

No. 21-511

IN THE
Supreme Court of the United States

TIM SHOOP, WARDEN,

Petitioner,

v.

RAYMOND TWYFORD,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF OF THE AMERICAN BAR
ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

The American Bar Association is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its members come from all fifty states and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys from law firms, corporations, non-profit organizations, and governmental agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields. The ABA's mission is, in part, to serve the public and the legal profession by advocating for the ethical and effective representation of all clients.²

The ABA's rules of professional conduct include guidelines and standards for the representation of clients in the criminal justice system generally, and for the uniquely high-stakes context of capital litigation specifically. The ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death

¹ All parties to this matter have provided written consent for this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

² Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

Penalty Cases (“ABA Death Penalty Guidelines”)³ describe the baseline for effective representation at every stage of a capital case. They have been widely adopted by state and local bar associations and indigent defense organizations, and by court rule in many death penalty jurisdictions. The ABA Standards for Criminal Justice (“ABA Criminal Justice Standards”)⁴ also provide guidance on professional conduct based on the consensus views of a broad array of criminal justice professionals.

The ABA is committed to ensuring that all clients, including capital habeas petitioners, receive meaningful legal representation. For more than thirty years, the ABA Death Penalty Representation Project has worked to improve the quality and availability of counsel in death penalty cases by recruiting counsel from law firms to represent capital clients. ABA-recruited counsel have represented nearly 400 individuals in capital cases, most of them in the post-conviction context.

The ABA submits this brief as *amicus curiae* in support of respondent on the second question presented: whether a court, before authorizing a habeas

³ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003).

⁴ ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992). The ABA published a revised edition of these standards in 2015; the earlier guidelines cited here correspond to the professional standards applicable to respondent’s federal habeas counsel in pursuing respondent’s application under 18 U.S.C. § 2254.

petitioner to develop new evidence, must determine that the evidence may be considered by a habeas court and that it could aid the petitioner in obtaining habeas relief. The ABA respectfully submits that investigations by counsel should not be restricted based on a premature assessment of what facts the investigations may uncover and what claims those facts will support.

A thorough investigation is indispensable to the effective representation of a client accused or convicted of a capital crime. The ABA Death Penalty Guidelines are based on the experiences of practitioners and ABA members in capital cases, and those experiences have shown that inadequate investigations are a recurring cause of ineffective representation. Defective investigations lead to wrongful convictions and death sentences, and they impair a capital litigant's ability to preserve and advance valid claims for habeas relief.

While the ABA takes no position on the death penalty itself, the ABA urges the Court to ensure that counsel for indigent capital prisoners in federal habeas corpus proceedings—a critical and highly complex stage of litigation—are able to discharge their professional responsibilities to their clients. Counsel must investigate *before* developing claims and *before* determining the legal arguments that will secure relief in a habeas court. The Court should reject a rule that would limit counsel's ability to conduct a proper investigation in federal habeas cases and provide proper representation to federal habeas clients.

SUMMARY OF ARGUMENT

Well-established standards of professional conduct require capital defense counsel to conduct an independent and adequate investigation at each stage of the case. Counsel must explore potential claims and defenses, and must do so *before* forming a strategy about how to present them. A proper investigation is especially important in federal habeas proceedings involving the contention that prior counsel's investigation fell short, placing habeas counsel in the position of not knowing what prior counsel's deficient investigation failed to find.

On the second question presented, the State urges a rule that would require a habeas court, before approving an investigation, to prematurely evaluate the claims that the investigation would develop and its own ability to consider the supporting evidence. Such a rule is incompatible with counsel's duty of investigation as reflected in the ABA Death Penalty Guidelines. It also disregards decades of experience—borne out by capital cases considered by this Court or taken on by ABA-recruited counsel—showing that a thorough investigation may establish the merit and procedural viability of a habeas claim in ways that could not have been foreseen before the investigation commenced. Courts can and should assess the potential relevance of specialized services to aid an investigation, but because the facts and legal theories that will carry a claim may not be apparent in advance, the proper inquiry when a petitioner seeks access to specialized services is whether those services *may* reasonably lead to facts pertinent to obtaining habeas relief.

In particular, a court cannot predetermine that evidence discovered by an investigation will be beyond the consideration of a federal habeas court under this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Pinholster* constrains the evidence a federal habeas court may consider when reviewing a claim the state court adjudicated on the merits—but claims surfaced by federal habeas counsel's investigation may *not* have been adjudicated in state court, because trial and state habeas counsel did not assert them, having failed to conduct an adequate investigation of their own. Such claims may be considered by a federal court if the procedural default of the claim is excused under this Court's precedents, but *the investigation itself* may be necessary to establish that the prior deficiencies of counsel justify a federal court's consideration of a claim.

This Court recognized in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), the importance of investigating claims before deciding them. In *Ayestas*, the Court unanimously confirmed that 18 U.S.C. § 3599 provides indigent capital litigants with reasonably necessary services to ensure that they have an opportunity to challenge judgments tainted by constitutional error. But the Court further confirmed that a habeas petitioner cannot be required to show, before obtaining funding for services under § 3599, that the services will allow him to prevail on the merits of a claim; the services themselves are indispensable to determining what viable claims exist in the first place. *See id.* at 1094. A court can determine whether to award habeas relief only by evaluating fully developed claims, and a thorough investigation ultimately

aids the habeas process itself, by ensuring that courts sitting in federal habeas jurisdiction decide claims—not theories—which have been properly developed and presented by counsel.

Counsel have a duty to follow a reasonable investigation wherever it leads, even when its outcomes could not have been predicted in advance. The Court should recognize that counsel must be able conduct an adequate investigation before establishing the merit and procedural viability of the claims it reveals.

ARGUMENT

The ABA urges the Court to reject a rule in which federal habeas courts must predict the outcome of an investigation before authorizing it. Pet. Br. 16. Counsel is obliged to conduct adequate investigations at each stage of the case, and the evidence that will emerge is never foreordained. The facts discovered through a reasonable investigation will inform counsel’s ascertainment of available claims, but they may also establish the procedural viability of a claim, particularly in federal habeas proceedings in which no sufficient investigation has been performed by prior counsel (who may also be unavailable or uncooperative). Requiring a court to predetermine whether an investigation will lead to evidence that can be considered in awarding habeas relief would preclude necessary investigations: before the fact, counsel will not yet have had the opportunity to develop the evidence needed to show that a claim has potential merit, and that its default may be excused by the deficiency of prior counsel or on other narrow grounds as permitted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

As this Court unanimously recognized in *Ayestas*, 138 S. Ct. 1080, a habeas petitioner cannot be asked to prove a point before being able to develop the evidence necessary to do so. Counsel must make informed strategic decisions based on all available facts, and must be able to investigate the basis for potential claims *before* deciding whether and how to present them. Petitioner’s proposed approach would contravene well-established professional norms, and it would also preclude the habeas court’s consideration of meritorious claims—prisoners generally cannot introduce new evidence in federal habeas proceedings without investigating the facts that would show they can clear the high bar to doing so. The ABA respectfully urges the Court to reaffirm that habeas petitioners may reasonably investigate new evidence without first demonstrating that the evidence they seek to develop will support habeas relief.

I. THE COURT SHOULD NOT ADOPT A RULE THAT WOULD CURTAIL THE ABILITY TO FULFILL COUNSEL’S DUTY TO INVESTIGATE

This Court has repeatedly recognized the indispensable role of counsel in our adversary system. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012); *see Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Powell v. Alabama*, 287 U.S. 45, 68 (1932). Counsel serve as the gateway by which individuals vindicate all other rights. Counsel to capital litigants are bound by the professional duty to provide effective representation.

Investigation is a critical part of that duty. Criminal defense counsel are obliged to conduct a prompt

investigation of the circumstances of the case and “explore appropriate avenues that reasonably lead to” relevant facts. ABA Criminal Justice Standard 4-4.1. For litigants to have “an adequate opportunity to present their claims fairly within the adversary system,” they must have “access to the raw materials integral to the building of an effective defense.” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (internal quotations omitted). Indeed, the services required to access those raw materials (for example, experts, investigators, and other specialists) “are necessities, not luxuries.” *Gideon*, 372 U.S. at 344. The professional requirement of conducting a thorough investigation extends to *all* stages of a representation, because an investigation is essential to protect the constitutional rights of prisoners that may have been violated at trial or on appeal. *See Martinez*, 566 U.S. at 8-10; ABA Death Penalty Guideline 10.7(A).

Counsel cannot marshal evidence in support of habeas claims without first investigating, developing, and understanding the circumstances surrounding their clients’ cases. *See, e.g., id.* 10.15.1(C) (habeas counsel “should seek to litigate all issues, whether or not previously presented, that are arguably meritorious”). This Court has emphasized that “[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.” *McFarland v. Scott*, 512 U.S. 849, 855 (1994); *McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (federal habeas counsel “must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief”).

The obligation to conduct a thorough investigation is at its zenith when habeas counsel argue that prior counsel were ineffective for failure to adequately investigate and present claims. *Martinez*, 566 U.S. at 11 (ineffective-assistance claims “often require investigative work”). The “inherent nature” of this sort of ineffective-assistance claim is that there is a reasonable probability that things would have turned out differently had prior counsel properly developed the client’s defense. *Trevino v. Thaler*, 569 U.S. 413, 424 (2013) (internal quotations omitted); see *Strickland v. Washington*, 466 U.S. 668, 693 (1984). Making that showing inevitably requires habeas counsel to investigate and develop facts outside the trial record or prior counsel’s files. See *Martinez*, 566 U.S. at 13 (“[i]neffective-assistance claims often depend on evidence outside the trial record”); *Trevino*, 569 U.S. at 424 (“the trial court record will often fail to contain the information necessary to substantiate the claim” (internal quotations omitted)). Habeas counsel must undertake the adequate investigation that was not performed before.

The ABA Death Penalty Guidelines detail counsel’s duty to investigate. *Infra* at 12. Those Guidelines draw upon decades of shared experience by criminal justice system experts, including capital defense practitioners, academics, and judges. The principles announced in the Guidelines “are not aspirational.” ABA Death Penalty Guideline 1.1, History of Guideline. Rather, they “embody the current consensus about what is required to provide effective defense representation in capital cases,” *id.*, and “apply from the moment the client is taken into custody” through

“all stages of every case,” *id.* Guideline 1.1(B). Inclusion of a standard in the Guidelines reflects the judgment of these experts that certain aspects of representation are necessary to protect the client’s constitutional rights. The current consensus is that effective representation in capital cases requires counsel to thoroughly investigate the claims available to a client. *Infra* at 12.

The Court should be wary of requiring federal habeas courts to constrict investigations in ways that conflict with the professional obligations of the attorneys appearing before them. To understand the critical function served by such counsel’s investigation, this Court has looked to the prevailing norms of practice memorialized in ABA professional guidelines and standards. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (relying on “the standards for capital defense work articulated by the American Bar Association” in finding unreasonable counsel’s decision not to retain a forensic social worker to support mitigation investigation); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (relying on ABA Standards for Criminal Justice in finding that counsel failed “to conduct a thorough investigation of the defendant’s background,” including by overlooking juvenile, school, and prison records that contained mitigation evidence); *Strickland*, 466 U.S. at 688 (looking to “[p]revailing norms of practice as reflected in American Bar Association standards” as “guides to determining what is reasonable”); *see also Bemore v. Chappell*, 788 F.3d 1151, 1163 (9th Cir. 2015) (finding that counsel, by failing to interview witnesses and otherwise conduct a thor-

ough “investigation of defenses,” fell short of “prevailing professional norms, as outlined by the ABA Standards” (quotation omitted). A rule curtailing the investigation that counsel are duty-bound to provide would impair counsel’s ability to comply with their professional obligations, and would conflict with this Court’s historical respect for those obligations.⁵

II. HABEAS COUNSEL MUST CONDUCT AN INVESTIGATION *BEFORE* DETERMINING WHICH CLAIMS TO RAISE, AND HOW

An independent and adequate investigation enables counsel to identify and develop possible claims and form a strategy for presenting them to the court. Providing counsel with the investigative services afforded by federal law thus ultimately aids the court’s ability to exercise habeas jurisdiction over meritorious claims. Requiring a petitioner to establish how an investigation will prove useful before it occurs would frustrate the very purpose of that investigation: to identify claims and develop evidence that will show the claims’ merit and viability.

Investigations can reveal unexpected evidence, which may give rise to previously unrecognized claims for relief or help overcome threshold procedural hurdles. But even if a court assumes an investigation will reveal only the hoped-for evidence, no

⁵ While the proper interpretation of the All Writs Act pursuant to the first question presented is beyond the ambit of this brief, it is important to be mindful of the potential for conflict with counsel’s professional responsibilities there, too: the Act should not be interpreted to prevent investigations necessary to the fulfillment of counsel’s duties.

claim can be prejudged without an actual evidentiary record, nor should counsel be forced to make premature strategic decisions contrary to their duty to investigate first. The cart should not be placed in front of the horse. The Court should continue to recognize the practical reality that investigations must precede the presentation and decision of claims, and permit habeas courts to authorize investigations that counsel would reasonably pursue.

A. A claim’s prospects cannot be determined before counsel conduct a proper investigation.

Investigation in accordance with prevailing professional norms lays the groundwork for counsel’s decisions at all other junctures of the case. *See Wiggins*, 539 U.S. at 523; ABA Death Penalty Guideline 10.8(A)(2) (“Counsel at every stage of the case ... should ... thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted”). Counsel can make “informed legal choices,” including advising a client, only “after investigation” of the “facts, circumstances, pleadings, and law involved” in a client’s case. *Strickland*, 466 U.S. at 680. Without first understanding the background and circumstances of a client’s case, counsel cannot know whether there are viable claims or responsibly advise a client. *See* ABA Death Penalty Guideline 10.7, cmt. at 1021 (“[c]ounsel cannot responsibly advise a client about the merits of different courses of action” and “the client cannot make informed decisions” unless counsel first conducts “a thorough investigation”).

1. *Investigation aided by specialized services can allow counsel to identify and develop the merits of a litigant's claims.*

The comments to the ABA Guidelines caution that “inadequate investigation by defense attorneys ... ha[s] contributed to wrongful convictions in both capital and non-capital cases.” *Id.* Comments to Guideline 10.7, at 1017. The trial record is therefore “unlikely to provide either a complete or accurate picture of the facts and issues in the case.” *Id.* Comments to Guideline 10.15.1, at 1086. Post-conviction counsel’s independent investigation serves as “quality control” or a “safety net” that “allow[s] the system to catch its mistakes.” Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521, 522 (2005). The capital context only amplifies the importance of this quality control function. ABA Death Penalty Guideline 10.7, cmt. at 1016 (counsel’s “duty to investigate the case thoroughly ... is intensified (as are many duties) by the unique nature of the death penalty”).

An investigation by counsel is necessary to identify and develop claims and arguments not apparent in the existing record. As this Court has explained, “[c]laims of ineffective assistance at trial often require investigative work and an understanding of trial strategy.” *Martinez*, 566 U.S. at 11. The “inherent nature of most ineffective assistance of trial counsel claims means that the trial court record will often fail to contain the information necessary to substantiate

the claim.” *Trevino*, 569 U.S. at 424 (quotation marks and alteration omitted).

Counsel may require specialized services—such as investigators, mitigation specialists, and mental health experts—to conduct an adequate investigation. *McFarland*, 512 U.S. at 855 (the “services of investigators and other experts” are especially “critical” in the initial stages of a habeas proceeding, “when possible claims and their factual bases are researched and identified”); see ABA Death Penalty Guideline 4.1, cmt. at 955 (“National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate supporting services.” (quotation marks omitted)). The need for access to specialized services, such as experts, is “particularly acute in death penalty cases.” *Id.*

The Guidelines recognize that counsel in capital cases will often require the assistance of “mental health experts” who can assess “[n]eurological and psychiatric impairment,” as well as any “history of physical and sexual abuse” that may be relevant to building a defense. *Id.* Guideline 4.1, cmt. at 956; see *id.* Guideline 10.11(F)(2) (experts may “provide medical, psychological, sociological, cultural or other insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability”).

Investigators are often “indispensable to discovering and developing the facts that must be unearthed ... in post-conviction proceedings,” both because of their unique experiences and skills and because of counsel’s many other obligations to fulfill. *Id.*

Guideline 4.1, cmt. at 958. Mitigation specialists similarly “possess clinical and information-gathering skills and training that most lawyers simply do not have,” and these specialists have the time and ability to gather and incorporate what may be critical information for the defense case. *Id.* at 959. “The circumstances of a particular case will often require specialized research and expert consultation as well,” *id.* Guideline 10.7, cmt. at 1026, such as the medical imaging the petitioner sought here.

“In particular,” because so many of those convicted of capital crimes suffer from mental impairments and experienced severely traumatic backgrounds, “mental health experts are essential to defending capital cases.” *Id.* Guideline 4.1, cmt. at 956. “Evidence concerning the defendant’s mental status is relevant to numerous issues that arise at various junctures during [capital] proceedings,” and “the defendant’s psychological and social history and his emotional and mental health are often of vital importance to the jury’s decision at the punishment phase.” *Id.*; *see, e.g., Porter v. McCollum*, 558 U.S. 30, 40 (2009) (reversing denial of habeas relief where counsel “failed to uncover and present” evidence of the defendant’s “mental health or mental impairment,” among other things). Empirical research confirms that mental health evidence, if documented and presented well, frequently “is considered by jurors to be highly mitigating.” John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1039 (2008). Access to specialized experts and evaluations is often essential for

counsel to effectively develop and present evidence of mental impairment. *See* ABA Death Penalty Guideline 4.1, cmt. at 956; *id.* Guideline 10.4, cmt. at 1004. Conversely, limiting access to investigative resources impedes counsel’s ability “to conduct the necessary and thorough investigation of both guilt and penalty phase issues required at every stage of a capital case.” Emily M. Olson-Gault, Testimony, *Birmingham, Alabama Hearing Before the Judicial Conference of the United States Committee to Review the Criminal Justice Act Program*, 3 (Feb. 18, 2016) (footnote omitted).

To the extent that specialized services are needed to conduct a proper investigation, counsel must have access to those services before determining the merits of particular claims. As this Court has recognized, federal habeas counsel’s investigation may turn up evidence supporting a claim outside the trial and state habeas record. In *Trevino*, for example, trial counsel did not adequately investigate mitigation evidence and called only the client’s aunt as a witness. 569 U.S. at 419. Federal habeas counsel investigated more thoroughly and discovered evidence trial counsel had missed, including medical evidence of their client’s head injuries and mental impairments. *Id.* This extensive mitigation evidence that prior counsel had failed to look for could be identified only *through* the thorough investigation of habeas counsel—not before it.

The decisions of lower courts confirm that habeas counsel’s investigation is critical to the development of potential claims. In *Gallegos v. Shinn*, No. 01-cv-01909, 2020 WL 7230698 (D. Ariz. Dec. 8, 2020), for instance, trial counsel presented only “[l]ay evidence”

of the defendant’s “learning disability” and “history of substance abuse,” and the defendant was sentenced to death. *Id.* at *22. Federal habeas counsel investigated much more thoroughly and obtained testimony from not only lay witnesses but also experts in psychology and psychiatry. *See id.* at *7-18. These experts offered “evidence about the brain-based nature” of the petitioner’s disabilities that helped “to explain the ramifications of those experiences,” and testing produced “evidence of organic brain damage” that trial counsel had overlooked. *Id.* at *24-25 (quotation omitted). The federal habeas court found that trial counsel had rendered ineffective assistance by failing to investigate and develop this “particularly compelling mitigation evidence,” which might have swayed a jury, and the court granted relief, vacating the death sentence. *Id.* at *26-28.

Ineffective assistance claims illustrate why a court cannot prejudge the need for specialized services, but they are far from the only example of claims such services may uncover that are not immediately apparent from the record. Consider *Williams v. Taylor*, 529 U.S. 420 (2000). There, state habeas counsel unsuccessfully sought funding for an investigator to examine possible jury misconduct. *Id.* at 442. Federal habeas counsel, however, successfully retained an investigator, who discovered that a juror had been married to and raised four children with the prosecution’s lead witness. *See id.* at 441, 443. This Court held that AEDPA did not bar the introduction of that evidence because the habeas petitioner had demonstrated diligence and thus not “failed to develop” the evidentiary record under 28 U.S.C. § 2254(e)(2). *Id.*

at 444. Before federal habeas counsel retained the investigator, no court could have predicted whether this evidence would emerge, or whether it—unlike other evidence that emerged in federal habeas proceedings, *see id.* at 437-40—would be admissible.

The experiences of attorneys representing capital petitioners through the ABA Death Penalty Representation Project further underscore the importance of investigations to identifying and developing claims:

- Joe Lee Guy: Mr. Guy was just four months away from his scheduled execution date when new attorneys took over his case. *See Guy v. Dretke*, No. CIV.A 5:00-CV-191-C, 2004 WL 1462196, at *1 (N.D. Tex. June 29, 2004). With fresh eyes, they undertook a renewed investigation that turned up significant mitigation evidence that was not previously in the record: Mr. Guy (i) had an IQ of 77, (ii) suffered traumatic childhood abuse at the hands of his mother, (iii) was abandoned as a child by both parents, and (iv) had an alcoholic father who was murdered. *See Howard Witt, Death Row Inmate Wins Sympathy*, Chi. Trib., June 23, 2004. The investigation also revealed that Mr. Guy's prior counsel had befriended the victim's mother, coached her in her testimony against Mr. Guy, and became the sole beneficiary of her estate worth over \$500,000. *Guy*, 2004 WL 1462196, at *1. Based on habeas counsel's new investigation, a federal court granted Mr. Guy's ineffective-assistance claim and remanded for a new penalty-phase trial. *Id.* at *2. Mr. Guy's death sentence was vacated and he received a life sentence instead.

- Quintez Wren Hodges: Mr. Hodges was awaiting his execution date when new attorneys intervened on his behalf. See *Hodges v. Epps*, No. 1:07-cv-66-MPM, 2010 WL 3655851, at *38-39 (N.D. Miss. Sept. 13, 2010), *aff'd*, 648 F.3d 283 (5th Cir. 2011). They started investigating from scratch. That investigation turned up information that allowed them to make the following claims: (i) the prosecution knowingly presented false testimony during the sentencing phase of the trial, (ii) the jury was improperly instructed at sentencing, and (iii) Mr. Hodge's prior counsel suffered a mental breakdown and failed to conduct proper examination before the sentencing phase. *Id.* Based on that new information, a federal court vacated Mr. Hodge's death sentence.

In each of these cases, as in *Williams*, investigation allowed counsel to survey the landscape of the case and chart a strategic course for representation—not merely to plot a route to a known destination. The existing record did not show what leads Mr. Guy's prior counsel should have pursued and what evidence they would have discovered, or what trial evidence against Mr. Hodges was false and presented by the prosecution with knowledge of its falsity. The paths to relief in these cases did not reveal themselves from the start; counsel found them in the investigation, and only after identifying the possibilities could counsel decide which paths to clear.

2. *Investigation can also reveal the basis to overcome threshold obstacles to presenting merits claims for federal habeas relief.*

Investigation in accordance with prevailing professional norms is essential not only to developing the merits of a claim but also to overcoming the significant procedural hurdles that apply in federal habeas proceedings. Confronting these threshold challenges is a critical aspect of post-conviction counsel's duty to "seek to litigate all issues, whether or not previously presented, that are arguably meritorious." ABA Death Penalty Guideline 10.15.1(C); *see also* McConville, *supra*, at 580 (the "gravity of the penalty" demands "that capital postconviction counsel raise all nonfrivolous claims").

A claim's procedural viability often depends on highly fact-specific arguments about the evidence developed in an investigation. Accordingly, as this Court has recognized, access to specialized services may be as necessary for navigating these procedural challenges as for litigating a claim on the merits. *See Ayestas*, 138 S. Ct. at 1094 (noting that it "may be error for a district court to refuse funding" for these services, despite the district court's discretion in that inquiry, when "funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default").

When it comes to overcoming threshold procedural barriers, as with proving a claim, the critical facts necessary often are not apparent from the pre-investigation record. The investigation itself may reveal the path to clear potential obstacles to hearing

the claim. Thus, to evaluate requests for investigative and expert services courts properly ask whether the services *may* lead to facts pertinent to obtaining relief in the habeas proceeding—not whether the specialized services *will* produce evidence that would allow the petitioner to prove a particular claim on the merits. *Cf. id.* (“To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks.”).

As this Court recognized in *Martinez* and *Trevino*, and reiterated in *Ayestas*, showing that both trial counsel and state habeas counsel rendered ineffective assistance can excuse a procedural default that would otherwise bar federal habeas review of a claim. In *Trevino*, the federal habeas petitioner sought to raise an ineffective-assistance-of-trial-counsel claim based on the mitigation evidence trial counsel had failed to investigate, but because state habeas counsel had not raised any such claim, it appeared to be procedurally defaulted and ineligible for federal review. *See* 569 U.S. at 419-20. This Court, considering the evidence federal habeas counsel had unearthed, held that the petitioner was entitled to argue in federal court that state habeas counsel also had rendered ineffective assistance, and that making that showing would excuse state habeas counsel’s procedural default on the ineffective-assistance-of-trial-counsel claim. *See id.* at 429.

The *Martinez/Trevino* example also illustrates why courts cannot condition access to specialized services on a before-the-fact showing of how any evidence counsel uncovers would be admissible under AEDPA. *Cullen v. Pinholster*, 563 U.S. 170 (2011), limits the

evidence a federal habeas court may consider *only* when the state court “adjudicated the claim on the merits” and the federal court is reviewing its decision under 28 U.S.C. § 2254(d)(1). *Id.* at 181. But *Pinholster* does not bar the admission of new evidence when federal habeas courts review “claims that were not adjudicated on the merits in state court,” *id.* at 186, such as ineffective-assistance claims that *Martinez* and *Trevino* allow a federal habeas court to consider in the first instance. Nor does *Pinholster* bar review of new evidence to support a previously raised claim when “facts adduced at a federal evidentiary hearing have so enhanced or changed the factual context of” a claim brought in state court “that it has essentially become a different claim, whose merits were not adjudicated by any state court ruling.” Hertz & Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 32.3 (2021) (citing *Pinholster*, 563 U.S. at 185-86 & n.10). Simply put, an investigation may result in a viable claim outside the scope of Section 2254(d)(1) and the limitations on the consideration of new evidence described in *Pinholster*.⁶

Lower court cases illustrate the importance of investigations to establishing a viable procedural avenue for a claim. In *Gonzalez v. Wong*, 667 F.3d 965

⁶ The United States correctly recognizes that habeas petitioners may conduct discovery in support of their claims, but errs in suggesting that a court may predetermine a claim’s procedural viability simply by applying *Pinholster*. U.S. Br. 28-29. Not all investigative roads lead to claims asserted under Section 2254(d)(1), and thus a petitioner may establish good cause for an investigation even if its inherent purpose is to identify new evidence.

(9th Cir. 2011), for example, federal habeas counsel obtained records about a key witness’s mental state and credibility that the prosecution had unlawfully withheld. *Id.* at 972. The defendant in state habeas proceedings had raised a *Brady* claim based on the prosecution’s failure to turn over different evidence about the same witness, and the state courts had adjudicated that claim on the merits. *Id.* at 977-78. On federal habeas review, the Ninth Circuit reasoned that the new evidence did not so radically transform the original *Brady* claim as to make it a new claim, and that *Pinholster* thus prohibited the federal courts from considering the new evidence. *Id.* at 979. But the court, noting the petitioner’s lack of fault and the strength of the evidence, found it inappropriate to dismiss the claim, and instead remanded it to the district court with instructions to stay the proceedings and allow the petitioner to present the claim in state court. *Id.* at 979-80. This “stay and abey process” allowed the state court to consider the claim first, in keeping with the purposes of AEDPA, and safeguarded the petitioner’s “interest in obtaining federal review of his claim,” thereby serving the ends of the federal habeas process. *Id.* at 980 (quotation omitted).

The experience of ABA-recruited counsel similarly confirms that a claim’s procedural viability cannot be prejudged before an adequate investigation. In the case of DeMontrell Miller, for example, a team of pro bono attorneys commenced an investigation six years after Mr. Miller was sentenced to death. *See Miller v. Director*, No. 6:15-cv-535, 2018 WL 1148105 (E.D. Tex. Jan. 26), *R. & R. adopted*, 2018 WL 1144753 (E.D. Tex. Mar. 1, 2018). Counsel’s thorough

investigation uncovered “critically important new evidence” that prior counsel overlooked, including new evidence from the State’s own medical examiner that scientifically undermined the State’s theory of the case. *Id.* at *1-2. The resulting claim had not been exhausted in state court and thus counsel amended the petition and moved to stay and abate the federal proceedings. The habeas court granted the request, allowing Mr. Miller to present the newly discovered evidence to the state courts, and thereafter pursue federal review if necessary. *Id.* at *4. Mr. Miller’s habeas counsel could not have predicted, before their investigation, that they would discover evidence of a new claim, and that the circumstances of the case would provide good cause for staying the federal proceedings to permit the claim’s exhaustion in state court.

The ability of a habeas petitioner to advance claims based on new evidence is already severely constrained, and frequently dependent on the petitioner’s ability to establish as a matter of fact an excuse for the procedural default of such claims. An investigation is critical to *making* that showing in the first place. A standard that would foreclose the very investigation necessary to establishing a claim’s merit and viability because no sufficient showing of merit and viability has been made would be illogical and unjust.

B. Giving counsel access to reasonably necessary services aids courts’ exercise of habeas jurisdiction over fully developed claims.

Congress has extended resources to counsel for indigent capital litigants, and contemplated that

counsel would have access to those resources before their clients' claims were determined on the merits. In 18 U.S.C. § 3599, Congress authorized federal courts to provide counsel for indigent defendants in capital cases with funding for “investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant.” 18 U.S.C. § 3599(f). The statute affords federal habeas petitioners “enhanced rights of representation, in light of what it calls ‘the seriousness of the possible penalty and ... the unique and complex nature of the litigation.’” *Martel v. Clair*, 565 U.S. 648, 659 (2012) (quoting 18 U.S.C. § 3599(d)). In enacting § 3599, Congress recognized that the factual development of claims is necessary to ensure that federal habeas petitioners in capital cases have meaningful access to counsel, which in turn helps secure the proper functioning of the habeas proceeding. *See id.* (Section 3599 “reflect[s] a determination that quality legal representation is necessary’ in all capital proceedings to foster ‘fundamental fairness in the imposition of the death penalty.’” (quoting *McFarland*, 512 U.S. at 855, 859)).

This Court unanimously recognized this understanding of § 3599 in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). *Ayestas* addressed Fifth Circuit precedent holding “that individuals seeking funding for [specialized] services must show that they have a ‘substantial need’ for the services.” *Id.* at 1092. The Court rejected that test as improperly requiring a heightened showing of need inconsistent with the text of § 3599, which requires counsel to show only that the services are “reasonably necessary” for representing the de-

fendant. *Id.* at 1093-94. Section 3599 guarantees indigent defendants the right to “investigative, expert, or other reasonably necessary services *at any time* either ... before judgment,” or “after the entry of a judgment imposing a sentence of death but before the execution of that judgment.” 18 U.S.C. § 3599(a)(1) (emphasis added). Properly understood, the statutory text authorizes district courts to provide funding for specialized services when “a reasonable attorney would regard the services as sufficiently important” to representation. *Ayestas*, 138 S. Ct. at 1093. The Court further recognized that counsel must have latitude to investigate claims before proving them: a petitioner may have to show “the likely utility of the services requested,” but “a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seek.” *Id.* at 1094.

The Court should not disturb its recognition in *Ayestas* that investigations must come before a decision on the merits in a habeas proceeding. Courts sitting in federal habeas jurisdiction exercise review over the habeas claims that are presented to them. An independent and adequate investigation by counsel—and the resources necessary to that investigation—naturally must precede the court’s determination as to whether the habeas petitioner’s claims have substantive and procedural merit. *See Trevino*, 569 U.S. at 421 (recognizing “the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law”). The evidence ultimately uncovered in a proper investigation enables the federal habeas court to review fully developed claims, not

mere theories. This Court should not erect roadblocks to counsel's ability to conduct the investigation they are duty-bound to provide, or to the habeas court's ability to consider, based on the evidence, whether the petitioner's sentence is lawful.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Sixth Circuit.

Respectfully submitted,

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