January 23rd, Tammy was driving Jessie home after church when [Gardner] kept text messaging about the upcoming divorce and asking, "YES OR NO?" Jessie read the text messages to her mother, who became frantic, but Tammy did not reply to [Gardner's] question. The messages stopped about 5 p.m." *Id*. Around 7:00 p.m., she met with David Young, her company's vice-president, for about three hours "seeking his help in 'disappearing' so that no one could track her." *Id*. Tammy eventually returned home, calling Young when she arrived around 11:00 p.m. *Id*.

"At 11:58 p.m., Erin Whitfield, the 911 dispatcher for the Collin County Sheriff's Office, received a 911 call from a woman who identified herself as 'Tammy.'" *Id*. Tammy said that her husband had shot her, she could not hear anything because of the ringing in her ears, and that "'there was blood everywhere.'" *Id*. Tammy said

that her attacker had fled "'in a white pickup truck with Mississippi plates.'" and "[s]he said his name was Steven Gardner." *Id.* The call eventually disconnected. *Id.*

A deputy dispatched to the scene "saw a white truck sitting in a ditch by a creak about two or three miles from Tammy's house." *Id.* When he arrived at Tammy's home, he could not gain entry until he kicked down the front door. *Id.* He found Tammy on her bed. *Id.* "She was trying to sit up, but she was bleeding badly from her head and seemed to be in shock." *Id.* "By the time the paramedics arrived, Tammy was spitting up a lot of blood and mumbling incomprehensibly." *Id.* She fell into a coma and was taken off life support two days later. *Id.* She was killed by a single gunshot through her head. *Id.* at 283–84.

That Sunday afternoon, Gardner borrowed his brother-in-law's white pickup truck, explaining that he was visiting relatives in Hattiesburg, Mississippi. *Id.* However, Gardner's credit card was used in "Marshall, Texas, which is on the way from Mississippi to Collin County." *Id.* Gardner's "fingerprint was found in that pickup as were fibers that were similar in all respects to red fibers taken from Tammy's robe." *Id.*

In the early hours of Monday, a Collin County detective called Gardner's cell phone around 5:15 a.m., but Gardner hung up on him. *Id.* He returned to his brother-in-law's home around 8:30 a.m. driving the white pickup truck. *Id.* Gardner's sister, Elaine, confronted him—"He didn't say anything; he just started crying." *Id.* "Elaine then went to check for her husband's .44 Magnum that he kept under his mattress.

It was there, with five live rounds and one spent round. [Gardner's] brother-in-law testified that he never left spent shells in his gun; he always reloaded it." *Id*.

Gardner turned himself in to the local sheriff's office. *Id*. While there, Gardner agreed to speak with the Collin County detective. *Id*. The detective told Gardner that he was trying to find out what happened to Tammy. *Id*. Gardner "said, 'I don't have an answer for that one.'" *Id*. When the detective explained that Tammy had been shot in the head, Gardner "replied, 'Okay.'" *Id*. The detective stated that Tammy was still alive and Gardner "said that she could tell [authorities] what had occurred 'if she wants, that'll be fine.'" *Id*. The jury found him guilty of capital murder. 21.RR.67.[1]

II. Facts Relevant to Punishment

A. State's punishment case

The State presented evidence that Gardner was exceptionally violent and repeatedly engaged in criminal behavior. Gardner and his second wife, Rhoda, lived in Laurel, Mississippi. 22.RR.28–30; 23.RR.49. Their relationship ended when Gardner shot the eighteen-year-old Rhoda in the face, breast, and torso. 22.RR.16–17, 77; 25.RR.SX.64. One of the bullets hit Rhoda's spinal column and rendered her a paraplegic. 22.RR.17. After about a month in the hospital, she was discharged to a rehabilitation facility. 22.RR.18–19. While there, she miscarried a child whose gestational age was estimated to be eight to twelve weeks. 22.RR.19–20. During a follow-up medical procedure required by the miscarriage, Rhoda had a cardiac

[1] "RR" refers to the transcribed statement of facts at Gardner's capital murder trial, or reporter's record, preceded by volume and followed by page or exhibit numbers. "SX" refers to the State's exhibits.

arrhythmia and died. 22.RR.20. For this, Gardner was convicted of aggravated assault and sentenced to eight years' imprisonment. 22.RR.33; 26.RR.SX.77.

While imprisoned for Rhoda's death, Gardner started communicating with Margaret Westmoreland. 22.RR.33–34. They eventually became romantically involved. 22.RR.34. After Gardner was released on parole, he married Westmoreland and moved in with her and her two children—six-year-old Tim and thirteen-year-old Becky. 22.RR.34–35. According to Westmoreland, their dating relationship was "great," but after they married, Gardner acted like "he owned" her. 22.RR.36. Gardner threatened Westmoreland and her family, including threats of skinning Westmoreland's children alive and snapping Westmoreland's neck. 22.RR.37. Westmoreland thought that Gardner would eventually kill her, but she did not immediately leave him because she feared him. 22.RR.38, 40.

Gardner was sexually inappropriate with Becky, including propositioning her "to have sex with the devil" so "that he could give [her] powers." 22.RR.68–69. He also belittled Becky and "proud[ly]" described killing Rhoda to her, showing no remorse. 22.RR.67, 78. Gardner and Westmoreland's relationship ended when Gardner, unprovoked, struck Becky in the head so forcefully that she required seventy-eight stitches and an overnight stay in a hospital. 22.RR.43–47, 71–73; 26.RR.SX.69.

Gardner then abducted Westmoreland at knifepoint from her workplace. 22.RR.50–52. He forced her to drive to various locales, eventually engaging in a high-speed chase with the police. 22.RR.50–53. Westmoreland eventually pulled over, believing that she would die anyway. 22.RR.52. Gardner was then arrested, his parole

revoked, and he returned to prison. 22.RR.53. Gardner still contacted Westmoreland though, threatening to "hunt [her] down" if she left him. 22.RR.54. Even at the time of trial, Westmoreland frequently moved and regularly changed her phone number because she was still in fear of Gardner. 22.RR.55–56.

Following the end of his relationship with Westmoreland, Gardner married Sandra and they had a son, Nicholas. 23.RR.52–53. They divorced in June 1999. 26.RR.SX.72. In mid-August 2001, Sandra applied for a temporary protective order. 26.RR.SX.72. Under oath, Sandra stated that Gardner had threatened her with physical violence, had threatened to release nude pictures of her, and had shown their six-year-old son "video tapes of his current wife naked." 26.RR.SX.72. A two-year protective order was granted. 26.RR.SX.72.

Gardner's final marriage was to Tammy. As described above, he abused her and then killed her with a single gunshot to the head. Gardner also sexually assaulted Tammy's daughter, Jessie, beginning when she was nine. 22.RR.124. Gardner kissed Jessie on the mouth, had Jessie touch his "private area," and had touched Jessie's "private area." 22.RR.125–26. Shortly after Tammy sent Jessie to live with her father, Gardner "tried to take [Jessie's] pants off and rape" her. 22.RR.127.

In addition, Gardner was spotted by police masturbating in his vehicle at the Irving Mall during Christmastime 1992, while women and children were in the area. 22.RR.93–95. When Gardner was pulled over, police discovered two illegal knives and a wooden club. 22.RR.102–03.

Finally, while in the Army, Gardner was punished for disobeying a superior non-commissioned officer, and leaving his post without authority. 26.RR.SX.74. An Army psychiatrist noted that Gardner had an "inadequate, immature, [and] sociopathic personality," and that Gardner was considered "ineligible for [re]enlistment" when he was discharged. 26.RR.SX.74.

B. Gardner's punishment case

The defense called four witnesses on Gardner's behalf. Gardner's co-worker, William Miles, described him as a "very diligent employee," responsible, and "a bit of a peacemaker." 23.RR.7–8. Miles was a "born-again Christian" who had talked with Gardner after his arrest and noted that Gardner had studied "the Word . . . in diligence" and "had become a believer much earlier in life." 23.RR.9–10. He opined that Gardner had "Christ in his heart." 23.RR.10. Another co-worker, Kelly Dowdy, stated that Gardner was "very professional, [and] very courteous," and displayed no hostility. 23.RR.16–18. One of Tammy's ex-husbands, Juan Sewell, described her as having a "weakness for men" and that she could be manipulative. 23.RR.21–23.

The final witness on Gardner's behalf was Elaine, his sister. She testified that Gardner was her "baby brother" and that she was his only living sibling after their oldest sister, Charlene, died at the age of six. 23.RR.25–26. After Charlene's death, life became "pretty stressful," emotionally and financially, in the Gardner household. 23.RR.26. Gardner's father was a "Baptist preacher" and the family moved often because he would be forced to resign. 23.RR.26–27. Gardner's father made Elaine and Gardner get up early each morning, listen to Bible passages, and pray. 23.RR.27–29. If the children refused to participate, they would be "whip[ped]." 23.RR.30.

Elaine described their parents' marriage as unhappy and that she and Gardner would frequently observe violence between them. 23.RR.30–34. Gardner's father had a temper and would "whip" Elaine and Gardner at least once a week, with Gardner receiving the brunt of the "whippings." 23.RR.30–32, 37–38. Elaine recalled one incident where their father was preaching but suddenly got up from his chair and took Gardner outside the meeting hall, beating him so loudly that the congregation could hear. 23.RR.35–36. Despite the rampant abuse, Elaine explained that "two lives were led, the one in front of the public, and then the one behind closed doors," and that the authorities were never called because "[y]ou didn't do that." 23.RR.39, 44.

Elaine also stated that Gardner, while in the Army, told his father that he "better not lay another hand on mom again." 23.RR.38–39. Elaine pleaded, while crying, to spare Gardner's life because "[h]e's all I've got," and that Gardner's elderly parents loved him. 23.RR.42, 58–59. Finally, Gardner received multiple commendations while in the Army including the "National Defense Service Medal" and the "Good Conduct Medal." 26.RR.SX.74.

C. Closure of punishment phase

Following the closure of both sides' punishment cases and the jury charge conference, second chair counsel put a matter on the record outside the presence of the jury.

> [W]e have[,] as part of our preparation for this trial[,] used a number of experts, both testifying and consulting experts as regards mitigation.
>
> And—and everything that's associated with them with regards to future dangerousness. The defense team has made a—a decision not to put those—those individuals on, although they were all ready to testify, and

> we had contacted witnesses and everything else. But it is part of our trial strategy—part of our trial strategy not to put them on[.]

23.RR.74. Second chair counsel also confirmed that Gardner concurred with this strategic decision. 23.RR.74.

In addition, lead counsel went on to note a matter for the record too, again outside the presence of the jury.

> We did check . . . Gardner's prior childhood accidents and injuries on our mitigation. There didn't seem to be anything other than what Elaine . . . has testified to. There was no serious illnesses at any time. There was physical abuse to him and Elaine. We have testimony to that. There was no sexual abuse of any type.
>
> The—the immediate family was checked as to the size of the immediate family, which was four—plus grandchildren. We checked with—as far as the relationship and attitudes toward the member that was drug—we checked whether or not there was drug or alcohol abuse by . . . Gardner or any members of the family. There was no[t]—we checked on whether there was any mental health treatment that would aid in mitigation in this case and—and also to the cohesiveness of the family. We've done that through all our experts. The family standard of living and living conditions.
>
> There were no available school records for . . . Gardner. They were all too old and could not be captured. We checked as far as the social relationships with members of, basically, the opposite sex, marriage, divorces, et cetera; and that's all come into evidence. And any—all awards or honors or special accomplishments. That can be shown by his Army records. And any and all traumatic experiences, anything at all, especially proud moments. Memberships in relig—religious, social, educational and charitable groups. And as far as his best side and worst side memories.
>
> Those are all items that our experts and myself have checked and determined what to put on in this case.

23.RR.77–78. After considering the evidence, the jury answered the punishment special issues in such a way that Gardner was sentenced to death. 23.RR.120–24.

III. Gardner's State Habeas Proceeding

A. Gardner's ineffective-assistance allegations

Just before the Court of Criminal Appeals (CCA) affirmed his judgment of conviction, *Gardner*, 306 S.W.3d at 306, Gardner filed his state habeas application. 1.SHCR.4–217.[2]

In his first claim, Gardner accused trial counsel of ineffectiveness because they did not advance abandonment rage during guilt-innocence "to negate the prosecution's assertion that [Gardner] killed Tammy . . . in retaliation for her status as a prospective witness." 1.SCHR.17. As Gardner's theory goes, he killed Tammy because "of abandonment rage and trauma," but "not because of [her] status . . . as a prospective witness who would testify against him," and trial counsel were deficient for failing to investigate and discover this defensive theory. *Id.* at 17, 21–28. This deficient performance was prejudicial because the State received "a directed verdict," and that "one or more jurors likely based their capital murder verdict on the alternative 'manner and means' theory of retaliation." *Id.* at 28–30.

In claim two, Gardner again asserted that trial counsel had failed to conduct an adequate investigation. 1.SHCR.32–33. This failing, in turn, barred counsel from presenting "a consistent, unified, and effective theme," abandonment rage, between both guilt-innocence and punishment phases of trial. *Id.* at 33–37. Abandonment rage would have negated the retaliation manner and means of capital murder and, if convicted, "would have naturally segued into the punishment phase to explain how

[2] "SHCR" refers to the documents filed in state habeas court, or state habeas clerk's record, preceded by volume number and followed by page numbers.

and why [Gardner] was less morally culpable and not deserving of death." *Id*. at 37–40. Gardner argued that prejudice was presumed or alternatively that it could be found because there was nothing presented to rebut retaliation at guilt-innocence, and it was a winning punishment theme. *Id*. at 41–42.

In claim three, Gardner alleged that trial counsel's investigation was inadequate because their mitigation specialist's performance, for which trial counsel were ultimately responsible, was subpar. 1.SHCR.43–51. Gardner asserted that the mitigation specialist failed to contact several individuals who could have corroborated information Gardner had provided to the defense team. *Id*. at 47, 50. Rather than conducting a "diverse investigation," the mitigation specialist primarily relied on Gardner's "mother, father, and sister," *id*. at 51, with whom she "developed and overly close relationship" taking "on the role of counselor to them instead of mitigation investigator." *Id*. at 50.

As such, the defense team did not know about Sylvia and Donald Reeves—Gardner's former in-laws via Westmoreland—who could "have revealed the manipulation of his first wife, Rhoda, detailed [his] remorse, and revealed [his] use of codeine in cold medication . . . prior to the shooting" of Rhoda. 1.SHCR.52, 54. The Reeveses could also have provided "further insight into [Gardner's] lack of control, . . . that [he] was mentally ill,. . . that he had been sent to a psychiatric facility after one incidence of violence," and that he had an "inability to control his anger over the smallest of things." 1.SHCR.53–54. They also did not know of Louise Lillis, a congregant of Gardner's father's church, who could "have

corroborated . . . that [his] father physically abused him" by testifying to "a particularly harsh whipping" she overheard during a church service. *Id.* at 54–55. Gardner attached affidavits from these three above-described individuals, and from Randy Reeves, the Reeveses' son, and William Stone, a friend of Gardner's while they were in the Army. 1.SHCR.188–202, 213–14. Had trial counsel and their mitigation specialist conducted an adequate investigation, which "would have uncovered the crucial information known to the Reeves[es] and to Lillis," it "would have provided the fact-basis supporting expert testimony about" abandonment rage. *Id.* at 55–56.

Trial counsel's deficient investigation was prejudicial, according to Gardner, because an effective investigation would have corroborated Elaine's testimony of physical abuse, rebutted the argument that Gardner was inherently violent, explained why he was less morally culpable, and would have been considered by the jurors, some of whom confirmed that by affidavit. 1.SHCR.57–61.

Claim four was functionally identical to claim three. The only relevant difference is that Gardner alleged trial counsel should have called the Reeveses and Lillis as lay witnesses (instead of simply discovering them), and should have called Dr. Gilda Kessner to testify about "abandonment rage and its neurobiological effects," 1.SHCR.65–68.

B. Trial counsel's response

Trial counsel jointly responded to Gardner's allegations. 2.SHCR.337–48. Lead counsel explained that he had been practicing law for thirty-five years, had been board certified, and had been lead counsel in seven prior capital murder cases. *Id.* at 337. Second chair counsel had been an attorney for six-and-a-half years, a peace

officer for twenty-four years prior to that, tried many felony cases to verdict, and taken many hours of capital specific continuing legal education. *Id*. at 337–38.

As to claim one, trial counsel explained that "[t]he issue of an abandonment rage . . . defense was never brought up by any . . . member of the defense team and, therefore, was not part of our trial strategy." 2.SHCR.338. They noted that Dr. Kessner, part of the defense team, never "raised abandonment rage as an issue or potential trial strategy at any time during trial preparation." *Id*. at 338. They also believed introducing abandonment rage at the guilt-innocence phase would have been problematic because it could have opened the door to rebuttal by the State with acts of violence, and because Collin County jurors are conservative and "don't respond well to 'novel' defensive theories." *Id*. at 339. As such, even had they known about abandonment rage, trial counsel would not have presented it. *Id*. at 339.

Concerning claim two, trial counsel explained that they believed there would be two defensive theories—one for guilt-innocence and one for punishment. 2.SHCR.339. For the former, trial counsel's strategy had been to argue that there was no burglary (because there was no evidence of forced entry and no direct evidence of Gardner's intent to commit a crime before entering Tammy's home), and the killing was not done in retaliation (because Gardner had not contested the divorce and signed a waiver that permitted it "to go forward . . . with no interference from" Gardner). *Id*. at 340. For the latter, they first tried "to humanize [Gardner] as much as possible." *Id*. However, their "mitigation expert had discovered little or nothing that was deemed useful for trial." *Id*. at 340–41. Thus, they were "limited to his sister

Elaine testifying, as his father chose not to come up for the trial and his mother was in such an emotionally unstable state that she" stayed in the attorneys' office "and was not able to testify on her son's behalf." *Id*. at 341. Second, they relied on the fact that the State had to prove Gardner's future dangerousness to society beyond a reasonable doubt, but prosecutors presented no evidence that Gardner would be dangerous while incarcerated. *Id*. Because of this lack of evidence, trial counsel refrained from presenting evidence concerning Gardner's likely behavior in prison because it would have invited rebuttal. *Id*.

Regarding claim three, trial counsel explained that lead counsel began an investigation upon appointment, which was taken over by the mitigation specialist and fact investigator after their respective appointments. 2.SHCR.342. Second chair counsel, the fact investigator, and the mitigation specialist "traveled to Mississippi to develop specific mitigation witnesses." *Id*. These witnesses "were gleaned through family contacts, interviews with [Gardner] and interviews with childhood friends." *Id*. They spoke with Elaine and Gardner's parents "about his childhood, adulthood and his allegations of physical and mental abuse by his parents," but both parents denied any abuse, saying that Gardner was a normal kid though he had few friends. *Id*. at 342–43. Trial counsel also acknowledged that the mitigation specialist had developed an overly close relationship with the Gardners and that she refused to share notes or summarize findings by report because "[s]he was overly concerned with what would become discoverable by the State." *Id*. at 343. Trial counsel expressed they would not have called Stone because his testimony of [Gardner's] womanizing

and constant focus on sex would not have a positive effect on any jury and especially a Collin County jury," nor would they have called the Reeveses[3] because it "would [not] have benefited . . . Gardner in a trial in Collin County, Texas." *Id*. at 343–44.

As to claim four, trial counsel explained that there just "wasn't much [mitigating evidence] available" in part because of Gardner's "past history of violence in many if not all of [his] relationships" and that his parents "would not, or refused to, admit to any abusive behavior on their part." 2.SHCR344–45. They also noted that another of their mental-health experts, Dr. Kate Allen, who had been "retained to examine and address . . . abandonment issues concerning [Gardner]," did not testify after watching several of the State's punishment witnesses because she lacked information and "felt that [Gardner] was psychotic." *Id*. at 345.

C. The state habeas court's findings

The state habeas trial court entered findings of fact and conclusions of law. 2.SHCR.383–401. The court found that trial counsel were credible, competent criminal defense attorneys. *Id*. at 369.

As to claim one, amongst other findings, the state habeas trial court noted that trial counsel *did* challenge the retaliation manner and means, but did not do so through abandonment rage because neither Dr. Kessner nor any other mental-health expert raised it as a defensive theory. 2.SHCR.370. Had trial counsel presented abandonment rage in guilt-innocence, it would have made admissible Gardner's other

[3] Trial counsel clearly confused Stone, Gardner's Army friend, with Donald Reeves, Gardner's former brother-in-law. 2.SHCR.344. But it is also clear that trial counsel knew what Stone had to say about Gardner (womanizing) and what Donald had to as well. *Id*. (knew Gardner when he was married to his "sister-in-law Margaret").

extraneous acts of violence. *Id*. at 371. And while abandonment rage "adds psychological context to" Gardner's actions, it "did not offer a legal justification for" them. *Id*. Further, several pieces of evidence were not consistent with abandonment rage and abandonment rage "did not address the independent aggravating element of murder committed in the course of a burglary, which was sufficient to support the jury's verdict." *Id*. at 371–72. Ultimately, the court concluded that trial counsel were neither deficient nor were their actions prejudicial in not discovering and presenting abandonment rage in the guilt-innocence phase. *Id*. at 372–73.

Concerning claim two, the state habeas trial court found that counsel made a strategic choice to elect two defensive theories—challenging the two manners and means at guilt-innocence, and relying on the absence of prison future dangerousness evidence and humanizing Gardner at punishment. 2.SHCR.373. The decision was reasonable in part because abandonment rage "had numerous weaknesses." *Id*. at 373–74. The court also rejected Gardner's presumed prejudice argument, finding that counsel "subjected the prosecution's evidence to meaningful adversarial testing." *Id*. at 374. It then found that there was no prejudice because abandonment rage would not have worked at guilt-innocence or at punishment. *Id*. at 374–75. The punishment prejudice decision relied on the fact that abandonment rage "would have reinforced the jury's conclusion that [Gardner] was a future danger," that there was evidence inconsistent with abandonment rage—Gardner was violent with people and in circumstances unconnected with abandonment—and that it would have "reinforced the State's" punishment case. *Id*.

Finally, the state habeas trial court addressed claims three and four together. 2.SHCR.375–79. It found that trial counsel "thoroughly investigated and prepared for [Gardner's] trial, including traveling to Mississippi to interview witnesses and hiring a mitigation expert, a private investigator, and two[4] mental health experts to assist with the case." *Id*. at 375. Counsel also "investigated [Gardner's] childhood, medical and family history, prior drug and alcohol abuse, education, military service, and other personal history." *Id*. This, the court determined, was in accord with prevailing case law concerning proper mitigation investigations. *Id*. And the court noted that trial counsel found much harmful information during their mitigation investigation and had "uncovered much of the same information as is included in [Gardner's] submitted timeline on habeas." *Id*. at 376. Thus, trial counsel were not deficient in their mitigation investigation. *Id*. at 377.

The court then addressed prejudice. 2.SHCR.377–79. First, it found that much information contained in the Reeveses' affidavits was not helpful, including "the parallels between Rhoda's and Tammy's murders," that Gardner "was frequently and irrationally angry," and that they did not have contact with Gardner since he assaulted Becky. *Id*. at 377–78. Second, it found that Lillis's affidavit was not "compelling" because she heard only a single instance of abuse, it would not have significantly corroborated Elaine's testimony, and Lillis would have been cross-examined at trial—that Gardner had a good relationship with his parents. *Id*. at 378.

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[4] Trial counsel actually had three mental-health experts: (1) Dr. Kristi Compton, a consulting mental-health expert; (2) Dr. Kate Allen, a testifying mental-health expert; and (3) Dr. Gilda Kessner, a psychologist retained as a risk-assessment expert. 1.SHCR.112, 204; 2.SHCR.338–39, 342, 345.

Third, the court found Dr. Allen's determination that Gardner was psychotic was not favorable punishment evidence. Fourth, it found that abandonment rage would also not have benefitted Gardner. *Id*. at 378–79. This is because it would "not have been persuasive," it demonstrated that Gardner "was consistently violent and incapable of ever forming normal, non-violent relationships," and there was evidence of mental-health exaggeration in his Army papers. *Id*. Fifth, the court found that Gardner's obsession with sex would not have been beneficial. *Id*. at 379. As such, the court found that Gardner failed to prove prejudice. *Id*.

The CCA adopted the state habeas trial court's finding save three findings, part of one, and a single alteration to another. *Ex parte Gardner*, WR-74,030-01, 2010 WL 3583072, at *1 (Tex. Crim. App. Sept. 15, 2010). Thus, based on the trial court's findings and its "own review of the record," the CCA denied relief. *Id*.

IV. Gardner's Federal Habeas Proceeding

Gardner petitioned the district court for a writ of habeas corpus raising the same claims he raised in state court. ROA.48–231. The district court denied relief and a certificate of appealability (COA), finding that the state court adjudicated the four ineffective-assistance claims and that these adjudications were not objectively unreasonable. ROA.908–46.

Gardner sought a COA in the Fifth Circuit on his ineffective-assistance claims. Mot.COA.3–5; Br.Supp.COA.15–45. The Fifth Circuit declined to issue one. *Gardner v. Davis*, 779 F. App'x 187, 189–94 (5th Cir. 2019). He now seeks a writ of certiorari claiming that the COA declination was in error. Pet. Cert. 16–32. The Director's response follows.

REASONS FOR DENYING THE WRIT

I. Gardner Provides No Compelling Reason to Grant Certiorari.

At the outset, Gardner fails to provide justification for granting a writ of certiorari—no allegation of a circuit split, a direct conflict between the state court and this one, or even an issue that is particularly important. *See* Sup. Ct. R. 10(a)–(c). That absence lays bare Gardner's true request—for this Court to correct the lower court's application of a properly stated rule of law. That, however, is hardly an *adequate* justification for expending limited judicial resources on three ubiquitous claims. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). And that is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J.) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). Gardner's petition should be denied for this reason alone. *Cf.* Sup. Ct. R. 14(h) (a petition for writ of certiorari should contain a "concise argument *amplifying* the reasons relied on for allowance of the writ" (emphasis added)).

II. The Fifth Circuit Properly Applied the Law and Was Correct to Deny COA.

Gardner's complaint is twofold. He complains about the Fifth Circuit's methodology and the outcome it reached in this case. He suggests that the court's methodology conflicts with *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), because it did not sua sponte apply both 28 U.S.C. § 2254(d)(1) *and* (2). And he asserts that the court's methodology conflicts with *Miller-El v. Cockrell*, 537 U.S. 322 (2003), because

it agreed with the lower court's findings. Pet. Cert. 16–18. He then lodges a series of (d)(1), (d)(2), and (e)(1) challenges to say that the lower court was wrong to deny COA. *See id.* at 16–31. But all his complaints misinterpret the law.

A. The Fifth Circuit's methodology is consistent with that of this Court.

While it did not so hold,[5] this Court suggested in *Wilson* that when a state court decision is accompanied by an explanation, a federal court is to review the state court's reasons "and defer[] to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192. Here, the CCA provided two reasons: its edited version of the state habeas trial court's findings and the record. *Ex parte Gardner*, 2010 WL 3583072, at *1. The Fifth Circuit's opinion reflects both. *See Gardner*, 779 F. App'x at 189–94.

Gardner argues that is not enough. He seems to interpret *Wilson* to require federal courts to sua sponte apply § 2254(d)(1) and (2) to ineffective-assistance claims and, in so doing, separate the state court findings into distinct legal and factual categories. Pet. Cert. 16–17. But Gardner fails to identify any court that has interpreted *Wilson* to require such. Absent a petitioner's (d)(2) challenge, reviewing federal courts typically apply (d)(1) to a state court's rejection of ineffective-assistance claims because they involve mixed questions of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984) (noting that ineffective-assistance claims are

[5] *See Wilson*, 138 S. Ct. at 1192 ("The issue before us, however, is more difficult. It concerns how a federal habeas court is to find the state court's reasons when the relevant state-court decision on the merits, say a state supreme court decision, does not come accompanied with those reasons."); *id.* at 1195 ("*Richter* did not directly concern the issue before us—whether to "look through" the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision.").

mixed questions of law and fact); *Grant v. Royal*, 886 F.3d 874, 912 (10th Cir. 2018) (same). To obtain relief, a petitioner must show that "the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The analysis considers the state court's findings regarding whether counsel was deficient and whether the deficiency was prejudicial. That is precisely what the Fifth Circuit did in this case. *See Gardner*, 779 F. App'x at 189–94. Its methodology comports with this Court's jurisprudence and that of the circuits.

Interspersed amongst his *Wilson* complaints, Gardner argues that the Fifth Circuit also contravened *Miller-El*. Pet. Cert. 17. According to him, the COA standard is the inverse of that required for relief: While a debatable state court decision precludes federal habeas relief, *see Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004), Gardner says it entitles him to COA. As he puts it, if "jurists of reason could debate/disagree with the state court's resolution" of his claim, then a COA should issue. Pet. Cert. 18. But he is wrong. When a petitioner seeks a COA on a claim denied on the merits by a state court, it must be reviewed in light of § 2254(d). *Miller-El*, 537 U.S. at 341. This section "imposes a highly deferential standard of review for evaluating state-court rulings and demands that state court decisions be given the benefit of the doubt." *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam).

In denying relief, the district court found that the state court did not contravene or unreasonably apply *Strickland* when it denied relief on Gardner's ineffective-assistance claims. ROA.908–46. To be entitled to a COA, then, Gardner was required to show—not that the state court's application of *Strickland* left room

for debate—but that it was debatable that it contravened or misapplied *Strickland*. Having failed to meet that burden, Gardner complains about various sentences from the Fifth Circuit's opinion. He overlooks the substance of the court's analysis and suggests that the court's failure to preface each of its sentences with "reasonable jurists could debate" renders its opinion erroneous. *See* Pet. Cert. 17 & n.2. He goes on to assert that the court made a premature merits determination because it "agreed" with the federal district court that the state habeas court's findings were not unreasonable. *Id*. at 17, 26, 31. But the lower court's statement of agreement preceded its analysis for each of the claims. It did not deny COA because it agreed with the lower court; it denied COA because any reasonable jurist would too. *See Gardner*, 779 F. App'x at 191–94. The Fifth Circuit's methodology is consistent with that of this Court and is apparent in the court's opinion in this case.

B. The Fifth Circuit correctly denied COA on Gardner's claims.

Gardner asserts that the Fifth Circuit was wrong to deny COA on his claims that counsel was ineffective for failing to adequately investigate mitigating evidence and for failing to pursue an abandonment rage theory in the guilt-innocence and punishment phases of trial. Pet. Cert. 19. While he explicitly argued in the lower court that "§ 2254(d) . . . ha[d] no place in [the court's] COA determination," Reply Br. COA 4–5, he now complains that the court erred because it "made no attempt" to apply it, Pet. Cert. 17. He challenges the lower court's debatability findings based on that standard and the § 2254(d)(1) and (d)(2) arguments he advances in this Court

today.[6] Still, he conflates (d)(1), (d)(2), and (e)(1) in a way that makes it difficult to understand his path to relief. Focusing on (d)(2), he asserts that a handful of state court findings were "based on an unreasonable determination of the facts." *Id.* at 21, 24, 31. But (d)(2) does not allow federal courts to overturn valid convictions because a postconviction state court erred in a finding or two, nor does it require a COA grant if such is debatable. The challenged finding or findings must be dispositive to the state court's denial of relief. In other words, a petitioner must show that the state court's "decision"—i.e., denial of relief—"was *based on* an unreasonable determination of the facts." § 2254(d)(2) (emphasis added). Gardner failed to demonstrate the debatability of that in the lower court, and he fails again in one.

1. The Fifth Circuit correctly found undebatable the district court's denial of relief on Gardner's deficient-investigation claim.

Gardner asserts that two of the twenty findings regarding the adequacy of trial counsel's mitigation investigation are rebutted by clear and convincing evidence. In turn, he argues that reasonable jurists could debate whether the state court's findings contravened or misapplied this Court's precedent or were based on an unreasonable determination of fact. Pet. Cert. 21–23. His arguments are unconvincing.

a. The state court's deficiency conclusion was not objectively unreasonable, and reasonable jurists would not debate this point.

Gardner asserted in state habeas proceedings that trial counsel's investigation was inadequate. But then he effectively proved the adequacy of trial counsel's

[6] Because Gardner did not raise his § 2254(d)(1) and (2) challenges in the Fifth Court, this Court should find that he waived them. *See Sims v. Apfel*, 530 U.S. 103, 109 (2000).

investigation. First, trial counsel compiled a team of experts to assist them—a fact investigator, a mitigation specialist, a consulting mental-health expert, a testifying mental-health expert, and a risk-assessment expert who also happened to be a psychologist. 1 SHCR.112, 204; 2.SHCR.338–39, 342, 345.

Second, Dr. Kessner described the interviews she conducted and documents she reviewed in preparation for trial, which were generated or gathered by the trial team. 1.SHCR.111–12, 208–09.[7]

Third, Gardner's postconviction mitigation specialist admitted that "*much* of the social history information that [she] used to compile the current psychosocial history *was obtained from previous notes and interviews by the private investigator, consulting psychologist, and mitigation specialist*." 1.SHCR.125 (emphasis added). And she too described abundant material she reviewed and that was obviously generated or gathered by the trial team. 1.SHCR.176.[8]

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[7] She "conducted several interviews with Mr. Gardner, reviewed documents supplied . . . by the attorneys and had limited interviews with family members." 1.SHCR 208. The documents reviewed included: (1) "Forrest County General Hospital" records; (2) "First National Bank of Marin" records; (3) Collin County Sheriff[']s Office" records; (4) "Southwestern Institute of Forensic Sciences at Dallas" records; (5) "Orchid Cellmark" records; (6) "Parkland Health and Hospital" records; (7) "Texas Department of Public Safety" records; (8) "Irving Police Department" records; (9) "Jones County Sheriff Department" records; (10) "Mississippi Crime Lab" records; (11) "Hinds County Coroner" records; (12) "University Hospital, Jackson MS" records; (13) "Mississippi State Penitentiary" records; (14) "Employment Records" for two businesses; (15) "Military Personnel Records;" (16) "Letters and Notes" from Tammy, "Justin White," Gardner, "Lori Osborn," and "Raquel E.B."; (17) and "Voluntary Statements" from a number of individuals who testified for and against Gardner. *Id*. at 208–09.

[8] Gardner's postconviction mitigation specialist listed the documents she reviewed for purposes of compiling Gardner's psychosocial history, which he submitted to the state habeas court as an exhibit, including many documents obviously generated for purposes of trial: (1) "[f]ive boxes" of counsel's trial file, including "interviews, research, invoices, handwritten notes, meeting notes, copies of records obtained, e-mails;" (2) the records of the fact investigator, including "copies of records, interviews, database researches for witnesses, meeting notes, invoices, miscellaneous trial notes, e-mails;" (3) the records of the mitigation specialist, including "[m]itigation notes, interview notes, timeline, genogram, records, invoices, correspondence with attorneys, . . . Gardner['s] letters, [Gardner's] writings on social history, drawings done by . . . Gardner, [l]etters [Gardner] wrote in jail

Fourth, Gardner produced only five witnesses who had not been contacted by counsel, all of whom Gardner knew for relatively limited periods of time long before trial and all of whom had very little to add to the mitigation picture, and some of whom were harmful to the defense. 1.SHCR.188–202.

As to Lillis, she knew Gardner because she was friends with his parents and was a congregant of the church where his father ministered. 1.SHCR.202. Based on evidence Gardner submitted, they lived in the same Mississippi town beginning in 1964 when Gardner was eight. *Id*. at 178–79. However, Gardner's father "left the church and the Gardner[]s moved to Ellisville." *Id*. at 202. That occurred, at the latest, in 1970. *Id*. at 179. Gardner therefore accused trial counsel of ineffectiveness for not discovering a friend of his parents with whom he was acquainted about thirty-five years before trial. The question of deficiency answers itself.

As to Stone, Gardner knew him while they were both in the Army and stationed in Hawaii, which Stone left in 1976. 1.SHCR.213. Records show that Gardner enlisted in February 1974. 26.RR.SX.74. And Stone admitted that he had no contact with Gardner for "at least twenty years." 1.SHCR.213. Thus, Gardner accused counsel of not discovering an individual whom Gardner knew, for a period of about two years, nearly thirty years prior to trial. Again the question of deficiency answers itself.

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to Tammy, [and] e-mails;" (4) Dr. Kessner's records, including "interviews, research notes, slides that were to be presented concerning future dangerousness, e-mails, invoices;" (5) Gardner's military records; (6) Gardner's Collin County jail records; (7) Gardner's Mississippi prison records; (8) Gardner's employment records; (9) various law enforcement records concerning Gardner; and (10) medical records of Rhoda. 1.SHCR.176.

As to Sylvia and Donald Reeves, he met them in 1981 or 1982. 1.SHCR.189. Within about two years, Gardner was imprisoned for killing Rhoda in May 1983. 26.RR.SX.77. Two years later, in June 1985, he was paroled. 26.RR.SX.77. In October 1987, his parole was revoked for kidnapping Westmoreland at knifepoint, 26.RR.SX.77, after which the Reeveses had no contact with Gardner, 1.SHCR.192. At best, the Reeveses knew Gardner for six years, punctuated with a two-year prison stint, about twenty years before trial. On top of that, during the time they knew Gardner, he had murdered one wife (Rhoda), abducted another, (Westmoreland, Sylvia's sister), and brutally assaulted a child (Becky, their niece). The same is necessarily true for their then-teenaged son, Randy. *Id*. at 200. Far from being deficient, trial counsel were likely wise to avoid contacting the Reeveses as they clearly knew significant harmful information concerning Gardner.[9]

It was not unreasonable for the state court to reject Gardner's contention of a deficient background investigation. Five limited witnesses, none of whom had contact with Gardner for about twenty years at best, and three of whom were readily known

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[9] Although trial counsel, in their postconviction affidavit, did not mention whether they knew about the Reeveses, it is obvious they did. Gardner's postconviction mitigation specialist stated that Gardner "had furnished information concerning two of his close friends, Sylvia and Don (Red) Reeves" to trial counsel's mitigation specialist. 1.SHCR.126. And, prior to trial, the State filed police reports concerning the shooting of Rhoda as business records to make them admissible without a live witness. 2.CR(219-80411-05).523; *see* Tex. R. Evid. 902(10). In those records, police stated that "Donald Ray Reeves can testify of his wife showing up with . . . Gardner at Montrose and telling him that [Gardner] shot Rhoda" and that Gardner was staying with "a Mr. & Mrs. REEVES." 2.CR(219-80411-05).553, 559. Further, Donald provided a written statement describing how Gardner and Rhoda had been living with Donald and his "wife," that Donald's "wife" said Gardner "shot Rhoda," and that Gardner had used Donald's gun to shoot Rhoda. 2.CR(219-80411-05).569. Further, Donald said that, on the morning Rhoda was shot, his "17 year old son, Randy Jean Reeves, woke [Gardner] up" to go to work. 2.CR(219-80411-05).569. Donald and Sylvia were also listed on Gardner's approved visitors list from his stay in Mississippi's prisons. 1.CR(219-81121-06).148–49. These records, too, were filed as business records by the State. 1.CR(219-81121-06).128. Thus, the trial team clearly knew about the Reeveses.

to possess harmful information, does not prove trial counsel's investigation deficient, and it is not objectively unreasonable for the state court to so recognize. *See Richter*, 562 U.S. at 108 ("An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense."); *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."). The Fifth Circuit found that no reasonable jurist would debate this conclusion. *Gardner*, 779 F. App'x at 193–94.

But Gardner debates it. Bypassing almost all the state court's findings regarding counsel's investigation, he argues that its conclusion was "based on an unreasonable determination of the facts." Pet. Cert. 21. But he does not address the findings—or the alternative findings—sustaining the state court conclusion, much less show them unreasonable. Instead, he complains that the Fifth Circuit embellished a state court finding and reminds the Court that Dr. Kessner believes the investigation was inadequate. *Id.* at 21–23. Neither make his claim debatable.

Gardner argues that the Fifth Circuit contravened *Wilson* because it "embellished" a state court finding. Pet. Cert. 21–22. Specifically, he faults the lower court for noting in its recitation of the facts a portion of trial counsel's affidavit that did not make it into the state court's conclusions and findings. Pet. Cert. 22 (citing *Gardner*, 779 F. App'x at 192). To be clear, the state habeas court found that Dr. Allen "concluded that [Gardner] was psychotic and . . . did not want to testify at trial."

2.SHCR.394. It then followed with a citation to trial counsel's affidavit, in which they indicated that Dr. Allen did not want to testify "because of lack of information and [because she] felt [Gardner] was psychotic." *Id*. The Fifth Circuit included the first half of counsel's statement in its discussion of the proceedings, whereas the state habeas court did not.

According to Gardner, the Fifth Circuit's reference to the state court record was out of bounds. But he is wrong. The CCA explicitly stated in its order that its denial of relief was based in part on its "own review of the record." *Ex parte Gardner*, 2010 WL 3583072, at *1. *Wilson* requires federal courts to review a state court's reasons, not to disregard them. That the CCA's reason was general does not strip it of deference. *Cf. Richter*, 562 U.S. at 98 (holding that when a state court decision is unaccompanied by an explanation, a federal habeas court may not disturb it if there is *any* reasonable basis for the state court's denial).[10]

Even if Gardner were correct about the law—i.e., *Wilson* prohibits reviewing federal courts from mentioning anything beyond the state court's findings—his analysis is flawed. He underlines and he italicizes to say that the state court found "that Dr. Allen did not want to testify <u>*solely because*</u> [she] 'concluded that [Gardner] was psychotic.'" Pet. Cert. 21. But Gardner's use of special fonts does not change the state court's finding. The state court did not find that Dr. Allen's opinion that Gardner

[10] Under Gardner's reading of *Wilson*, reviewing federal courts would be limited to verbatim recitations of the state court findings and conclusions. If the findings and conclusions were anything less than self-contained, convictions would be overturned. This of interpretation of *Wilson* would greatly undermine Antiterrorism and Effective Death Penalty Act and the comity, federalism, and finality it was written to protect. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

was psychotic was why she did not want to testify, much less the sole reason. 2.SHCR.394. The state court's decision to include part of trial counsel's affidavit in its findings does not mean that it rejected the remainder. A state court's findings and conclusions are necessarily more succinct than the records they synthesize.[11]

Furthermore, the Fifth Circuit's inclusion of Dr. Allen's full statement in its recitation of facts had no bearing on its analysis. The court did not represent that the state court found Dr. Allen did not want to testify for lack of information. It simply noted that trial counsel said that. *Gardner*, 779 F. App'x at 187. And they did. The Fifth Circuit's methodology of reviewing and discussing evidence from the state court record is consistent with *Wilson*. In any event, it does not speak to whether the state court's denial of relief was unreasonable.

Taking a different approach, Gardner attempts to cast doubt on the state court's finding regarding the investigation's adequacy based on Dr. Kessner's assertions otherwise. Gardner reminds the Court of Dr. Kessner's speculations about the existence of additional corroborating witnesses and that the mitigation specialist took on the role of counselor to Gardner and his family. Pet. Cert. 23. But Dr. Kessner's aspirational conjecture and the mitigation specialist's extra services are not the clear and convincing evidence necessary to rebut that trial counsel conducted a thorough investigation. *See* ROA.944 (explaining that Dr. Kessner's warning was

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[11] Gardner also suggests that the state court deliberately excluded Dr. Allen's lack-of-information statement because it would have contradicted its conclusion that the mitigation investigation was inadequate. Pet. Cert. 22. But this is misleading, as it omits the context of Dr. Allen's statement. Dr. Allen determined that she could not testify because, after hearing the abuse perpetrated by Gardner on one of his step-daughters, she determined that she lacked truthful information. *See* 2.SHCR.345. It follows that Gardner was not truthful, not that the mitigation investigation was inadequate. *See* ROA.944.

"too vague to serve as notice to counsel that they missed certain avenues of investigation."). They do not undermine the state court's conclusions that trial counsel retained mental health professionals and investigators, or that counsel and the investigators traveled to Mississippi where they investigated all possible avenues of mitigation. 2.SHCR.393. Nor do they undermine the state court's finding that trial counsel's investigation uncovered much of the same information that postconviction counsel's investigation uncovered. 2.SHCR.394. The state court's rejection of Gardner's allegations of trial counsel's deficient investigation was based on what trial counsel did and the evidence they uncovered. Pet. Cert. 23. Such an approach is consistent with this Court's precedent and is not rendered debatable because a mental health professional believes the investigation could have been better.

b. The state court's prejudice conclusion was not objectively unreasonable, and reasonable jurists would not debate this point.

The state court's rejection of Gardner's deficient-investigation claim was also based on his failure to demonstrate prejudice. 2.SHCR.394–95. Gardner does not appear to debate the state court's prejudice findings on this claim, *see* 2.SHCR 395–98, which renders his (d)(1) and (d)(2) challenges futile—undebatably so. *See Strickland*, 466 U.S. at 697.

2. The Fifth Circuit correctly found undebatable the district court's denial of relief on Gardner's abandonment-rage claims.

Gardner complains about two of the state court's forty-four findings relevant to its rejection of his abandonment-rage claims. *See* 2.SHCR.352. Specifically, he challenges the state court's findings that the proposed abandonment-rage theory was

not consistent with the evidence and that counsel's pursuit of separate strategies at the guilt-innocence and punishment phases were inconsistent. He argues that both are based on an unreasonable determination of facts and rebutted by clear and convincing evidence. Pet. Cert. 24–29. He supports his argument with Dr. Kessner's opinion and the National Legal Aid and Defender Association (NLADA) Guidelines, neither of which directly confront the complained-of findings. The state court's findings Gardner challenges are not dispositive to its denial of relief. A more traditional analysis—considering the findings that sustain the denial—is helpful.

a. The state court's deficiency conclusion was not objectively unreasonable, and reasonable jurists would not debate this point.

Gardner asserted in state habeas proceedings that trial counsel were ineffective because they did not pursue an abandonment-rage theory in the guilt-innocence and punishment phases of trial. The supposedly deficient background investigation was the causal link to Dr. Kessner's "discovery" of abandonment rage. 1.SHCR.55. But because trial counsel were not deficient in their investigation of Gardner's background, and the state court finding confirming this fact is objectively reasonable, the link is broken. There is no longer a "but for" to reach abandonment rage. *Strickland*, 466 U.S. at 694. Thus, Gardner cannot show that trial counsel were deficient for not discovering or advancing abandonment rage at any stage of trial.

The causal link is also broken because trial counsel hired multiple mental-health experts, provided them with the results of a professionally competent background investigation and none of them identified abandonment rage as a

possible issue.[12] "Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (quoting *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002)). It was not objectively unreasonable, nor is it debatable amongst reasonable jurists, that the state court did not fault trial counsel for not discovering abandonment rage, a condition not even Gardner's experts identified.

In denying COA, the Fifth Circuit properly considered the state court's findings that the mitigation investigation was adequate and that none of the experts identified abandonment rage. *Gardner*, 779 F. App'x at 190. While these findings alone could sustain the state court's denial of relief, Gardner does not rebut them. Instead, he challenges a different, nondispositive state court finding—that trial counsel's pursuit of different strategies during guilt-innocence and punishment were not inconsistent. But he fails in that challenge too, as his evidence is not clear or convincing, nor does it rebut the relevant finding.

During the guilt-innocence phase of trial, counsel sought to challenge the aggravating elements that elevated the crime to capital murder—burglary and

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[12] Presumably, Gardner will reply that Dr. Kessner warned trial counsel "that there were important corroborating witnesses who were not being located and interviewed for mitigation." Br.Supp.COA.22. But as the district court noted, this warning "was too vague to serve as notice to counsel that they had missed certain avenues of investigation." ROA.944. And, more importantly, it undermines Dr. Kessner's assertion that a more fulsome background investigation would have led her to uncover abandonment rage. In other words, if Dr. Kessner raised an alarm only for "*corroborating* witnesses," then that means she had all the underlying substance necessary to render an opinion. Yet, she did not identify abandonment rage, and this too undermines any causal link between trial counsel's supposedly deficient background investigation and abandonment rage.

retaliation. 2.SHCR.390. During punishment, trial counsel's strategy was to challenge the State's claim of future dangerousness and humanize Gardner for mitigation. *Id*. The state court found that both were reasoned decisions and not inconsistent. *Id*. While Gardner does not directly say what rebuts the court's finding, he seems to imply that the NLADA's guidelines do. He asserts that "[h]aving an effective theory of the case is a national standard of practice when representing persons accused of capital crimes." Pet. Cert. 26. But that is like saying having a "winning" strategy is a national standard of practice. Attorney performance is not judged on the result of the trial—in order to raise an ineffective-assistance claim, counsel has necessarily lost. *Cf. Strickland*, 466 U.S. at 689. The NLADA's guidelines say nothing about trial counsel's strategy in this case. In any event, because Gardner's trial-level mental health experts did not identify abandonment rage, and because such a theory would have been a losing strategy at guilt-innocence and punishment, trial counsel were not required to adopt it for the sake of consistency. *See Martinez v. Quarterman*, 481 F.3d 249, 256 (5th Cir. 2007) ("[T]here is certainly no formal rule against switching theories between punishment and guilt/innocence phases of trial."). There is no debatablity here.[13]

[13] Gardner takes issue with calling abandonment rage "novel," because it was identified "at least as early as 1999." Pet. Cert. 25, 29. Setting aside whether citation to two articles for a theory that was maybe seven years old at the time of Gardner's trial and for which Gardner provides no Diagnostic and Statistical Manual for Mental Disorders reference renders something well-established, it matters not because Gardner's mental-health experts did not identify it, so he cannot fault counsel for not identifying it. This is not debatable.

b. The state court's prejudice conclusion was not objectively unreasonable, and reasonable jurists would not debate this point.

Even if trial counsel should have discovered the Reeveses, Lillis, and Stone, and even if this would have led to the discovery of abandonment rage, Gardner still failed to show prejudice in state court. Undebatably so.

i. Prejudice in relation to the guilt-innocence phase

The question of prejudice in relation to abandonment rage is easily answered. Had the theory of abandonment rage been presented at guilt-innocence, it would have permitted the prosecution to introduce its punishment case in rebuttal. 2.SHCR.387. As described above, the State's punishment case was overwhelming. *See supra* Statement of the Case I.A. Gardner cannot show prejudice where his proposed defensive tack would have devastated his guilt-innocence case. *See Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam).

Further, abandonment rage was not a good fit, factually, for Gardner. 2.SHCR.388. For example, Gardner killed Rhoda because she would *not* leave him, and he harmed Westmoreland *during* their relationship. 2.SHCR.388. He also harmed one of his stepdaughters without provocation, 22.RR.43–47, 71–73; 26.RR.SX.69, and sexually abused another, 22.RR.124–27. Thus, even if abandonment rage had been presented, Gardner did not show that it was reasonably probable the jury would have accepted that he suffered from it, much less show that it would have provided a basis for finding him not guilty or guilty of a lesser offense.

To rebut the state court's finding—that the abandonment-rage theory was inconsistent with the evidence of Gardner's history of abuse—Gardner calls Dr. Kessner's theory clear and convincing evidence. He explains, Dr. Kessner "attested that [the] abandonment rage theory embraced all the periods of violence, including acts of abuse toward children of a spouse." Pet. Cert. 24. It is true that Dr. Kessner said that Gardner "uses violence to manage his relationships," 1.SHCR.112, but she never talked about why violence towards his stepdaughters had anything to do with *abandonment* rage, she never talked about violence towards Jessie at all, and she never addressed the Reeveses' description of him as irrationally angry. Rather, Dr. Kessner's affidavit focuses mostly on the relationship between Tammy and Gardner, not reconciling seemingly random violence into a coherent narrative. *See id.* at 115–18. No reasonable jurist would debate that Gardner exhibited violent behavior unconnected to a romantic relationship or abandonment.

Even if the jury accepted that Gardner suffered from abandonment rage, it would not have necessarily negated the retaliation manner and means. 2.SHCR.388. Retaliation occurs when a person "intentionally or knowingly harms or threatens to harm another by an unlawful act . . . in retaliation for or on account of the service or status of another as a . . . prospective witness." Tex. Penal Code § 36.06(a)(1)(A). Here, Gardner clearly intended to harm Tammy via an unlawful act—he shot her in the head with a .44 magnum handgun. And there was evidence that Gardner harmed Tammy not because of the breakup (abandonment), but because of the upcoming divorce (wherein Tammy was necessarily a prospective witness). Indeed, Gardner

was not angry when Tammy ended the relationship, 19.RR.266, but became agitated *after* Tammy filed for divorce, 19.RR.206. Thus, Gardner failed to demonstrate a reasonable probability of a different result concerning retaliation.

Additionally, even though abandonment rage conceivably negates retaliation, it has no relevance to the alternative manner and means of burglary. 2.SHCR.389. A person commits burglary "if, without the effective consent of the owner, a person . . . enters a building or habitation and commits or attempts to commit a felony, theft, or an assault." Tex. Penal Code § 30.02(a)(3). There is no doubt that Gardner entered Tammy's home with the intent to murder her—he "borrowed" his brother-in-law's pickup truck, stole a .44 magnum handgun, and drove straight to Tammy' house from Mississippi with both—and there was "ample circumstantial evidence that Tammy did not consent to [Gardner's] middle-of-the-night entry." *Gardner*, 306 S.W.3d at 287. In fact, uncontrollable rage triggered by abandonment makes it *more* likely Gardner entered Tammy's home without her effective consent and for the purpose of harming her. As to guilt-innocence, the state court's finding of no prejudice is objectively reasonable. Reasonable jurists would not debate that.

ii. Prejudice in relation to the punishment phase

As to prejudice at punishment, the answer is even simpler. The state court found that Gardner failed to demonstrate that he was prejudiced by counsel's failure to present evidence of abandonment rage because the theory was inconsistent with his history of violence and would have shown that he was a future danger. 2.SHCR.392. While the theory may have offered a reason for Gardner's violent rage, it also would have undercut his argument on the future dangerousness issue. *See,*

e.g., *Rayford v. Stephens*, 622 F. App'x 315, 337 (5th Cir. 2015); *Martinez*, 481 F.3d at 254–55 (finding that temporal lobe epilepsy—described as "a mental disorder . . . [which] caused 'savage and uncontrolled' aggressiveness"—"embodies the type of 'double-edged' evidence which this circuit has repeatedly stated that counsel may elect not to present").

As to the five witnesses trial counsel should have supposedly discovered, they, for the most part, do more harm than good too. Had Gardner brought out that his second wife Rhoda was manipulative, 1.SHCR.189–90, 195 (Sylvia and Donald), this blame-the-victim testimony would have gone poorly, *see, e.g.*, *United States v. King*, 604 F.3d 125, 142 (3d Cir. 2010) (describing a defendant's attempt to blame the victim as disturbing). The same would be true for specific instances of violence, such as the shooting of Rhoda, 1.SHCR.190 (Sylvia), abusing Westmoreland and her daughter Becky, 1.SHCR.191 (Sylvia), and threatening to kill Randy, 1.SHCR.198–99 (Randy), along with Gardner's impulse control and anger problems, 1.SHCR.191–92, 195 (Sylvia and Donald). *See, e.g.*, *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (evidence of good behavior "unlikely to have had a significant mitigating effect" because it would have exposed defendant's prior arson conviction, and arson was one of the manner and means of capital punishment alleged). And Gardner's obsession with sex and repeated infidelities, 1.SHCR.213 (Stone), would not have been of assistance either, *see Bell v. Kelly*, 260 F. App'x 599, 606 (4th Cir. 2008) (affirming denial of federal habeas relief because, in part, the un-presented evidence would have "allowed the prosecution to emphasize multiple instances of Bell's infidelity"); *cf.*

Rompilla, 545 U.S. at 392 (evidence that Rompilla's father bragged about cheating on his wife was mitigating).

The arguably favorable information offered by the five affiants does not counterbalance the negative. The Reeveses initially found Gardner likeable (which changed after he abused Westmoreland and Becky), 1.SHCR.189, 195, 198; Rhoda was manipulative and played games with Gardner (which cannot compare to the pain and suffering Rhoda endured after Gardner shot and paralyzed her causing her to miscarry), 1.SHCR.189–91, 195; Gardner might have been on codeine when he shot Rhoda (which is sheer speculation), 1.SHCR.190; Gardner expressed remorse over shooting Rhoda (which is undermined by his bragging of killing Rhoda to Becky), 1.SHCR.190, 195; Lillis overheard an instance of corporal punishment inflicted on Gardner by his father (which is cumulative of Elaine's abuse testimony at trial), 1.SHCR.202; Gardner was friendly with Stone in the Army (which is undermined by the fact he was *too* friendly with his colleagues' wives), 1.SHCR.213–14; and Gardner's violence in relationships is explained by abandonment rage, which has a biological component (and which proves that he will be permanently violent), 1.SHCR.112–18. This, compared with the overwhelming punishment case presented by the State, *see supra* Statement of the Case I.A, yields no possibility for prejudice, no objectively unreasonable decision, and no room for debate amongst reasonable jurists. Accordingly, the Fifth Circuit was correct to deny COA.

Overlooking the substantial evidence supporting the state court's rejection of his claim—and the Fifth Circuit's denial of COA—Gardner attempts to obtain relief

by nit picking. He asserts that the Fifth Circuit's reference to the double-edged nature of abandonment rage contravenes *Wilson* because the state court did not find that the theory was double-edged. Pet. Cert. 29. But in fact, it did. Responding to Gardner's assertion that abandonment rage would have been mitigating, the state court found:

> In the punishment phase, . . . [the abandonment rage theory] would have reinforced the jury's conclusion that [Gardner] was a future danger because it showed he was highly controlling and would be a danger in any future relationship where he did not feel in control.
>
> . . .
>
> The abandonment rage theory would have reinforced the State's theory that [Gardner] murdered Tammy because he "lost that control" and emphasized his violent nature.

2.SHCR.392. True, the state court was not convinced that the theory would have been mitigating. And true, the state court did use the term "double-edged." Even so, it is difficult to imagine a better way to characterize the above findings. There is nothing in *Wilson* that suggests that federal courts are prohibited from synthesizing state court findings or using terms the state court did not use.

Gardner also asserts that finding mitigating evidence double-edged is no longer consistent with this Court's precedent. But he is incorrect again. Pet. Cert. 29–30; *Pinholster*, 563 U.S. at 201 (recognizing that "substance abuse, mental illness, and criminal problems . . . [are] also by no means clearly mitigating, as the jury might have concluded that Pinhoster was simply beyond rehabilitation"); *see also id.* (summarizing a part of *Atkins v. Virginia*, 536 U.S. 304 (2002) as "recognizing that mitigating evidence can be a 'two-edged sword' that juries might find to show future dangerousness"). And Gardner's argument that evidence relevant to future

dangerousness is not relevant to mitigation, Pet. Cert. 30, is not logical, Tex. Code Crim. Proc. art. 37.071(e)(1) (a juror must find the mitigating evidence is "sufficient" to warrant a sentence other than death), supported by state law, *Mosley v. State*, 983 S.W.2d 249, 263 n.18 (Tex. Crim. App. 1998) ("Such an observation does not, however, preclude *permitting* the jury to consider aggravating factors in making its evaluation."), or supported by federal law, *Freeney v. Davis*, 724 F. App'x 303, 313–14 (5th Cir. 2018). This is not debatable either. The Fifth Circuit's denial of COA was proper, and there is no basis for revisiting that decision.

CONCLUSION

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

Respectfully submitted,

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