No. 21–6846

IN THE
Supreme Court of the United States

JUAN JOSE REYNOSO,
Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

ERAN S. SHARON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
stephen.hoffman@oag.texas.gov

Counsel for Respondent

CAPITAL CASE
QUESTION PRESENTED

In federal district court Petitioner Juan Jose Reynoso raised a procedurally defaulted ineffectiveness claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), based on his counsel's purported failure to investigate mitigating evidence in preparation for the punishment phase of Reynoso's capital trial. The district court held that Reynoso's ineffectiveness claim was procedurally defaulted, his state habeas counsel was not ineffective (thereby precluding any equitable exception to the default), there was no actual prejudice even if there was cause for the default, and Reynoso's underlying *Wiggins* claim was meritless because his new mitigating evidence was cumulative to the evidence presented by Reynoso's trial attorneys. Focusing on the merits, the Fifth Circuit agreed that Reynoso's failed to make a substantial showing that he suffered prejudice from of counsel's alleged deficiencies. Reynoso's petition for certiorari review now raises the following questions:

1. Did the Fifth Circuit correctly perform the threshold analysis required for the grant of a certificate of appealability (COA)?

2. The Fifth Circuit found that Reynoso's new mitigating evidence was cumulative, double-edged, and dwarfed by the State's aggravating evidence. Did the Fifth Circuit correctly identify and apply this Court's precedent when it found that no prejudice accrued from counsel's purported failure to investigate?

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INTRODUCTION

Reynoso[1] was convicted and sentenced to death for murdering Tonya Riedel during a robbery because she would not give him any money. Following unsuccessful direct appeal and state habeas proceedings, Reynoso sought federal habeas relief in district court. He offered a procedurally defaulted ineffective-assistance-of-trial-counsel (IATC) claim and attempted to establish cause for his default by showing that state habeas counsel ineffectively failed to litigate the claim. *See Martinez v. Ryan*, 566 U.S. 1 (2012). But the district court denied habeas relief and any COA.

As relevant to this petition (Pet.), the district court found that Reynoso's claim was both procedurally defaulted and meritless. *See* Petitioner's Appendix (App.) at 3.App.1–6. The district court determined that "Reynoso admitt[ed] that he defaulted his claim" by failing to raise it in his original state habeas application. *See* 3.App.2–4; 5.App. Regarding excusal of his default, the district court found that state habeas counsel was not ineffective because Reynoso did not show "that there was a reasonable probability that he would have been granted state habeas relief had the new evidence been presented in the state habeas proceedings." 3.App.4. Concerning the merits, the district court found that Reynoso failed to show actual prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). 3.App.4. On appeal, the Fifth Circuit affirmed by denying Reynoso's claims on the merits. *See* 1.App.1 n.1.

[1] Respondent Bobby Lumpkin will be referred to as "the Director." "ROA" refers to the record on appeal. All references are preceded by volume number and followed by page number where applicable.

Reynoso now argues that the Fifth Circuit "mis-perceived his IATC claim and ignored the arguments he presented in support of that claim." Pet.12. Specifically, he contends that his ineffectiveness claim was about trial counsel's failure to conduct an adequate investigation of mitigation, not their failure to present mitigation evidence. Pet.13–15. Next, he argues that the Fifth Circuit erred in holding "that the uninvestigated evidence was cumulative, and the failure to investigate it, non-prejudicial." Pet.16–20. Reynoso also contests the circuit court's holding that the uninvestigated evidence was too double-edged to show prejudice. Pet.20–23. Finally, he disagrees with the Fifth Circuit's conclusion that the mitigation evidence was dwarfed by the State's aggravating evidence. Pet.23–26.

Reynoso's arguments, however, are meritless. The Fifth Circuit correctly set forth the standards for granting a COA and *Strickland* in its opinion. 1.App.1 Thus, Reynoso has the difficult task of showing that, despite acknowledging and articulating the correct standard, the Fifth Circuit somehow failed to apply it. Under Supreme Court Rule 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." Here, the court of appeals pointed out that Reynoso's ineffectiveness claim was procedurally defaulted, 1.App.1 n. 1, and the underlying IATC claim would fail in view of the substantial mitigation evidence already adduced by trial counsel. 1.App.1–2. To the extent Reynoso asserts that the Fifth Circuit misapplied *Strickland* when it allegedly glossed over his claim, trial counsel was not ineffective for failing to present cumulative mitigation evidence. *See, e.g., Wong v. Belmontes*, 558 U.S. 15,

23 (2009) (per curiam) ("[a]dditional evidence on these points would have offered an insignificant benefit, if any at all."). And although the Fifth Circuit did not reach this argument, 28 U.S.C. § 2254(e)(2) also operates to preclude the introduction of new evidence in federal habeas to support Reynoso's defaulted IATC claim.

In sum, Reynoso's petition does not demonstrate any special or important reason for this Court to review the decision below, and this Court typically does not engage in routine error correction. Review is also not warranted because Reynoso does not show that a split exists among the circuit courts regarding any relevant issue. No writ of certiorari should issue on Reynoso's claims.

STATEMENT OF THE CASE

I. Facts of the Crime

In the evening of March 2, 2003, friends George Jiminez and Tonya Riedel were at a convenience store in the Heights neighborhood of Houston. ROA.2307, 2318. Jiminez was a day laborer who rented a room in the area, and Riedel, whom Jiminez knew as "Shadow," was homeless. ROA.2317. Riedel, forty-four years old at the time, was the mother of four. ROA.2954. Although at one time she had been a file clerk for an oil company, she had developed an addiction to drugs and alcohol and had lost her home and custody of her children. *Id*. Riedel told Jiminez she was hungry, so he bought her a bottle of wine and some ravioli, which she heated in the store's microwave and began eating. ROA.2318. As the two left the store, a man—later identified as Reynoso—approached them, drew a gun, and demanded money. ROA.2319. Jiminez gave Reynoso his wallet, which contained $20. *Id*. Reynoso then

turned to Riedel and began calling her "bitch" and "all kinds of names." *Id*. Jiminez said that Riedel told Reynoso, "I don't have—I don't have no money. Leave me alone. You know, she was, like screaming at him. You know, leave me alone, I don't have no money." Jiminez said that Reynoso struck Riedel in the face, and "she fell sitting down." ROA.2320. Reynoso then shot her "in the heart."[2] *Id*. A car drove up, Reynoso got in, and the car drove away. *Id*. Soon thereafter, Riedel died. ROA.2307, 2313.

Later that night, Eugene Reyes, a police informer and a friend of Reynoso's, got a phone call from his friend. ROA.2352. Reynoso asked for a ride. *Id*. After Reyes picked up him up, Reynoso told him about the robbery. ROA.2353. Reyes said that Reynoso told him, "[H]e had tried to rob—rob a lady and said she didn't have no money. So he said he basically shot her in the head [sic] since he thought she was lying." *Id*. Reyes said that Reynoso told him that "she had went down to her knees and started pleading for her life, basically, saying please don't do it, don't do it." *Id*. Reyes said that Reynoso's attitude about the shooting was "[B]asically, he didn't care. It was like a joke." *Id*. Asked whether Reynoso was bragging, Reyes said, "Yes, because he brought it up a number of times." *Id*.

Frank Habisreitinger, a tattoo artist who previously had given Reynoso several tattoos, testified that on March 3, 2003, the day after the slaying, Reynoso came to his shop and asked for two teardrop tattoos. ROA.2356–57. He said that Reynoso told him that he wanted the tattoos because "he killed a motherfucker." ROA.2357.

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[2] To the extent Reynoso complains that this evidence is mischaracterized, the Director accurately quotes Jimenez's trial testimony. As Reynoso concedes, the autopsy showed a fatal gunshot wound approximately in the "right upper chest." Pet.3.

On March 6, while riding in a car with the police informer Reyes and other individuals, Reynoso was stopped and arrested by Houston police. ROA.2359. Reynoso later gave an oral statement to police in which he acknowledged shooting Riedel. ROA.3374–411. He told police that at the time of the shooting, "I was just drunk, high wasn't even thinking." ROA.3399. He said, "Cause I know if I was sober I wouldn't have done it. But I was fucked up you know what I'm saying." ROA.3399.

II. Evidence Relating to Punishment

A. The State's future dangerousness evidence included Reynoso's rampage of robberies and juvenile-justice run-ins.

1. Reynoso committed a string of armed robberies leading up to his murder of Tonya Riedel.

At sentencing, the State introduced evidence that in the weeks leading up to the murder, Reynoso had gone on an armed-robbery spree. Jilliana Dawn Kennedy testified that in the evening of February 8, 2003, around 11:00 P.M., she and a friend, Christa Prichard, were robbed by Reynoso at a car wash near Old Town Spring in Harris County. ROA.2974–75, 2978.

On February 8, 2003, at about 11:30 P.M. a gunman armed with a 9 millimeter handgun, later identified as Reynoso, robbed a convenience store near Airtex and Interstate 45 in north Harris County. ROA.3029–30. That same night, after 11:30, Reynoso and others robbed a video rental store on West Rankin in north Harris County. ROA.3035, 36.

Weeks later, at about 5:00 A.M. on March 1, 2003, David Sauseda and his wife went to an apartment complex on North Main Street in Houston to buy beer after

hours. ROA.3043. After buying the beer, Saucedo returned to his Chevy Blazer, when Reynoso and another man pulled up in a vehicle behind him, demanded money, shot him in the leg, and robbed him. ROA.3044–45. Sauseda's wife, who stayed in the Blazer during the robbery, later identified the gunman as Reynoso. ROA.3050.

On March 2, 2003, at about 11:00 P.M., Reynoso robbed a convenience store in southeast Houston. ROA.3115–17. He entered the store, got a 24-ounce beer, approached the counter, drew a .45-caliber pistol and told the clerk, "[G]ive me all your money or else I'll F-ing [sic] kill you." ROA.3117. The clerk, behind a glass partition, gave him some money, about $150, and Reynoso took off. ROA.3117. The next night, at about 8:00 P.M., March 3, 2003, Brenda Cortez and her husband were sitting in a car outside a relative's house near Interstate 45 and Beltway 8 in north Harris County when they were approached by Reynoso and another man who held them at gunpoint and then stole their car. ROA.3050–54.

Robert Haynes, a neighbor of Reynoso's, testified about an incident that occurred on March 4, 2003. ROA.3057. Haynes advanced Reynoso a pound of marijuana that Reynoso was to sell to a friend for $400 and repay Haynes. *Id*. Reynoso called Haynes and told him that he had been robbed and the marijuana had been stolen. ROA.3058. Haynes told Reynoso that he still owed him the $400. ROA.3058. Reynoso told Haynes to meet him at a car wash nearby and he would pay him. *Id*. Haynes drove his truck to meet Reynoso at a car wash where he was ambushed. ROA.3058–59. Reynoso put a gun to Haynes's head and threatened to kill him. ROA.3059–60. As the two struggled, the gun discharged twice, the first shot nearly

missing Haynes's face. ROA.3060. Another man joined the fight and tried to help Reynoso, but Haynes was able get away. *Id.* Reynoso and the other man took Haynes's truck and chased after him. ROA.3061. Haynes was able to flag down a Harris County constable who radioed for backup and sent out an alert to be on the lookout for Reynoso in Haynes's truck. ROA.3065, 67. A warrant was issued for Reynoso's arrest, and some days later Haynes's truck was recovered. ROA.3069.

Asa Cruz, a friend of Reynoso's, testified about an incident that happened the night of the murder. ROA.3074–75. Eugene Reyes, Reynoso, and Cruz were driving around the Greenspoint area looking for a motel room for Reynoso. ROA.3075–76. They pulled up to a motel, and Cruz got out to ask the desk clerk about prices. *Id.* When Cruz told Reynoso the price, Reynoso thought the room was too expensive, so he got out and went up to the front desk and pulled a pistol on the desk clerk. *Id.* The clerk was behind a glass partition. *Id.* Reynoso did not fire the gun. *Id.* The men then left to go to a different motel. *Id.*

2. Reynoso had a history of juvenile-justice run-ins.

The State introduced evidence that Reynoso's run-ins with the justice system began in December 1993 with a terroristic threat referral. ROA.2964. Later juvenile-justice referrals included allegations of unlawfully carrying a weapon when he was fourteen; unauthorized use of a motor vehicle; and evading arrest. ROA.2964–65. Reynoso was assigned to the Serious Offense Supervision Unit and later sent to Harris County Juvenile Probation Boot Camp. ROA.2965. Later, he was released to his father's custody but was assigned to the weekend boot camp. ROA.2967. Reynoso

failed to comply with the release terms by not maintaining contact with authorities and by failing a drug test. *Id*. When he was fifteen, he was sent to the Texas Youth Commission (TYC), the state school for juvenile offenders. ROA.2967–68. His records there showed ten incidents involving either self-referrals or substantial program disruptions. ROA.3010. After release on parole, he absconded. ROA.3013.

As an adult, he was convicted of burglary of a vehicle, twice; possession of marijuana; possession of a controlled substance; and contempt of court, all misdemeanors. ROA.2981–82. A Houston police officer testified that in July 1994, he effected a traffic stop in connection with a stolen car. ROA.3021. After the car stopped, the passenger and the driver, later identified as Reynoso, fled on foot. ROA.3022. The officer chased Reynoso on foot and saw Reynoso draw a 9 millimeter handgun. *Id*. Reynoso finally complied with the officer's orders to stop and was arrested. ROA.3023. A Harris County jailer testified that while awaiting trial, Reynoso had assaulted another inmate. ROA.3025.

B. Reynoso's defense in mitigation included evidence of good character, childhood difficulties, abandonment by his mother, and drug use.

Reynoso's father testified that when his son was thirteen, his wife, Reynoso's mother, abandoned the family. ROA.3133. Reynoso's father, Juan Reynoso, Sr., who painted cars for a living, said he and his wife divorced because she was using cocaine. *Id*. It was when his mother left that Reynoso began to misbehave. *Id*. Although Reynoso remained good at school sports, his grades began to suffer. ROA.3133–34. When Reynoso was thirteen, he began using illegal drugs, marijuana, and sniffing

glue. ROA.3135. Then, when he was nineteen, he attempted suicide. *Id*. When he was twenty, Reynoso was involved in a car accident. ROA.3134. "He began to have something bad in his mind," his father said. ROA.3134. Reynoso began to have seizures and was treated for depression. *Id*.

Juanita Bustos, Reynoso's maternal grandmother, testified that after her daughter's divorce, Reynoso wanted his mother and father to get back together. ROA.3141. She said that Reynoso's father provided his children food and shelter but was not the "kind of nurturing type of father." ROA.3142. Bustos testified that her grandson loved his children. *Id*. Bustos also stated that after Reynoso began getting into trouble, she tried to minister to him. ROA.3143. At one point, Reynoso planned to move to Corpus Christi to live with her. *Id*. Bustos testified, "[Reynoso] knows he did wrong. And from day one he's told me how sorry he is he did what he did. He repented, he knows God's going to forgive him." *Id*.

Stephanie Collar had known Reynoso since she was fourteen and was his former girlfriend. ROA.3144. She said he had always been nice to her, had never been violent, and was kind to her pets. ROA.3144–46. Reynoso was unhappy at home, she said. ROA.3146. And he was unhappy that the mother of his children would not allow him to see his kids. *Id*. Once Reynoso drove his car off the highway in a suicide attempt. ROA.3147.

Another former girlfriend said she still loved Reynoso. ROA.3152. He always had positive things to say, always made her feel great, and was a caring and loving father. *Id*. But his friends were a bad influence. *Id*. She had never seen him with a

gun and had never seen him use drugs, but she acknowledged that her parents would not have liked him. ROA.3153–55.

Ronald Ramos, a family friend, said that Reynoso's friends put him in a bad environment. ROA.3159. He said that Reynoso's father was often absent and that his brother, Armando, picked on Reynoso and once beat him up. ROA.3160. Ramos had seen Reynoso under the influence of drugs and alcohol. *Id*. Dr. Dong Soo Kim testified that he had treated Reynoso for anxiety and had prescribed Xanax. ROA.3163.

Isabel Perez, Reynoso's cousin, testified that when he was young, Reynoso was "very nice," that he was "very confident about himself, very sure," that he always stood up for the underdog, and that he was "very polite, very respectful, very well-mannered." ROA.3166–67. But after Reynoso started having problems at home, she said, he became withdrawn. ROA.3167.

The mother or Reynoso's children, Linda Robles, said although they lived together only four days, she had wanted to marry him. ROA.3199. He loved his children, would cook for them, and would teach them right from wrong. ROA.3200. But Robles did not like Reynoso's friends. ROA.3199.

Reynoso's mother, Velma Jean Vella, testified on his behalf and disputed her ex-husband's allegations that she had used drugs. ROA.3205. She loved her children, she said, and felt guilt and remorse about leaving them. *Id*. Because of the deterioration of her marriage, though, she felt that she "needed to move on." *Id*. Her husband had not been involved in criminal activity, but after she left, Reynoso began having problems with minor delinquency. ROA.3206. Once, after her husband

slapped Reynoso, Child Protective Services were notified. ROA.3207. Vella said while Reynoso was growing up, he was caring, happy, athletic, and bright. *Id*. Her husband was a good provider, but not caring or affectionate. *Id*.

Norma Jean Flores, Vella's sister and Reynoso's aunt, said that as a boy, her nephew was normal and active. ROA.3213. His father was a good provider, but she had seen him direct some physical abuse against Reynoso and Reynoso's older brother, Armando. ROA.3214.

Roxanne Flores Aguirre, Reynoso's half-sister, said that before his parents' separation, her brother was involved in baseball as pitcher and "always got praise from his coaches." ROA.3215. Before he was thirteen or fourteen, he was a normal boy. *Id*. But after their parents' divorce, her brother began misbehaving in school. ROA.3216. Aguirre's step-father, Reynoso, Sr., was not involved with the children. *Id*. He would sit on the couch, drink beer, and watch television. ROA.3216. She described him as an alcoholic. ROA.3217. Her father was also abusive to the children. *Id*. She saw evidence that her brother, Reynoso, Jr., had started cutting himself. ROA.3218. She also had seen him abuse paint thinner. ROA.3220.

Kevin Robicheaux, a school friend of Reynoso's, said that his friend had used marijuana, paint thinner, and "fry"—cigarettes soaked in embalming fluid. ROA.3225. Robicheaux believed that Reynoso had always been a good person but had made some mistakes. ROA.3227.

Reynoso testified. He said that when he committed the murder he had been drinking, abusing Xanax, and did not remember his actions. ROA.3237. He did not

remember the robbery of Brenda Cortez or the convenience-store robbery in southeast Houston. ROA.3238. Reynoso believed his problems arose after he "[b]egan to associate myself with a delinquent group of people." *Id*. When he was in TYC and had no access to illegal drugs, he said, he did better. ROA.3239. Over the years, he had used illegal drugs and substances, including marijuana, paint, "acid," embalming fluid mixed with PCP, and cocaine. ROA.3240. He also abused the prescription medication Xanax. *Id*. He said that his family members physically abused him. His father once slapped him across the face, and Armando and his cousins would beat him up. ROA.3241. He began working when he was sixteen at a car wash and had since held several legitimate jobs. ROA.3241–42. Reynoso said he committed the crimes because he had been on drugs and that otherwise he was a normal, loving, caring person. ROA.3244.

III. Conviction and Postconviction Proceedings

A Texas jury convicted Reynoso of capital murder for killing Tonya Reidel during a robbery. ROA.1454–55. Pursuant to the jury's answers to Texas's punishment-phase special issues, the trial court sentenced Reynoso to death. *Id*. The Court of Criminal Appeals (CCA) affirmed Reynoso's conviction and sentence on direct appeal. *See generally Reynoso v. State*, No. AP-74952, 2005 WL 3418293 (Tex. Crim. App. Dec. 14, 2005); Tex. Code Crim. Proc. art. 37.071, § 2(h). Reynoso did not file a petition for certiorari.

Reynoso sought state habeas review of his conviction. ROA.1364–75. The trial court entered findings of fact and conclusions of law recommending that relief be

denied. ROA.1414–21. The CCA initially dismissed his application for habeas corpus relief, *Ex parte Reynoso*, 228 S.W.3d 163 (Tex. Crim. App. 2007), but then on its own motion reconsidered, *Ex parte Reynoso*, No. WR-66,260-01, 2007 WL 2660265 (Tex. Crim. App. Sept. 12, 2007) (per curiam) (unpublished); *see* Tex. R. App. P. 79.2(d), and denied relief, *Ex parte Reynoso*, 257 S.W.3d 715 (Tex. Crim. App. 2008).

Reynoso filed his initial federal petition in 2009 raising four claims for relief—including the unexhausted IATC claim he presents to this Court. ROA.10–78. After being granted a stay to present the unexhausted IATC claim to the CCA—which found it to be an abuse of the writ, *see* 5.App.—he filed an amended petition in January 2011. ROA.93–106; ROA.157; ROA.188–258. From there, Reynoso was granted a series of stays between 2011 and 2013 because he asked the district court to defer ruling on his petition until the disposition of the then-pending cases of *Martinez* and *Trevino v. Thaler*, 569 U.S. 413 (2013). ROA.611–15; ROA.625–66. Ultimately, the district court denied federal habeas relief and denied a COA. ROA.914–25; *see* 3.App. In particular, it ruled that Reynoso's IATC claim was procedurally defaulted, and alternatively, without merit. *Id.* On appeal, Reynoso asked for a COA challenging the district court's denial of his *Wiggins* claim. ROA.214–46. The Fifth Circuit denied COA on Reynoso's claim and affirmed the district court's ruling. *See* 1.App. This petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

The questions that Reynoso presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a

matter of right, but of judicial discretion, and will be granted only for "compelling reasons." An example of such a compelling reason would be if the court of appeals below entered a decision on an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Reynoso's purported circuit conflict is illusory, and he fails to show that the Fifth Circuit's decision conflicts with relevant holdings of this Court. And where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." Sup. Ct. R. 10.

Furthermore, there is no automatic entitlement to appeal in federal habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). As a jurisdictional prerequisite to obtaining appellate review, a petitioner is required to first obtain a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). In determining whether to issue a COA, a court must consider whether the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The COA standard:

> . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Buck v. Davis, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327); *see also Slack*, 529 U.S. at 484. "Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336).

I. Reynoso's IATC Claim Is Procedurally Defaulted; Nevertheless, His Claim Lacks Any Possibility of Success, and His Proposed Investigation Would Have Been Unhelpful and Simply Duplicated Previous Efforts.

Reynoso's underlying IATC claim concerns trial counsel's alleged failure to effectively investigate mitigating evidence. Pet.12–26. This claim was barred on state habeas review by an independent and adequate state law ground. 5.App.1–2; ROA.741–42. The district court held that the claim was procedurally defaulted and thus barred from being reviewed on the merits in a federal forum, and alternatively without merit. *See* 3.App. The Fifth Circuit affirmed the district court's ruling and denied COA relief. *See* App.1. Reynoso asserts that the Fifth Circuit misconstrued and failed to address his IATC claim and erred in finding that the uninvestigated evidence was cumulative, double-edged, and dwarfed by the State's aggravating evidence. Pet.12–26. But the Fifth Circuit correctly set forth the standards for granting a COA and *Strickland* and applied it to Reynoso's claim. *See* App.1. Moreover, contrary to his assertion, he fails to show cause and prejudice to excuse the default of his underlying IATC claim. Accordingly, certiorari review is inappropriate.

A. Counsel effectively investigated mitigating evidence and the mitigating evidence raised in federal habeas is largely cumulative of testimony that was presented at trial.

Reynoso first contends that the Fifth Circuit failed to address his IATC claim about trial counsel's failure to conduct an effective mitigation investigation and instead construed him to complain about counsel's failure to adequately present mitigation evidence. Pet.13–15. At the COA stage, however, the Fifth Circuit is limited to "a threshold inquiry into the underlying merits of the claims," and must

ask "only if the District Court's decision was debatable." *Buck*, 137 S. Ct. at 774 (quoting *Miller-El*, 537 U.S. at 327, 348). Thus, an in-depth parsing of his claim would be inappropriate on COA. The Fifth Circuit correctly set forth this standard in its opinion. 1.App.1. Reynoso fails to even acknowledge this standard and does not contend that the Fifth Circuit somehow how failed to apply it.

Despite his contention, the Fifth Circuit largely focused on the merits of his claim. 1.App.1–2. In the district court, Reynoso argued that his counsel performed a tardy and inadequate investigation that failed to uncover individuals who could have testified favorably for him and failed to prepare those that did testify because counsel relied on an investigator to interview witnesses. *Id.* at 1. But the Fifth Circuit previously rejected a similar claim concerning the preparation of witnesses. *Id.* (citing *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007) (rejecting IATC claim "where counsel delegated pre-testimony witness interviews to an investigator, and the petitioner argued that these witnesses would have been 'more effective' if they had been better prepared." (internal quotation marks omitted)).

Reynoso argues that the Fifth Circuit's reliance on *Coble* was misplaced because "Coble's claim was one about presentation not investigation, just the opposite of Reynoso's claim." Pet.15. Although he contends that "Coble made no claim about the inadequacy of the investigation and in fact 'concede[d]' its adequacy," *id.*, Coble's argument was similar, and the evidence in Coble resembles the purported testimony here, and likewise, was deemed to be cumulative. *See Coble*, F.3d at 435–36 (counsel did not adequately prepare for sentencing "because they failed to interview and

prepare the witnesses that testified"; "Coble argued that uncalled witnesses would have testified regarding [his] difficult upbringing, his mother's psychiatric problems, his stay in a state home, his Vietnam experiences, and his positive performance as a father and worker. Coble's sentencing witnesses testified about these issues.").

And the Fifth Circuit held that Reynoso failed to demonstrate how his proposed investigation would not simply be duplicative. 1.App.1 ("Almost all this evidence—such as his mother's abandonment of the family and his subsequent substance abuse, depression, and self-harm—concerns aspects of Reynoso's history to which thirteen mitigation witnesses, including Reynoso himself, testified at trial."). Indeed, although Reynoso presented the district court with more detailed testimony than what was at his trial, much of the evidence he proffered is cumulative, double-edged, or both, and he fails to show that such testimony would have made a difference.

"Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and in the ultimate determination of whether the death penalty is an appropriate punishment." *Riley v. Cockrell*, 339 F.3d 308, 316 (5th Cir. 2003) (citation omitted). But *Strickland* does not require counsel "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). To establish prejudice Reynoso must demonstrate that "there is a reasonable probability that, absent the errors, the

sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

To render effective assistance, the Sixth Amendment requires counsel "to make a reasonable investigation of defendant's case or to make a reasonable decision that a particular investigation is unnecessary." *Ransom v. Johnson*, 126 F.3d 716, 723 (5th Cir. 1997) (citing *Strickland*, 466 U.S. at 691). The reasonableness of an attorney's investigation must be determined by considering not only the evidence already known to counsel, but also whether such evidence would lead a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 527. The reasonableness of an investigation depends in large part on the information supplied by the defendant. *Strickland*, 466 U.S. at 691.

Here, the district court found that Reynoso's underlying claim failed to meet the second *Strickland* prong. 3.App.3–4; *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."). In fact, the district court found that much of the mitigation evidence[3] "came before the jury, though perhaps not in the detail Reynoso now wishes." 3.App.3. As explained by the district court:

> Some of Reynoso's new evidence conflicts with his own trial testimony, such as that he came from a "middle class background" and was not "abused on any kind of ongoing basis." Some of Reynoso's new evidence may support greater insight into his background. That said, Reynoso relies on witnesses who have come forward years after trial, yet

[3] Reynoso claimed—through witness affidavits— that trial counsel should have elicited extra evidence that he: grew up in poverty; had a violent home life and grew up watching his parents fight; was abandoned by his mother; had an absent father; found security in gang life; experienced trauma from growing up around violence; used drugs to cope with his troubled life; and had a mental illness that, combined with other aspects of his life, led to explosive anger and indifference to others. *See* ROA.916; ROA.817–18; *see also* ROA.265–419; Pet.4–9.

> who can only give testimony about circumstances that Reynoso knew himself. The witnesses Reynoso is insisting his counsel should have "investigated" were all people whom Reynoso knew. Counsel are not normally required to discover witnesses that the defendant has withheld, especially when, as here, they are duplicative. Reynoso's trial attorneys gave the jury insight into the same general subjects as Reynoso presents on federal review.
>
> This is not a case where Reynoso's trial attorneys abdicated their duty to present mitigating evidence. The defense called numerous witnesses. Their testimony followed the same themes, even if lacking in detail, as the information now presented on federal review. Reynoso takes issue with his trial attorneys' choice of questions and depth of examination, but his argument "boils down to a matter of degrees - [he] wanted these witnesses to testify in greater detail about similar events and traits[.]" The new evidence differs little in substance or mitigating thrust from that his trial attorneys put before the jury. Actual prejudice does not exist for evidence that is "in the main cumulative" to that from trial.
>
> Against that evidence, the State showed Reynoso's extremely violent history of offenses. Reynoso committed numerous crimes as a juvenile: unlawfully carrying a weapon, stealing cars, evading arrest. He absconded from parole. As an adult, he was convicted of burglary of a vehicle, possession of drugs, and contempt of court. Reynoso sold drugs and threatened to kill other drug dealers. Reynoso shot a man after stealing his drugs. In the weeks before the murder and attempted robbery of his homeless victim, Reynoso engaged in other violent robberies. With accomplices, Reynoso robbed several people, threatening to shoot them. Reynoso robbed several stores. He stole cars. After his arrest for capital murder, Reynoso assaulted another inmate. The State argued that violence was an unremitting and escalating theme in Reynoso's life.

3.App.3–4 (footnotes omitted). The Fifth Circuit agreed, finding Reynoso's IATC claim meritless and denying him a COA. *See* 1.App.

Reynoso continues to assert that his counsel's mitigation investigation was inadequate, but the record demonstrates that his counsel conducted—and presented—a robust mitigation investigation that included evidence of Reynoso's

good behavior and character, childhood hardship, mental impairment, and drug use. *See* Facts Relating to Punishment, Section II(B), *supra*. Further testimony would have been redundant/cumulative. *Belmontes*, 558 U.S. at 22 (adding cumulative evidence to "what was already there would have made little difference"); *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984) (counsel's decision not to present cumulative and redundant testimony does not constitute IATC). Indeed, Reynoso himself appears to characterize the allegedly missing evidence as mere "minutiae." Pet.2, 4.

Moreover, Reynoso's reliance on *Sowell v. Anderson*, 663 F.3d 783, 791 (6th Cir. 2011), for the proposition that his attorney should have investigated further, is unavailing. *Sowell* was a death-penalty case where trial counsel failed to interview the family members of the defendant for mitigation evidence. The Sixth Circuit found the omitted mitigation evidence of petitioner's horrific childhood differed in strength and in subject matter from the mitigating evidence previously adduced at trial and that "the evidence [was] therefore not cumulative." *Id*. at 795. Reynoso's case differs in at least four ways. First, unlike in *Sowell*, counsel interviewed Reynoso's family members. Second, there was no similarly obvious need for further investigation in this case, where, as noted by the district court:

> Reynoso relies on witnesses who have come forward years after trial, yet who can only give testimony about circumstances that Reynoso knew himself. The witnesses Reynoso is insisting his counsel should have "investigated" were all people whom Reynoso knew. Counsel are not normally required to discover witnesses that the defendant has withheld, especially when, as here, they are duplicative. Reynoso's trial attorneys gave the jury insight into the same general subjects as Reynoso presents on federal review.

3.App.4. Additionally, an attorney's decision not to investigate is entitled to deference on review and is examined in light of the information supplied by the defendant that might influence the decision. *Strickland,* 466 U.S. at 691.

Third, the *Sowell* court held that this was "not a case in which the omitted evidence 'would have triggered admission of . . . powerful [aggravating] evidence in rebuttal." *Id.* at 797 (quoting *Belmonte*s, 588 U.S. at 388), but, as addressed below, Reynoso's mitigation evidence would have triggered the same damaging evidence in rebuttal. Fourth, while the *Sowell* court found the omitted evidence was "not merely cumulative of that presented at sentencing[,]" *id.* at 797, most—if not all—of Reynoso's alleged new evidence was presented at his trial. *See* Facts Relating to Punishment, Section II(B), *supra*; *see also Wong*, 558 U.S. at 22; *Coble*, 496 F.3d at 436–37 (counsel not ineffective for failing to present witnesses that "would have presented testimony already provided by other witnesses"). As the Fifth Circuit pointed out, "[f]ailure to present more of the same evidence cannot support a finding of prejudice." 1.App.1 (citation omitted). Reynoso's claim that counsel simply should have investigated *more* fails to entitle him to the relief he seeks. Reynoso's contention that there was other evidence that could have been presented—or that counsel should have focused more on Reynoso's childhood poverty, loss, trauma, violence, drug use, and related mental disorders—fails to establish ineffective assistance.

B. Reynoso's proffered evidence is double-edged.

Reynoso also alleges that the Fifth Circuit ignored and could not reasonably conclude that "the uninvestigated evidence of trauma was 'too double-edged to show

prejudice.'" Pet.20–23. Reynoso's claim relates to an affidavit report from Dr. Richard Dudley showing certain psychiatric observations relating to Reynoso's repeated exposure to trauma. ROA.414–19. Reynoso suggests that he suffered from trauma-related disorders that were treatable and that his case is akin to *Littlejohn v. Trammell* (*Littlejohn I*), 704 F.3d 817 (10th Cir. 2013). But Reynoso fails to show that trial counsel were ineffective for not calling Dr. Dudley.

Prior to trial, counsel retained psychologist Dr. Floyd Jennings to examine Reynoso. ROA.293, 95–98. Dr. Jennings met with Reynoso in person and examined him for approximately two hours. ROA.295. In his report, Dr. Jennings described Reynoso as having "a severe character disorder resulting in antisocial behavior." ROA.298. Still, given Reynoso's "[a]ppearance," "[c]ognitions," "[m]ood," and "[m]entation," Dr. Jennings concluded that there was "no evidence of a mental illness as such" ROA.297–98. Trial counsel's reliance on this assessment was reasonable. *See Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (counsel "should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses"); *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000) (counsel is not required to "canvass[] the field to find a more favorable defense expert").

Further, Reynoso ignores the cumulative nature of Dr. Dudley's testimony. Particularly, the portions dealing with Reynoso's distrust of others, substance abuse, depression, and potential mental disorders. *See* ROA.414–19; ROA.867–69; ROA.921 n.26. Still, even if Dr. Dudley's testimony would have helped to contextualize Reynoso's exposure to violence and resulting trauma, that is not all it

would have done. While Reynoso assumes that his trial counsel's examination of Dr. Dudley would only relay the effects trauma had on Reynoso, the State's cross-examination certainly would not have been so limited, and any evidence of Reynoso's antisocial personality disorder would likely have been countered by the State's expert testimony. *See Alstyne v. Cockrell*, 35 F. App'x 386 (5th Cir. 2002) (citing *Lagrone v. State,* 942 S.W.2d 602, 610–11 (Tex. Crim. App. 1997) (trial courts may "order criminal defendants to submit to a state-sponsored psychiatric exam on future dangerousness when the defense introduces, *or plans to introduce,* its own future dangerousness expert testimony" (emphasis in original)), *cert. denied,* 522 U.S. 917 (1997); and *Soria v. State,* 933 S.W.2d 46, 57–58 (Tex. Crim. App. 1996) (same), *cert. denied,* 520 U.S. 1253 (1997)). Indeed, Dr. Dudley's affidavit shows that such testimony would have revealed extremely damaging information that would have bolstered the State's future dangerousness case instead of rebutting it.

Such information impacts the assessment of both deficient performance and prejudice. *See Strickland,* 466 U.S. at 699 (counsel made reasonable strategic choice in "[r]estricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence . . . not come in"); *Belmontes*, 558 U.S. at 20 (in considering prejudice a court must "consider all the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path—not just the . . . evidence [the inmate] could have presented, but also the . . . evidence that almost certainly would have come in with it.").

Even if trial counsel had uncovered evidence suggesting that Reynoso suffered from "various psychiatric . . . symptoms associated with/that often result from violent, traumatic events," made worse by the abandonment of his mother, ROA.415, Reynoso has not shown that a reasonable attorney would have presented that information to the jury and that it would have made a difference. *See Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (unclear whether reasonable counsel would have used double-edged evidence had it been available); *see also Reed v. Vannoy,* 703 F. App'x 264, 270 (5th Cir. 2017) (citing *Dowthitt*, 230 F.3d at 745) ("[D]ouble-edged evidence cannot support a showing of prejudice under *Strickland*"); *see also Trevino v. Davis*, 861 F.3d 545, 551 n.5 (5th Cir. 2017), *cert. denied* 138 S. Ct. 1793 (2018).

For example, Dr. Dudley relays Reynoso's "various psychiatric signs and symptoms" associated with trauma—including "increased autonomic hyperreactivity and the *perception of the world and others as dangerous*." ROA.415 (¶7) (emphasis added). But this is damaging, double-edged evidence that could easily undercut his future dangerousness case. *See Cannon v. Gibson*, 259 F.3d 1253, 1277–78 (10th Cir. 2001) (failure to introduce testimony of petitioner's psychiatric disorders "which distort his perceptions and impair his judgment" did not establish prejudice because it would portray him as an "unstable individual with very little impulse control" and strengthen argument that he was a continuing threat to society); *see also Ladd*, 311 F.3d at 360.

In addition, Reynoso fails to show reasonable trial counsel would have put on punishment evidence revealing Reynoso—whom the jury had already found guilty of

murdering a homeless woman in cold blood, had "abnormal feelings of anger," ROA.416 (¶11), and "organic brain damage," ROA.417 (¶11). *See Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir. 2005) ("[C]ounsel's decision not to introduce evidence of neurological impairment (i.e., organic brain damage) as mitigating evidence at the punishment phase constituted reasonable and protected professional judgment. . . . evidence of organic brain injury presents a 'double-edged' sword, and deference is accorded to counsel's informed decision to avert harm that may befall the defendant by not submitting evidence of this nature."); *Johnson*, 306 F.3d at 253 (evidence of brain injury was "double edged" because it would support a finding of future dangerousness).

Further, Reynoso's reliance on *Littlejohn I* is misplaced. In *Littlejohn I*, an expert evaluated Littlejohn and testified that he had "neurological injury [originating] from birth," and that his mother admitted to using drugs during her pregnancy. 704 F.3d at 862. No such evidence is present in Reynoso's case. Crucially, Dr. Dudley's never interviewed Reynoso, *see* ROA.414–15, whereas Dr. Jennings evaluated him in person for approximately two hours. ROA.295. Dr. Dudley's assessment of Reynoso, based on a mere review of his life history developed by the federal habeas counsel and the trial record, was therefore, incomplete. *See* ROA.414–15. Although Dr. Dudley speculated that due to Reynoso's "extensive history of head trauma, there is more than enough reason to be concerned about and therefore a need to assess for organic brain damage[,]" ROA.417, unlike *Littlejohn I*, the evidence Reynoso's trial counsel had did not amount to "red flags pointing up a

need to test further." *See Rompilla*, 545 U.S. at 392. Finally, the Tenth Circuit has since clarified *Littlejohn I* and explained that "organic-brain-damage evidence would have been just as likely—if not more likely to have had an aggravating effect rather than a mitigating effect on a sentencing jury." *See Littlejohn v. Royal* (*Littlejohn II*), 875 F.3d 548, 559–60 (10th Cir. 2017); *see also Grant v. Royal*, 886 F.3d 874, 920–21 (10th Cir. 2018). Therefore, *Littlejohn I* is unavailing.

To the extent Reynoso alleges that trial counsel should have focused more on Reynoso's social history, it is not clear that it would have aroused any more sympathy from the jury. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) ("The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation.") (citation omitted). And even had a jury found increased evidence of Reynoso's social history to be mitigating, such evidence could have harmed his future dangerousness case. *See Johnson v. Cockrell,* 306 F.3d 249, 253 (5th Cir. 2002) (evidence of Johnson's abusive childhood, and drug and alcohol problems "could all be read by the jury to support, rather than detract, from his future dangerousness"). As the Fifth Circuit determined:

> the proffered new evidence that trauma caused Reynoso to suffer 'extreme reactivity to perceived threat' is too double-edged to show prejudice. Although this evidence 'might permit an inference that he is not as morally culpable for his behavior, it also might suggest [Reynoso], as a product of his environment, is likely to continue to be dangerous in the future.

1.App.2 (citation omitted).

Indeed, given the cumulative and double-edged nature of Reynoso's proffered testimony, he fails to show a reasonable likelihood that the jury would have reached a different result. *See Adekeye v. Davis*, 938 F.3d 678, 683 (5th Cir. 2019) (prejudice requires showing that "it was 'reasonably likely' the jury would have reached a different result, not merely that it could have reached a different result'").

C. Reynoso's proposed evidence is outweighed by the aggravating evidence in his case.

Even assuming Reynoso's new evidence differs in any meaningful way from the evidence presented at his trial, he still cannot show prejudice. *See Riley*, 339 F.3d at 315 ("If the petitioner brings a claim of ineffective assistance with regard to the sentencing phase, he has the difficult burden of showing a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel.") (internal quotation marks omitted)). Here, Reynoso declines to balance his purportedly new evidence against all the aggravating evidence, including the brutal nature of the crime he committed. *See Belmontes,* 558 U.S. at 20; *Strickland*, 466 U.S. at 695. But the sheer brutality of his crime, coupled with the aggravating evidence in his case prevents him from proving he was prejudiced by counsel's alleged deficiencies. *See Vasquez v. Thaler*, 389 F. App'x 419, 428 (5th Cir. 2010) ("Naturally, the power of the newly amplified case to mitigate a jury's selected punishment will be contingent on other factors in the case, such as the circumstances of the crime."); *Ladd*, 311 F.3d at 360 (citing *Strickland*, 466 U.S. at 698) ("evidence of future dangerousness" is "overwhelming. . . it is virtually impossible to establish prejudice").

In particular, the "brutal and senseless nature of [Reynoso's] crime," *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006), is evident from the record. For instance, the jury heard Reynoso describe approaching his homeless victim while pointing a gun at her during a robbery: "She just got on her knees[,] she was scared." ROA.3380. They also heard Reynoso detail with cruel indifference how he executed Riedel because "she didn't want to give [him] her money." *Id.*; *see also* ROA.3381 ("I was standing point blank, shot her in the throat. I tried [to] shoot her in the head but[,] you know[,] ended up missin' [and shot] her in the throat."). Further, beyond describing his murder of Riedel with a remarkable degree of remorselessness, Reynoso even went so far as to "brag" about murdering her. ROA.2353.

And the aggravating evidence in Reynoso's case was powerful. In addition to hearing how Reynoso brutally executed a homeless woman by shooting her point blank while she was on her knees, the jury was presented with Reynoso's extensive and violent criminal history:

> Reynoso committed numerous crimes as a juvenile: unlawfully carrying a weapon, stealing cars, evading arrest. He absconded from parole. As an adult, he was convicted of burglary of a vehicle, possession of drugs, and contempt of court. Reynoso sold drugs and threatened to kill other drug dealers. Reynoso shot a man after stealing his drugs. In the weeks before the murder and attempted robbery of his homeless victim, Reynoso engaged in other violent robberies. With accomplices, Reynoso robbed several people, threatening to shoot them. Reynoso robbed several stores. He stole cars. After his arrest for capital murder, Reynoso assaulted another inmate. The State argued that violence was an unremitting and escalating theme in Reynoso's life.

3.App.4; ROA.922–23.[4] In the end, even though the jury heard an abundance of mitigating evidence—including Reynoso's good behavior and character, childhood hardship, mental impairment, and drug use—it simply did not find the evidence sufficiently mitigating. Reynoso fails to show that cumulative, double-edged expert or lay testimony would have changed that. This is especially true in light of the aggravating factors and the cruelty of the crime.

This Court has explained that the fact patterns of its IATC cases do not necessarily set the bar for a finding of prejudice. *See Andrus v. Texas*, 140 S. Ct. 1875, 1886 n.6 (2020) ("[W]e have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice."). But Reynoso's purportedly omitted mitigating evidence simply does not compare to the mitigating evidence the Court has found to be prejudicially omitted in other cases. *See*, *e.g.*, *Wiggins*, 539 U.S. at 516–17, 525–26, 534–35 ("Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care."); *Rompilla*, 545 U.S. 374, 378, 390–95 (evidence established that Rompilla was reared in a slum, quit school at sixteen, had a series of incarcerations, his mother drank during pregnancy, his father had a "vicious temper," Rompilla and his siblings "lived in terror," he and a brother were locked "in a small wire mesh dog

[4] The jury were also shown photos of tattoos over Reynoso's eyes reading "fuck you now," and "fuck you forever," respectively. *See* ROA.3396; ROA.3456. Additionally, Reynoso indicated in his confession that if he had been pulled over by a police officer after the murder, he was "willing to kill" them. ROA.3404; *see also* ROA.3403 ("I was thinking if a lawman pulled me over I was gonna shoot the police officers too.").

pen that was filthy and excrement filled," their home had no indoor plumbing, and they slept in an attic with no heat); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.").

When any allegedly missing evidence, coupled with the evidence that was actually offered by the defense, is weighed against the aggravating evidence, including the circumstances of the crime, there is simply no reasonable probability that the outcome of the sentencing would have been any different in this case.

D. Reynoso fails to overcome the default of his IATC claim.

The district court concluded that Reynoso procedurally defaulted his IATC claim by failing to raise it in his original state habeas proceeding. *See* 3.App.2–4. Rather than affirm on this basis, the Fifth Circuit denied COA based on "[Reynoso's] failure to show a substantial constitutional claim." *See* 1.App.1 n.1. The weakness of Reynoso's claim on the merits colors the *Martinez* analysis. Reynoso's *Wiggins* claim is unquestionably procedurally defaulted. *See* 3.App.2–4; Pet.9. Reynoso suggests that he can evade his default under *Martinez*/*Trevino*, but the district court correctly found that "[e]ven if habeas counsel's representation amounted to cause, Reynoso has not shown that there is a reasonable probability that he would have been granted state habeas relief had the new evidence been presented in the state habeas

proceedings. Adequate and independent state procedural grounds prevent this court from reaching the merits of Reynoso's fourth claim for relief." 3.App.4.

As shown above, the district court found Reynoso's IATC claim lacked merit. *See id*. Because Reynoso's underlying claim lacks merit, there is no way that Reynoso can make the "substantial" showing required by *Martinez* that he was prejudiced by state habeas counsel's alleged deficiencies. 566 U.S. at 14 (requiring IATC claim to have "some merit"); *see* 1.App.1–2. Similarly, even assuming he has shown cause under *Martinez*—Reynoso cannot show accompanying actual prejudice. *Ramey v. Davis*, 942 F.3d 241, 255–56 (5th Cir. 2019) (quoting *Hernandez v, Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013)). If the state court would not have granted relief on his claim, then it is difficult to see how Reynoso could have been prejudiced by any omission by habeas counsel.

Indeed, to demonstrate that *Martinez*'s equitable exception applies, Reynoso must first show that his state habeas counsel was actually ineffective under the *Strickland* standard. *Martinez*, 566 U.S. at 17. But Reynoso asserts a different type of grievance against his state habeas attorney than the complaint levied by Martinez. Martinez was convicted in Arizona state court of sexual conduct with a minor, and his conviction was affirmed on direct appeal. *Id*. at 4–8. Martinez's appellate counsel initiated collateral review in state court by filing a notice of postconviction relief, but then filed a statement that she could find no colorable claim for postconviction relief. *Id*. The state court gave Martinez the option of filing a pro se petition, but Martinez alleged that his counsel failed to inform him that he needed to do so. *Id*. After the

time to file a petition expired, the trial court dismissed the collateral action. *Id*. Later, represented by new counsel, Martinez filed a new request for postconviction relief in state court alleging that his trial counsel had been ineffective, but this petition was dismissed because he did not present the claim in the first proceeding. *Id*. In federal habeas proceedings, the district court then denied Martinez's claims as procedurally barred. *Id*.

In contrast, Reynoso is in a poor position to complain about the actions or omissions of state habeas counsel. Habeas counsel was appointed on May 19, 2005, around a week after the judgment and conviction were entered. ROA.1724. As evidenced by the record, the time Reynoso could have spent cooperating with habeas counsel to advance claims was spent waffling with the state courts on the issue of whether he wished to pursue postconviction review at all. 3.App.2–3; ROA.1029–39, 1715–17, 1721–24, 3406–08. He now blames counsel for not pursuing claims that Reynoso himself declined to pursue. A petitioner cannot block his attorney's efforts to defend him and later claim ineffective assistance of counsel. *Sonnier v. Quarterman*, 476 F.3d 349, 362 (5th Cir. 2007); *see also Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984) ("By no measure can [a defendant] block his lawyer's efforts and later claim the resulting performance was constitutionally deficient."); ROA.918–20.

To that end, Reynoso's assertions of deficiency on the part of trial counsel are fundamentally different from those in which the Court has found deficient performance. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (with a month to prepare before sentencing the attorney "had only one short meeting with [the defendant]

regarding the penalty phase. He did not obtain any of [his] school, medical, or military service records or interview any members of [his] family"); *Rompilla*, 545 U.S. at 389 (finding deficient performance when counsel failed to "to look at a file he kn[ew] the prosecution w[ould] cull for aggravating evidence . . . when the file [was] sitting in the trial courthouse, open for the asking"); *Wiggins*, 539 U.S. at 516–19 (counsel failed to prepare a social history and ignored issues that required further investigation); *Williams*, 529 U.S. at 395 ("[T]rial counsel did not begin to prepare for [the punishment] phase of the proceeding until a week before the trial[,] . . . failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood*, not because of any strategic calculation* . . . [failed to] introduce available evidence that [he] was 'borderline mentally retarded" and otherwise ignored readily available evidence.).

As a result, Reynoso fails to prove deficiency on the part of state habeas counsel for failing to challenge trial counsel's mitigation investigation. In other words, the depth of the mitigation investigation done in Reynoso's case would not lead a reasonable state habeas attorney to delve any deeper. For that reason, and because of Reynoso's own inconsistency in pursuing postconviction relief, he fails to show reasonable jurists would debate the district court's determination that he cannot show cause under *Martinez* for the default of his IATC claim. *See* ROA.919–20.

Reynoso complains that counsel failed to conduct an adequate extra-record investigation. Pet.9, 25. But simply because habeas counsel did not raise the specific IATC allegation that Reynoso, in hindsight, now contends he should have raised does

not render counsel's investigation or performance ineffective under *Strickland*. 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way."); *cf. Jones v. Barnes*, 463 U.S. 745, 751–53 (1983) (holding appellate counsel is only constitutionally obligated to raise and brief those issues that are believed to have the best chance of success). Unlike in *Martinez*, state habeas counsel did not fail to file or otherwise abandon his client—instead, he simply did not raise a claim that Reynoso now contends he should have. Counsel was thus not deficient. In any event, as noted above, no prejudice could have accrued because the allegedly omitted claim would not have been successful.

II. The Introduction of New Evidence in District Court to Prove Reynoso's Underlying *Wiggins* Claim Would be Precluded by 28 U.S.C. § 2254(e)(2).

As the lower courts held, Reynoso's *Wiggins* claim is unexhausted and, thus, procedurally barred. 1.App.1 n. 1, 3.App.2. Still, a petitioner may overcome this bar using the exception set forth in *Martinez*. Under Fifth Circuit precedent, a district court *may* order discovery, and even a hearing, on the limited question of state habeas counsel's representation during the initial collateral appeal. *Washington v. Davis*, 715 F. App'x 380, 385–86 (5th Cir. 2017). However, § 2254(e)(2) precludes a federal court, in adjudicating a petitioner's procedurally-defaulted IATC claim, from considering evidence regarding trial counsel's performance that is outside the state-court record. That is, section 2254(e)(2) would restrict the discretion of the district court to consider any new evidence when deciding Reynoso's underlying *Wiggins* claim. *See Pinholster*, 563 U.S. at 186; *Williams*, 529 U.S. at 427–29 (applying § 2254(e)(2) to the

introduction of evidence that would support an unexhausted *Brady*[5] claim); *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004) (applying this restriction whether petitioner seeks to introduce new evidence through either a live evidentiary hearing or through written submission).

This bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). That opening clause is met if the prisoner "was at fault for failing to develop the factual bases for his claims in state court," *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam), meaning a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. Under accepted agency principles, state habeas counsel's lack of diligence is attributed to the prisoner for § 2254(e)(2) purposes. *Holland*, 542 U.S. at 652–53; *Williams*, 529 U.S. at 437, 439–40. Thus, when an IATC claim is unexhausted or procedurally defaulted because it was not raised by state habeas counsel, then there was not a "diligent" attempt, *id.* at 432, "to develop the factual basis of [that IATC] claim in State court proceedings." 28 U.S.C. § 2254(e)(2). Of course, this is the very essence of a *Martinez* argument.

Finally, Reynoso cannot demonstrate that he meets any exception to § 2254(e)(2)'s bar on new evidence. He does not demonstrate a new retroactive rule of constitutional law and does not show diligence plus actual innocence. 28 U.S.C. § 2254(e)(2)(A)–(B). As a result, Reynoso's claim also fails under Section 2254(e)(2).

III. The Lower Court Correctly Applied *Strickland*.

[5] *Brady v. Maryland*, 373 U.S. 83 (1963).

Reynoso asserts that the Fifth Circuit misapplied *Strickland* because the court excused counsel's purportedly unreasonable investigation by relying on the fact that "uninvestigated evidence was cumulative, and the failure to investigate it, non-prejudicial." Pet.16–20. However, the lower courts, as shown throughout this brief, were plainly of the opinion that the investigation into Reynoso's personal and family backgrounds was thorough, and additional evidence would not have been beneficial. *See*, *e.g.*, *Wong*, 558 U.S. at 28.

Simply because trial counsel did not raise every shred of possible evidence does not mean that counsel's assistance was deficient under *Strickland*. *Cf*. *Harrington v*. *Richter*, 562 U.S. 86, 110 (2011) ("*Strickland* does not guarantee perfect representation, only a reasonably competent attorney.") (citation and internal quotation marks omitted). "The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources." *Smith v*. *Collins*, 977 F.2d 951, 960 (5th Cir. 1992) . A reviewing court "must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second guessing." *Skinner v*. *Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009) (quotation and citation omitted). When unpresented evidence is not "shocking and starkly different than that presented at trial," the Fifth Circuit has previously held that an ineffectiveness claim is not viable. *Blanton v*. *Quarterman*, 543 F.3d 230, 239–40 n.1 (5th Cir. 2008).

As discussed above, trial counsel made a reasonable investigation into possible mitigating factors and presented thirteen witnesses at the punishment phase. *See* Facts Relating to Punishment, Section II(B), *supra*. The Fifth Circuit noted that these witnesses testified that "[a]lmost all of this evidence—such as his mother's abandonment of the family and his subsequent substance abuse, depression, and self-harm—concerns aspects of Reynoso's history to which thirteen mitigation witnesses, including Reynoso himself, testified at trial." 1.App.1.

Here, the record clearly shows that the trial witnesses related the important facts concerning Reynoso's personal history and background. *See Pinholster*, 563 U.S. at 200 (finding no reasonable probability that the additional evidence presented in state habeas proceeding would have changed jury's verdict because the "'new' evidence largely duplicated the mitigation evidence at trial"). Moreover, "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107. Further, Reynoso fails to offer evidence of his trial counsel's sentencing strategy. A reviewing court must presume the counsel's actions were reasonable. *See Strickland*, 466 U.S. at 690. And Reynoso must rebut that presumption. *See id*. He offers no evidence of counsel's strategy and no evidence of facts supplied to counsel by Reynoso in anticipation of sentencing. *See Strickland*, 466 U.S. at 691. In the absence of any such evidence, Reynoso fails to rebut the presumption of sound trial strategy. *See id*.

Indeed, the lower courts did not err by finding that additional testimony would

have been cumulative. "[Reynoso's counsel]'s mitigation strategy failed, but the notion that the result could have been different if only [counsel] had put on more than the [thirteen] witnesses he did, or called expert witnesses to bolster his case, is fanciful." *Wong*, 558 U.S. at 28. Similarly, in *Van Hook*, this Court held that "the minor additional details" of Van Hook's traumatic childhood, which the interviews with additional family members would have revealed, did not prejudice Van Hook because counsel had already presented extensive evidence of Van Hook's traumatic childhood at trial. *Bobby v. Van Hook*, 558 U.S. 4, 11–12 (2009) ("there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties").

Reynoso's petition merely demonstrates how he now, in hindsight, would have conducted the punishment investigation. But such backward-looking analysis does little to establish that counsel's thorough investigation and subsequent strategy was anything but sound, and flies in the face of *Strickland*'s mandate that counsels' performance must not be judged through the distorting lens of hindsight. *Strickland*, 466 U.S. at 689. "Reliance on 'the harsh light of hindsight' to cast doubt on a trial that took place . . . years ago is precisely what *Strickland* [. . .] seek[s] to prevent." *Richter*, 562 U.S. at 107 (citing *Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). The lower courts did not err in their evaluation of Reynoso's IATC claim.

IV. Reynoso Does Not Identify a Circuit Split That Requires this Court's Intervention.

Reynoso's petition also fails to warrant this Court's attention because he does not identify any compelling circuit split. Sup. Ct. R. 10(a). Although Reynoso identifies two circuit court opinions that he believes reach a different conclusion regarding the inclusion of his proffered evidence, these cases are distinguishable.

Again, in *Sowell*, the Sixth Circuit held that counsel was ineffective for failing to investigate Sowell's childhood in preparation for presenting mitigating evidence at punishment phase of a capital case. 663 F.3d at 790–92. Sowell submitted affidavits of fourteen family members and friends who detailed the violence and deprivation of his childhood, and many of the witnesses stated in their affidavits that they would have been available and willing to testify at punishment. *Id*. at 791. The court also pointed out that counsel had expert psychological reports that referenced a childhood of abuse and neglect, which should have moved counsel to investigate further. *Id*. at 792. Because Sowell's counsel was unaware of facts necessary to make an informed strategic decision of how to proceed in mitigation, counsel's failure to interview family and friends about his background, education and family relationships fell short of a reasonable investigation, and thus was deficient. *Id.* at 790–91.

Unlike *Sowell*, however, Reynoso's trial counsel interviewed and presented thirteen witnesses, including family members and friends, that testified about various aspects of Reynoso's life history, including his childhood hardship. Again, to the extent Reynoso insists that his counsel should have investigated witnesses he either knew or who had previously testified on his behalf, "[c]ounsel are not normally required to discover witnesses that the defendant has withheld, especially when, as

here, they are duplicative." 3.App.4. Reynoso has not established that his counsel was unaware of facts necessary to make informed strategic decisions, and thus, *Sowell* is of little import and does not suggest a circuit split on this point.

Likewise, *Littlejohn I* is distinguishable. In *Littlejohn I*, an expert evaluated Littlejohn and found him to have "neurological injury [originating] from birth," and that his mother used drugs during her pregnancy. 704 F.3d at 862. As shown above, beyond speculation, there was no evidence of any neurological defects in Reynoso's case, and no indication that his mother used drugs while pregnant. *See* ROA.417. Unlike *Littlejohn I*, the evidence Reynoso's trial counsel had did not point to any red flags requiring further evaluation. *See Rompilla*, 545 U.S. at 392. Even if Reynoso's alleged "trauma-related disorder" were treatable and the evidence were admitted, it would be "too double edged to show prejudice," likely countered by damaging expert testimony, and outweighed by the State's aggravating evidence. Pet.23; 3.App.1–2; *see Littlejohn II*, 875 F.3d 548, 559–60; *see also Grant*, 886 F.3d at 920–21. Consequently, Reynoso does not identify a circuit split that requires this Court's attention and his petition should be denied.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court refuse certiorari review.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER

First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Stephen M. Hoffman
STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

s/ Eran S. Sharon
ERAN S. SHARON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
Fax: (512) 320–8132
stephen.hoffman@oag.texas.gov

Attorneys for Respondent