

No. _____

**In the
Supreme Court of the United States**

Thomas Leo Springs,

Petitioner,

v.

Dexter Payne,

Respondent.

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

Petition for Writ of Certiorari

CAPITAL CASE

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QUESTIONS PRESENTED

In *Wilson v. Sellers*, 584 U.S. 122, 125 (2018), this Court made clear that where the state court provides reasons for its decision, AEDPA deference is a “straightforward inquiry” requiring a federal court to “simply review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable.” *Wilson* clarified the limited scope of *Harrington v. Richter*, 562 U.S. 86 (2011), which provided that “[w]here a state court’s decision is *unaccompanied by an explanation*” a federal habeas court may “determine what arguments or theories . . . *could have supported*” the unreasoned decision. *Id.* at 102 (emphasis added).

In this case, the Arkansas Supreme Court found petitioner Thomas Springs’ trial counsel deficient for failing to present readily available testimony from his son, Matthew, at the penalty phase of his capital trial but articulated four reasons why Mr. Springs could not demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). After finding those four reasons to be unsupported and unreasonable, the federal district court nonetheless affirmed. The Eighth Circuit likewise affirmed, finding the state court’s ultimate conclusion reasonable without examining the four actual reasons supplied by the state court.

One of the four reasons cited by the Arkansas Supreme Court, and the only reason actually mentioned by the Eighth Circuit to uphold the no-prejudice finding, was that Matthew’s testimony “could have” resulted in damaging impeachment evidence. However, neither the Arkansas Supreme Court nor the opinion below suggested that such impeachment *would have* occurred. The record in this case shows that the prosecution would not have actually tried to impeach Matthew.

The questions presented by this case are:

- (1) Whether a federal court applying AEDPA deference to a reasoned state court opinion may ignore the explanation provided by the state court and instead apply *Richter*'s "could have supported" standard.
- (2) Whether this Court's clearly established law allows a state court, in assessing *Strickland* prejudice, to weigh hypothetical impeachment evidence if the record shows that no such evidence would actually be put to the jury.

LIST OF PARTIES

Petitioner Thomas Springs is an inmate at the Varner Supermax Unit, Arkansas Division of Correction. Respondent Dexter Payne is the Director of the Arkansas Division of Correction.

LIST OF RELATED PROCEEDINGS

State v. Springs, No. CR-2005-88 (Sebastian County District Court)
(judgment of guilt and sentence entered November 17, 2005)

Spring v. State, No. CR 06-221 (Arkansas Supreme Court) (opinion affirming conviction and sentence on direct appeal filed December 7, 2006)

State v. Springs, No. CR-2005-88 (Sebastian County District Court) (order denying postconviction relief entered June 10, 2009)

Springs v. State, No. CR 09–824 (Arkansas Supreme Court) (opinion affirming denial of postconviction relief filed May 5, 2012)

Springs v. Payne, No. 5:13-cv-005 (United States District Court for the Eastern District of Arkansas) (order denying federal habeas corpus petition entered August 19, 2021)

Springs v. Payne, No. 22-3399 (United States Court of Appeals for the Eighth Circuit) (opinion affirming denial of federal habeas corpus petition filed March 8, 2024)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 95 F.4th 596 (8th Cir. 2024). Pet. App. 1a. The order of the United States District Court for the Eastern District of Arkansas denying the claim subject to this Petition is unreported. Pet. App. 11a. The opinion of the Arkansas Supreme Court is reported at 387 S.W.3d 143 (Ark. 2012). Pet. App. 79a.

JURISDICTION

The Eighth Circuit entered judgment on March 8, 2024. Pet. App. 1a. The Eighth Circuit denied a timely motion for rehearing on April 26, 2024. Pet. App. 119a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 2254(d) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The Sixth Amendment provides:

“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”

INTRODUCTION

For over two decades this Court’s decisions have been consistent: under 28 U.S.C. § 2254(d), federal courts look to the state court’s decision, and that decision’s reasoning, in determining whether a federal habeas petitioner may be entitled to relief. If the state court provided no reasoning, federal courts may posit their own reasons that “could have supported” its ruling. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). But this Court confirmed, in *Wilson v. Sellers*, 584 U.S. 122, 125 (2018), that if a state court *does* provide a rationale, federal courts must examine the actual reasons given and only defer to them “if they are reasonable.” Notwithstanding this Court’s clear direction, some circuit courts read § 2254(d) to require deference not to the state court’s rationale, but to its conclusion. Under this approach, so long as some unstated “plausible argument exists to support the ruling,” the state court decision is reasonable “even if its actual rationale was unreasonable.”¹

The idea that § 2254(d) does not require examining the actual rationale of a state court has created a jurisdictional split. The Eighth and Eleventh Circuits apply the “could have supported” framework even if the state court provided its own reasoning. Most circuits explicitly reject this outlier approach. The Fifth Circuit has acknowledged a conflict between *Richter* and *Wilson* but has not yet resolved it.

This case exemplifies the problem with the Eighth Circuit’s approach. Each of the four reasons the Arkansas Supreme Court cited to deny Mr. Springs’ ineffective-

¹ *Sheppard v. Davis*, 967 F.3d 458, 467 (5th Cir. 2020) (describing this approach but questioning its validity after *Wilson*).

assistance claim was unsupported and unreasonable—as the district court thoroughly explained. Pet. App. 44a–49a. But the district court still denied relief, citing precedent requiring it to consider any basis that “could have” supported the state court’s conclusion. Pet. App. 50a–51a. (citing *Williams v. Roper*, 695 F.3d 825, 823, 837 (8th Cir. 2012)). The Eighth Circuit engaged in the same hypothetical review of “the state court’s ultimate conclusion.” Pet. App. 5a. In doing so, it did not even mention three of the state court’s dubious reasons. As to the only reason it reviewed, the Eighth Circuit modified the state court’s rationale with justifications never raised to or relied upon by the state court to deem the decision reasonable.

The sole reason cited by the Arkansas Supreme Court and examined below was that Mr. Springs was not prejudiced because his new mitigation testimony “could have” been met with impeachment. Pet. App. 8a (opinion below), 83a (state court). The Eighth Circuit, moreover, cited new evidence the Arkansas Supreme Court did not consider or rely on. Pet. App. 8a, 83a. And both rulings had a more fundamental problem that warrants summary reversal: the actual record showed that no such impeachment would have been used to counter new mitigation. By ignoring the record and deciding prejudice based on an unfounded possibility of impeachment, the courts violated the clear rule for *Strickland* prejudice which requires weighing only the evidence a jury would have actually seen.

This Court should grant certiorari to resolve the circuit split for how to review reasoned state-court decisions after *Wilson* and *Richter*. Alternatively, the Court should summarily reverse to correct the Eighth Circuit’s (and the Arkansas Supreme Court’s) flagrant misunderstanding of *Strickland* prejudice.

STATEMENT OF THE CASE

Petitioner Thomas. Springs was convicted of one count of capital murder for killing Christina Springs, his estranged wife and mother of his six children. *Springs v. State*, 244 S.W.3d 683, 685 (Ark. 2006). At the penalty phase, the defense called sixteen witnesses—mostly co-workers and neighbors—to testify that Mr. Springs was a hard worker and a good father. Only one of the Springs’ children, Jacob, testified, having been called not by defense but by the State. Jacob spoke primarily about his mother and the impact of her loss on his life, including no longer living with his siblings and “feel[ing] like I don’t have anything to live for anymore.” Pet. App. 38a. Jacob did not talk about Mr. Springs, except to tell him:

Dad, I want you to know you are so selfish to take her away. One day you said if you can’t have her no one can have her. I didn’t know you meant us kids too. I just want to know why you killed my mom. Will you tell me when I grow up?

Pet. App. 87a–88a. Despite the unhelpful nature of Jacob’s testimony, at least one juror found his testimony mitigating, writing in on the mitigating circumstances form that Mr. Springs “has six children and at least one of them has expressed a wish to get an answer as to why his father killed his mother.” *Id.* at 153. At least one juror also found three other mitigating factors, but the jury concluded that the three aggravating factors outweighed the four mitigating factors and sentenced Mr. Springs to death. *Id.*

After the jury was released, the prosecution called three of the Springs’ other children to read their victim impact statements. One of them was Matthew, who told the judge:

I am Matt, I am 16. I have come today to talk to you all about my mom. My mom was a wonderful woman. She was my best friend. We would tell each other secrets and sometimes we would even wrestle at night when everyone else was sleeping. I would always get beat, but you have got to be a good sport about everything. She was something, though. She was friends with everyone she met. She taught me how to be a respectful, young gentleman. She raised me right. What can I say?

Despite what happens here today I know that she is in a better place and she is happy. I love her now and I loved her then. I will love her later. I always will. Sometimes when you love someone you are happy when they are gone even [if] it hurts you to be without them. I know she is happy and with that in mind I'm happy, too.

I want to say a little about my dad now. My dad, he was good guy and more than half the time he was a great dad. I am not going to sit up here and lie and I am not going to say that he was a bad guy because my dad was a great person. He treated me and my family right most of the time. He taught us how to grow up and be respectful. He taught us how to be nice to people and say, yes, ma'am; no, ma'am; yes, sir. He loved to get involved in extracurricular activities. He even saved me once when I got hit by a car.

Even though I wish today that what happened wouldn't have happened and that we would still, you know, be in contact. I feel really bad and I am sorry he had to—that what happened happened, but I just hope that, you know, everybody has their place in God's eyes and he may have messed up, but he still has his chance to redeem himself. I want him to know that me and his kids, my brothers and sister, we love him to death and we care about him more than anything. Even though mom is gone, it doesn't mean that he is not our dad just because you do something that makes people or makes your kids hate you doesn't mean that they don't love you because we love you for who you are, but they hate you for what you did. Well, thanks for listening.

Pet. App. 40a–41a (paragraph breaks added).

During his state postconviction proceedings, Mr. Springs' new counsel argued that trial counsel were ineffective for failing to call Matthew to testify. Pet. App. 86a–88a. At a postconviction hearing, Matthew testified that if his father's lawyer had contacted him before trial, he would have testified on behalf of his father. Pet.

App. 87a. When asked what his testimony would have been, Matthew reiterated the statements he made to the trial judge after the jury imposed death, and commented on the loss he and his siblings would have if their remaining parent is executed:

Well, he was a good man, you know, he had – everybody has faults and everyone makes mistakes, but, I mean, he is my dad and he is my sister’s dad and he is my brothers’ dad and, you know, they had already lost one parent and, you know, him being alive gives them something to be, you know, they could write him, they can have something to keep up with and, you know, I wouldn’t want them to lose their father and I wouldn’t want to lose mine because then it feels like we have nobody.

Pet. App. 42a–43a. The State did not cross-examine Matthew’s testimony, CA8 App. at 1197, or otherwise suggest that it would impeach him or use his testimony as a basis for introducing rebuttal evidence. *See* Pet. App. 114a–115a. The trial court denied postconviction relief. Pet. App. 104a.

The Arkansas Supreme Court affirmed, holding that “counsel was ineffective in not interviewing Springs’ other children and not calling Matthew to testify as a mitigation witness,” but ruled that it “cannot say that prejudice resulted therefrom[.]” Pet. App. 88a. The court offered four reasons for its holding: (1) Matthew’s testimony was not “comparable” to Jacob’s trial testimony; (2) Matthew’s testimony was cumulative to that from other mitigation witnesses; (3) “the State . . . could have impeached Matthew’s testimony by introducing evidence that established the family was living in a shelter at the time of the murder”; and, (4) Matthew testifying would “have raised questions about the remaining children as to why none of them were willing to testify on their father’s behalf.” Pet. App. 89a–90a. On those bases, the court upheld the denial of the *Strickland* claim.

Mr. Springs filed a petition in federal court arguing that the Arkansas Supreme Court’s rationale for its no-prejudice ruling was unreasonable under 28 U.S.C. § 2254(d). The federal district court found each of the four reasons given by the Arkansas Supreme Court to be highly dubious. Pet. App. 44a–49a. The court held that: it was “unclear why” the incomparability of the two children’s statements mattered and pointed out that they were comparable, both representing the views of children of both the victim and defendant, Pet. App. 45a–46a; parts of Matthew’s testimony were not cumulative as they showed Springs’ “children’s love for him, their forgiveness,” and “how his death would affect them”—which provided “independent mitigating value.” Pet. App. 47a; it was “difficult to see what additional damage to Springs’ case” evidence of living in a crisis center before the murder would have done, *id.*; it would raise far more questions to have “one child testify on behalf of the State and none on behalf of their father.” Pet. App. 48a–49a.

Despite going to great lengths to explain the unreasonableness of the four actual reasons given by the Arkansas Supreme Court, the federal district court denied relief on the ground that the state court “reasonably *could have* concluded that Springs was not prejudiced by his lawyers’ deficient performance.” Pet. App. 50a–51a (citing *Williams*, 695 F.3d at 832, 837) (emphasis added).

The Eighth Circuit affirmed, agreeing that its job was to “evaluate the reasonableness of the state court’s ultimate conclusion, not necessarily the reasoning used to justify the decision.” Pet. App. 5a. The Eighth Circuit failed to examine the reasonableness of the actual reasons provided by the Arkansas

Supreme Court, instead relying on reasons and evidence the state court never considered. The court ruled that “[e]ven if Matthew’s testimony had led the jury to find one or more additional [mitigating] factors, this would not have negated the impact of the three significant aggravating factors unanimously identified.” Pet. App. 7a. In doing so, the court stated that Matthew’s testimony “opened the door to cross-examination about his father’s abuse of him and his mother,” as the prosecutor “could have” asked about an instance where Springs “grabbed Matthew around the neck and hit him on the head.” Pet. App. 8a.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for writ of certiorari because the Eighth Circuit has “entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” S. Ct. R. 10(a). Alternatively, this Court should grant this petition for writ of certiorari because the Eighth Circuit has “decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c).

I. This Court should resolve the circuit split in how federal courts apply deference to the specific reasons offered by a state court.

A. The circuits are split as to whether *Richter*’s “could have supported” standard should be applied to cases where the highest state court issues a reasoned decision.

In *Richter*, this Court articulated the following framework for habeas review of state-court merits decisions:

Under § 2254(d), a habeas court must determine what arguments or theories supported *or, as here* [where the state court provided no explanation] could have supported, the state court’s decision; then it must ask whether it is possible fairminded jurists could disagree that

those arguments or theories are inconsistent with the holding in a prior decision of this Court.

562 U.S. at 102 (emphasis and alteration added). This language requires the habeas court to identify possible “arguments or theories” that could justify the state court’s silent denial of the petitioner’s claim, then evaluate each of those possible arguments and theories to determine whether they clear § 2254(d)’s bar.

This Court has elaborated that this requires an analysis of “hypothetical reasons” that a “state court might have given” for rejecting the claim. *Brumfield v. Cain*, 576 U.S. 305, 323 (2015). And the Court further clarified that such hypothetical reasoning is appropriate where either the entire state-court decision, or the entire denial of a claim, contains no explanation. *See Johnson v. Williams*, 568 U.S. 289, 293, 298 (2013) (examining the scope of *Richter*).

Following *Richter*, some courts understood their task as “invent[ing] possible avenues the state court could have relied upon to deny. . . . relief.” *Evans v. Davis*, 875 F.3d 210, 217 (5th Cir. 2017); *accord Hittson v. Chatman*, 576 U.S. 1028, 1030 (2015) (Ginsburg, J., joined by Kagan, J., concurring in denial of certiorari) (describing the Eleventh Circuit’s application of *Richter* as “hypothesiz[ing] reasons”); *see also Grueninger v. Dir., Vir. Dep’t of Corr.*, 813 F.3d 517, 526 (4th Cir. 2016); *Walker v. McQuiggan*, 656 F.3d 311, 318 (6th Cir. 2011); *Torres v. Bauman*, 677 F. App’x 300, 302 (6th Cir. 2017); *Pye v. Warden*, 50 F.4th 1025, 1074 n.31 (11th Cir. 2022) (J. Pryor, J., dissenting); *Wilson v. Warden*, 834 F.3d 1227, 1245 (11th Cir. 2016) (Jordan, J., dissenting), *rev’d*, 584 U.S. 122 (2017); *Hedlund v. Ryan*, 750 F.3d 793, 836 n.11 (9th Cir. 2014) (Wardlaw, J., concurring), *withdrawn and*

superseded, 815 F.3d 1233 (9th Cir. 2016); *Montgomery v. Bobby*, 654 F.3d 668, 700 (6th Cir. 2011) (Clay, J., dissenting).

Other courts, however, held that *Richter*'s invitation to engage with hypothetical reasons applied only in cases, like *Richter* itself, where there was no reasoned state court decision. See *Tamplin v. Muniz*, 894 F.3d 1076, 1086 (9th Cir. 2018); *Dennis v. Secretary, Pa. Dep't. of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016).

Seven years after *Richter*, this Court decided *Wilson v. Sellers*, 584 U.S. 122 (2018).² There, it held that when making a reasonableness determination under § 2254(d), a federal habeas court must “train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner’s federal claims,” and then “defer[] to *those reasons* if they are reasonable.” *Wilson*, 138 S. Ct. at 125 (emphasis added) (quoting *Hittson*, 576 U.S. 1028). The Court called this a “straightforward inquiry when the last state court to decide a prisoner’s federal claim explains its decision on the merits in a reasoned opinion.” *Id.* Even the three dissenters emphasized, “a federal habeas court must focus its review on the final state court *decision on the merits*.” *Id.* at 136 (Gorsuch, J., dissenting). This language made clear that where there is a reasoned decision, a federal court defers to those given reasons and nothing more.³

² For more on the pre-*Wilson* circuit split, see Patrick J. Fuster, *Taming Cerberus: The Beast at AEDPA’s Gates*, 84 U. CHI. L. REV. 1325 (2017).

³ See generally *Antiterrorism and Effective Death Penalty Act—Habeas Corpus—Scope of Review of State Proceedings—Wilson v. Sellers*, 132 HARV. L. REV. 407, 408 (2018) (“*Wilson* likely restricted *Richter*’s practice of hypothesizing bases to

Indeed, the core holding of *Wilson* makes no sense if federal courts are free to invent hypothetical theories and arguments supporting a state court’s ruling. The question presented in *Wilson* was how a federal court should conduct review under § 2254 where the highest state court fails to offer reasons for its decision but a lower state court does. 584 U.S. at 125. The Eleventh Circuit’s decision that *Wilson* reversed concluded that in such circumstances, the federal court should ignore the lower state court’s reasoning and instead should ask “what arguments ‘could have supported’” the highest state court’s decision. *Id.* at 127.

This Court expressly rejected that approach, holding that in such circumstances “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.” *Id.* This Court explained that where the state’s highest court does not offer reasons but the lower state court does, looking through to the lower court’s reasons is more “realistic,” and “more efficiently applied than a contrary approach—an approach, for example, that would require a federal habeas court to imagine what might have been the state court’s supportive reasoning.” *Id.* at 130

Richter’s specific procedural posture—that is, to cases where there is no reasoned opinion by any state habeas court—thus limiting the heavy and unnecessary burden this practice places on habeas practitioners.”); *see also* Means, FEDERAL HABEAS MANUAL, § 3.70 (May 2023 Update) (“With this observation [in *Wilson*], the Supreme Court apparently settled the matter: the ‘fill the gaps’ aspect of *Richter*—considering grounds that *could have* supported the state court’s decision—does not extend beyond the unexplained rulings to reasoned state court decisions.”).

This Court also expressly rejected the argument that *Richter* allowed the federal court to invent reasons supporting the state court’s decision. *Id.* This Court held that where a lower state court has offered reasons for denying a petitioner’s claims, “*Richter* does not control.” *Id.* at 131. If *Richter*’s “could have supported” framework does not apply in cases where the highest state court says nothing but the lower state court offered a reasoned decision, then it most certainly does not apply where the highest state court itself offered a reasoned decision.

The lesson of *Wilson* is that where *any* state court has offered reasons for denying a petitioner’s claim, the federal court is to assess the reasonableness of those reasons alone. And the majority of circuits follow this reasoning, including the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits. *See Porter v. Coyne-Fague*, 35 F.4th 68, 76 (1st Cir. 2022) (citing *Wilson*’s instruction to review the “specific reasons given by the state court”); *Scrimo v. Lee*, 935 F.3d 103, 111–12 (2d Cir. 2019) (citing *Wilson* to explain that “[w]e therefore consider the rulings and explanations of the trial judge”); *Richardson v. Kornegay*, 3 F.4th 687, 697–98 (4th Cir. 2021) (“we must identify ‘the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims.’”) (quoting *Wilson*, 584 U.S. at 125); *Thompson v. Skipper*, 981 F.3d 476, 480–81 (6th Cir. 2020) (“Hewing to *Wilson*, this court recently explained that AEDPA requires a habeas court ‘to review the actual grounds on which the state court relied.’”) (quoting *Wilson*, 584 U.S. at 125); *Winfield v. Dorethy*, 956 F.3d 442, 454 (7th Cir. 2020) (“Having found the state court’s ‘specific reasons’ for denying relief, the next question is whether that explanation was reasonable thereby requiring our deference.”) (citing *Wilson*, 584

U.S. at 125); *Kipp v. Davis*, 971 F.3d 939, 952 n.10 (9th Cir. 2020) (“[B]ut we may look only to the reasoning [actually articulated by] the California Supreme Court”) (citing *Wilson*, 584 U.S. at 125).

Nevertheless, some circuits, including the Eighth, have continued to hold otherwise, relying on abrogated pre-*Wilson* precedent. In *Williams v. Roper*, 695 F.3d 825, 831 (8th Cir. 2012), relied upon by the district court below, the Eighth Circuit held that under *Richter*, “reviewing whether the state court’s decision involved an unreasonable application of clearly established federal law” means “examin[ing] the ultimate legal *conclusion* reached by the court, not merely the *statement of reasons* explaining the state court’s decision.” (internal citations omitted) (emphasis added). Specifically, in assessing *Strickland* prejudice, “the proper question is whether there is ‘any reasonable argument’ that the state court’s judgment is consistent with *Strickland*.” *Id.* at 831–32 (citing *Richter*).

Despite *Wilson*, the Eighth Circuit has continued to follow the approach it adopted in *Williams* without addressing or even acknowledging this Court’s contrary holding. See *Zornes v. Bolin*, 37 F.4th 1411, 1415 (8th Cir. 2022). Indeed, Mr. Springs’ case is the first case in which the Eighth Circuit even cites *Wilson* at all. Despite citing to *Wilson*, the Eighth Circuit here did not engage with *Wilson*’s core holding. To the contrary, the court simply cited to *Wilson*, and proceeded to apply *Richter*’s “could have supported” framework.

Rather than reviewing the “specific reasons given by the state court and defer[ing] to those reasons,” the Eighth Circuit cited *Zornes*, stating that “[w]e evaluate the reasonableness of the state court’s ultimate conclusion, not necessarily

the reasoning used to justify the decision.” Pet. App. 5a. The Eighth Circuit did not even mention the Arkansas Supreme Court’s inexplicable reasons that Matthew’s statement was not “comparable” to Jacob’s, that Matthew’s testimony was cumulative, nor that only hearing from one child in favor of Mr. Springs could raise questions about why other children were not willing to testify on his behalf. Pet. App. 89a. In fact, the Eighth Circuit seemed to explicitly disagree that Matthew’s testimony was cumulative when it asserted that his testimony “may have been given more weight by the jury than the testimony of friends and neighbors” but still found that this would not have been enough to change the outcome. Pet. App. 7a.

The Eighth Circuit only recounted one of the four reasons given by the Arkansas Supreme Court: that Matthew “could have” been met with impeachment. Pet. App. 8a, 89a. But even on this issue, the Eighth Circuit went far beyond the reasons stated by, or even presented to, the Arkansas Supreme Court. The Arkansas Supreme Court held that the prosecution “could have impeached Matthew’s testimony by introducing evidence that established the family was living in a shelter at the time of the murder and that the Department of Human Services had a case file on the family because of past issues.” Pet. App. 8a. Yet the Eighth Circuit went further, commenting that

[P]utting Matthew on the stand would have opened the door to cross-examination about his father’s abuse of him and his mother. Records from the Arkansas Department of Human Services included a report from Christina—corroborated by Matthew himself—that Springs had “grabbed Matthew around the neck and hit him on the head” shortly before Christina and the children left for the shelter. Had Matthew testified during the penalty phase, the prosecutor could have asked him about that incident and others like it. Any such testimony would have further offset the mitigating value of his testimony.

Pet. App. 89a. The Arkansas Supreme Court said nothing about Mr. Springs ever choking Matthew or other abuse. Pet. App. 8a. And again, the State never even made the argument about the alleged choking incident in state-court proceedings.

Ultimately, the Eighth Circuit chose to defer to the Arkansas Supreme Court’s prejudice ruling without actually analyzing whether its reasons for coming to this conclusion were in fact reasonable, and relied on theories and arguments that were never articulated by the Arkansas Supreme Court. The opinion here represents a blatant refusal to apply the dictates of *Wilson*.

The Eleventh Circuit has also refused to abide by the holding of *Wilson*. In *Pye v. Warden*, a divided en banc court distinguished between “reasons” and “justifications,” concluding that under *Wilson*, when assessing the reasonableness of a state court’s reasons, federal courts need not “strictly limit [their] review to the particular justifications that the state court provided.” 50 F.4th 1025, 1035–36 (11th Cir. 2022) (en banc). “Rather, in order to ‘give appropriate deference to [the state court’s] decision,’ having determined the *reasons* for the state court’s decision, we may consider any potential *justification* for those reasons.” *Id.* at 1036 (emphasis in original) (internal citations omitted). Thus, the majority explained that if, for example, a state court denies a petitioner habeas relief on the ground that the petitioner was not prejudiced by his counsel’s deficient performance, “[it] can, in evaluating whether that ‘reason [was] reasonable,’ consider additional rationales that support the state court’s prejudice determination.” *Id.*

Four judges dissented in relevant part, proffering a different reading of *Wilson*. They explained that *Wilson* “without a doubt . . . rejected *Richter*’s approach

in cases with reasoned decisions.” *Id.* at 1064. (J. Prior, J., dissenting); *see also id.* at 1056 (Jordan, J., concurring in the judgment). The dissent criticized the majority for “sidestep[ping]” *Wilson*’s directive by “imagining two categories of support for a state-court decision: reasons and justifications,” a distinction, the dissent explained, that does not exist in the caselaw. *Id.* at 1065–66. If the majority view is correct, the dissent posited that examining a state court’s reasoning would be futile, and that federal courts would “have no need to train their attention on a state court’s reasons” because federal courts could just create their own reasons for why a claim fails. *Id.* at 1066. And if this were true, “the Supreme Court would have had no reason to take [the *Wilson* case], and *Wilson* would not exist.” *Id.*

The Ninth and Third Circuits’ approach to deference is consistent with the *Pye* dissent. Both before and after *Wilson*, the Ninth Circuit had limited federal habeas courts’ review to the state court’s specific justifications. *Kipp v. Davis*, 971 F.3d 939, 948–60 (9th Cir. 2020); *Taylor v. Maddox*, 366 F.3d 992, 1008 (9th Cir. 2004). And while the Third Circuit has not cited *Wilson*, an en banc court in *Dennis*, 834 F.3d at 281, understood even before *Wilson* that “*Richter* and its progeny do not support unchecked speculation by federal habeas courts in furtherance of AEDPA’s goals.” “[F]ederal habeas review does not entail speculating as to what other theories could have supported the state court ruling when reasoning has been provided, or buttressing a state court’s scant analysis with arguments not fairly presented to it.” *Id.* at 281–82. *Dennis* made clear that “no case decided by our court or the United States Supreme Court permits this approach.” *Id.* It distinguished *Richter* as laying “out the analytical path for federal habeas courts confronted with

a state court opinion devoid of reasoning” *Id.* Contrary to *Pye* and *Williams*, the Third Circuit explained that any “gap filling” of state-court reasoning is “reserved for those cases in which the federal court cannot be sure of the precise basis for the state court’s ruling.” *Id.* No “gap filling” may “permit a federal habeas court, when faced with a reasoned determination of the state court, to fill a non-existent ‘gap’ by coming up with its own theory or argument, let alone one, as here, never raised to the state court.” *Id.*

The Fifth Circuit has expressed uncertainty about the state of the law following *Wilson*. In *Sheppard v. Davis*, the Fifth Circuit acknowledged that it had previously “consider[ed] ‘not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it *could have* relied upon.’” 967 F.3d 458, 466–67 (5th Cir. 2020) (emphasis in original). But because *Wilson* explained that “a federal court should ‘train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner’s federal claims and . . . give appropriate deference to that decision[,]” the Fifth Circuit assumed without deciding that *Wilson* abrogated its earlier approach. *Id.* at 467–48. *Sheppard* is not the first time the Fifth Circuit has expressed uncertainty following *Wilson*. See *Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018) (“The continued viability of this approach after the Supreme Court’s decision in *Wilson v. Sellers* is uncertain”).

B. This Court’s intervention is necessary to resolve this split.

In multiple respects, federal habeas doctrine has been in a state of realignment over the last few years. *See, e.g., Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) (overruling *Teague v. Lane*, 489 U.S. 288 (1989) “watershed” exception to retroactivity rule). But this realignment does not contemplate ignoring the plain text of the AEDPA, and indeed, the realignment has focused on strengthening federal courts’ commitment to AEDPA’s text. *See, e.g., Shinn v. Ramirez*, 596 U.S. 366, 384–85 (2022) (explaining the textual primacy of 28 U.S.C. § 2254(e)(2) despite the equitable rule of *Martinez v. Ryan*, 566 U.S. 1 (2012)); *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (applying the textual “terms” of 28 U.S.C. § 2254(d) to state court harmless error determination to “assess the reasonableness of the ‘last state-court adjudication on the merits of the petitioner’s claim.’”).

This Court’s intervention is necessary to again assert the primacy of congressional text, which requires evaluating whether a state court’s decision “involved” an unreasonable application of clearly established law. 28 U.S.C. § 2254(d)(1). Ignoring the state court’s actual reasons and manufacturing different reasons not included in the state-court’s reasoning flouts the plain meaning of “involved.” *See* Involved, Merriam-Webster, <https://www.merriam-webster.com/dictionary/involved> (last visited Jul. 18, 2024) (“having a part in something; included in something”); *cf. Hayes v. Sec’y, Fla. Dep’t of Corr.*, 10 F.4th 1203, 1225 & n.5 (11th Cir. 2021) (Newsom, J., concurring) (examining the textual definition of “based on,” within the meaning of § 2254(d)(2)).

There is another, less obvious but important, reason for this Court to intervene. The absence of clarity within AEDPA’s deference doctrine has become a particular focal point of disagreement even within the courts of appeals, leading to unusually charged exchanges between majority and dissenting views of cases. *See, e.g., Cassano v. Shoop*, 10 F.4th 695, 696 (6th Cir. 2021) (Griffin, J., dissenting from denial for reh’rg en banc) (noting how Sixth Circuit has “‘acquired a taste for disregarding’ the Antiterrorism and Effective Death Penalty Act of 1996”); *Taylor v. Jordan*, 10 F.4th 625, 642 (6th Cir. 2021) (Moore, J., dissenting) (referring to majority opinion as “topsy-turvy travesty”); *Ford v. Peery*, 9 F.4th 1086 n.1 (9th Cir. 2021) (Van Dyke, J., dissenting from denial of reh’rg en banc) (as to examples where Ninth Circuit misapplied AEDPA deference: “[M]y diligent law clerk did prepare a very nice string-cite spanning multiple pages. But including it felt awkward—like trying to shame a career offender with his rap sheet.”); *compare Pye*, 50 F.4th at 1058–59 (J. Pryor, J., dissenting) (“But what happened during Alice’s time through the looking glass was a dream. This, case, unfortunately, is not.”) *with id.* at 1056 (majority opinion) (“[T]oday’s dissent—which like so (so, so, so) many before it, is framed around an extended allusion to Lewis Carroll’s Alice-based novels What the dissent lacks in originality, it more than makes up for in spice.”).

Opportunities for this kind of disagreement would dissipate with additional clarity from this Court as to whether federal courts may manufacture reasons to support rulings instead of reviewing only the state court’s actual, provided reasons, as part of the correct review under § 2254(d).

II. This Court should summarily reverse or remand for the Eighth Circuit to decide *Strickland* prejudice in conformity with this Court’s clearly established precedent.

This Petition presents a second related but also independent basis for certiorari. This Court’s *Strickland* cases clearly require that prejudice be decided upon a threshold assessment of what evidence a jury would actually see, had counsel been adequate. If a court rules that it can conduct a *Strickland* reweighing of evidence the jury would not actually see, the ruling is contrary to clearly established law under § 2254(d)(1).

The Eighth Circuit and the Arkansas Supreme Court violated this rule. Both courts relied on an unquantified, hypothetical notion that Matthew’s testimony “could have” been impeached or rebutted with new evidence. But a mere “could have” is not the law. A correct reweighing involves only evidence that likely *would have* been put before the jury. And the record here proves—without even a suggestion to the contrary from any court—that Matthew’s testimony would not have been impeached or rebutted.

A. Clearly established law on *Strickland* prejudice does not permit consideration of evidence a jury “could” but likely would never *actually* see.

When examining *Strickland* prejudice, this Court has clearly established that evidence may be reweighed only upon a finding that such evidence would actually have been seen by the jury absent counsel’s deficient performance.

This Court’s most thorough case articulating the threshold prejudice analysis is *Wong v. Belmontes*, 558 U.S. 15 (2009). Like this case, *Belmontes* considered rebuttal evidence to a defendant’s deficiently omitted mitigation. This

Court determined that such evidence should be weighed for prejudice purposes, so long as the record shows that jury “would have” seen it in response to the new mitigation. *Id.* at 20 (citing *Strickland*, 466 U.S. at 695–96, 700).

In *Belmontes*, the trial prosecutor wanted to introduce additional aggravation—a second uncharged murder. The trial court kept the evidence out, while cautioning it “would come in for rebuttal or impeachment” if the defense opened the door. *Id.* at 19. The “prosecution was eager” and stood “ready to admit this evidence during the sentencing phase.” *Id.* at 18–19.

Noting the eagerness of the prosecution and guiding statements from the trial court, this Court ruled that there was “little doubt” that the rebuttal evidence would have actually been used. *Id.* at 25. The Court also examined a chance that such evidence might not be used due to a state evidentiary rule but rejected that as highly unlikely. *Id.* The Court found the record to be “clear” that such aggravation “would come in for certain rebuttal evidence. . . . The worst kind of bad evidence would have come in with the good,” *id.* at 26—or at least “almost certainly would have come in with it,” *id.* at 20. Only after this threshold finding, the Court reweighed the strength of all the evidence, *id.* at 26–28, concluding that “it is hard to imagine [the new mitigation outweighing] the evidence that Belmontes had committed another murder,” *id.* at 27–28; *see also Porter v. McCollum*, 558 U.S. 30, 43 (2009) (considering the weight of rebuttal and impeachment evidence only after concluding that “the jury *would* also have learned” about it if counsel presented new mitigation) (emphasis added).

The same threshold prejudice rule applies prior to weighing possible defense evidence. In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court found that trial counsel deficiently failed to investigate the client’s social history. *Id.* at 533–34. Rather than simply weigh the social history evidence, this Court examined the threshold prejudice question: whether, absent the investigation deficiency, counsel “would have introduced it at sentencing in an admissible form.” *Id.* at 536.

The Court concluded in the affirmative—that counsel would probably have introduced the evidence, absent a failure to investigate. *Id.* at 536. All justices took the threshold rule as a given—a court must first consider if potential evidence would actually be used—though the Court divided on the answer given the facts of the case. *See id.* at 552 (Scalia, J., dissenting) (“Wiggins must demonstrate that [absent the deficient investigation] there is a ‘reasonable probability’ that (1) his attorneys would have chosen to present the social history evidence to the jury, *and* (2) upon hearing that evidence, the jury would have spared his life”) (emphasis in original). To this end, the Court also examined (but rejected) a possibility that the new mitigation might not make it in because of an evidentiary rule. *Id.* at 536. Only after this finding, the Court proceeded to reweigh the evidence. *Id.* at 536–38.

Indeed, *Strickland* itself left no realistic doubt that a prejudice analysis must consider, as a logical threshold matter, whether the prosecution would actually use rebuttal evidence to mitigation. The Court’s prejudice formulation directed courts to weigh “the evidence before the judge or jury” and consider the “effect” counsel’s errors had on that “evidentiary picture.” *Strickland*, 466 U.S. at 695–96. Applying the formulated rule, the Court’s reweighing included the defendant’s rap sheet—

even though it was excluded from the trial, *see id.* at 673, upon finding that the rap sheet “would probably have been admitted into evidence” to impeach the new mitigation. *Id.* at 700.

The same threshold prejudice rule applies in the *Strickland* cases in the plea-bargaining context: *Hill v. Lockhart*, 474 U.S. 52 (1985), and its progeny. If trial counsel gives “erroneous advice” to the defendant about a plea deal, it is not enough that defendant *might* have gone to trial. Rather, a court must first find that “but for counsel’s errors,” the defendant actually “would have insisted on going to trial.” *Id.* at 59–60 (concluding the record did not support this showing); *see also Lee v. United States*, 582 U.S. 357, 369 (2017) (concluding the record supported such showing).

The rule likewise requires forecasting the prosecutor’s actual litigation moves, absent deficient performance. If counsel deficiently caused a defendant to miss a good plea bargain, *Strickland* prejudice must include a threshold examination of whether the prosecution would have kept or withdrawn the plea. *See Lafler v. Cooper*, 566 U.S. 156, 163–64, 174 (2012) (bypassing AEDPA deference due to state court’s failure to apply *Hill*). Put differently, a “complete . . . showing of *Strickland* prejudice” requires seeing if the prosecutor would have changed tactics, but-for counsel’s error. *Missouri v. Frye*, 566 U.S. 134, 148 (2012). This is done via an “objective assessment” of what it actually “would have” done. *Id.* at 149–50.

Thus, the Court’s clearly established *Strickland* prejudice law is understood to allow reweighing of only the evidence a jury would actually be likely to see, absent deficient performance. *See, e.g., Ross v. Davis*, 29 F.4th 1028, 1053 (9th Cir. 2022) (examining a state-court finding based on the postconviction record that “the

prosecution would have presented Ross’s juvenile record” to impeach new mitigation); *Andrews v. Davis*, 944 F.3d 1092, 1105 (9th Cir. 2019) (evaluating postconviction testimony to conclude “the prosecution was likely to call its own mental health experts to rebut” new mitigation); *Mason v. Mitchell*, 543 F.3d 766, 785 (6th Cir. 2008) (granting habeas relief where the state court relied on a “risk[]” of prosecutorial rebuttal evidence, where the record showed that the “spectre of rebuttal evidence” was false and the evidence would not actually come in); *Carter v. Bell*, 218 F.3d 581, 597–600 (6th Cir. 2000) (examining whether certain “negative material” and impeaching cross-examination would actually be introduced in response to new mitigation).

B. The Arkansas Supreme Court (and the Eighth Circuit) contravened clearly established law by weighing rebuttal evidence despite clear indications in the record showing that the evidence would not have actually been used.

The Arkansas Supreme Court and the Eighth Circuit flouted the correct rule for *Strickland* prejudice. They never considered the necessary threshold issue of whether, if Matthew testified, the prosecution would actually have impeached him. The state court simply noted the prosecutor “could have” impeached him. Pet. App. 89a. The Eighth Circuit erred worse, asserting Matthew “could have” been impeached with facts never cited by the state court. Pet. App. 8a. In doing so, each court sidestepped the actual record showing that Matthew “almost certainly,” *Belmontes*, 558 U.S. at 20, would not have been impeached. This contravened *Strickland* prejudice law beyond any possibility of fairminded disagreement.

The trial and postconviction records show that the prosecution would not have impeached Matthew. Even without Matthew, Mr. Springs’ good-character mitigation already opened the door to the impeachment evidence cited by the courts, which was available to the State and logically relevant to impeach or rebut. There was no asserted basis for why the State would even want to change their litigation strategy based on Matthew alone. And inexplicably, the possible impeachment mentioned by the Arkansas Supreme Court—*i.e.*, the fact that the family had lived in a crisis shelter and that a DHS case file existed due to prior abuse—was already known in full detail by the trial jury.⁴

The sentencing record shows that the prosecution’s strategy was to avoid antagonizing good-character witnesses with bad act impeachment. It also shows the prosecution was not otherwise “eager” to introduce such rebuttal through some other evidentiary hook. *See Belmontes*, 558 U.S. at 18. Its cross-examination of the 16 penalty witnesses evinced no hostility toward Mr. Springs. The prosecutor approached each witness with deference and respect, never inquiring into bad acts toward his family despite having an open door to do so. CA8 App. at 799–904.

The most striking example comes from the testimony of Jannifer Springs, who is Mr. Springs’ sister and was the last defense witness.⁵ She described times

⁴ *See* CA8 App. at 349–50 (prosecution opening statement); CA8 App. at 587–38 (testimony of employee of the shelter); CA8 App. at 367 (testimony from relative about moving to the shelter); CA8 App. at 353–54 (defense counsel acknowledging the order of protection); CA8 App. at 254 (defense acknowledging to the jury that one witness knew the family “through his work at DHS”).

⁵ Jannifer Springs’s name is mistakenly rendered as “Jennifer” in the record.

spent with the kids and Chrissy (the victim, as she called her); she introduced moving family photos of Mr. Springs, Chrissy and the kids; and she favorably noted Mr. Springs’ role in his family. CA8 App. at 894–902. Her brief testimony perfectly teed up the prosecutor to discuss Mr. Springs’ prior acts. But the prosecution stuck to its theme and questioned her with brevity and respect—staying away from any derogatory facts about her brother. CA8 App. at 902–04. After Jannifer testified, the defense rested and the prosecution declined rebuttal. CA8 App. at 905.

The prosecution’s approach to the character witnesses was sensible. The strategy tracked established guidance for questioning lay witnesses on sensitive topics.⁶ That was especially appropriate here, because any probing into Mr. Springs’ prior acts (*i.e.*, the impeachment incidents the Eighth Circuit hypothesized “could have” been elicited) could not realistically be kept in isolation, stripped of the context of the kids’ overall plight as recounted in the DHS records. The records show a complex tapestry of family struggle—depicting Christina’s own beating and neglect of the kids and portraying no single villain or hero—where both Christina and Mr. Springs were part and parcel of the abuse and neglect.⁷

⁶ In such situations, lawyers are instructed to avoid risking a “heated exchange” with a lay witness, as that may “antagonize the jurors” because “lay jurors usually sympathize with the lay witness[.]” Imwinkelried, EVIDENTIARY FOUNDATIONS, § 1.04 (Matthew Bender 12th ed. Jan. 2023). This advice is doubly true for dealing with child witnesses. McLaughlin, 1 FEDERAL EVIDENCE PRACTICE GUIDE, § 12.06(1)(a)–(c) (Matthew Bender Apr. 2024). And it is triply true as to Matthew, who spoke on behalf of his father despite having lost the mother he loved.

⁷ The file lists both parents’ DHS investigations—though more often into Christina than Mr. Springs. CA8 App. 1093. Less than a year before the murder, the

The postconviction record dispels any doubt that Matthew would not have been impeached if he had testified at trial. When Matthew testified at the postconviction hearing, the prosecutor declined the opportunity to cross-examine him, CA8 App. at 1197, though he did cross others witnesses, CA8 App. at 1162, 1202.⁸ More broadly, the postconviction record belies any suggestion that the prosecution wanted to insert rebuttal aggravation—be it via Matthew, or through another legal hook. Nor does the record support any prosecutorial interest in facts from the DHS records in particular. In fact, it shows the opposite: **the records were introduced by Mr. Springs’ postconviction counsel over multiple objections from the prosecutor.** CA8 App 1030–31, 1091–92.

Soon after Matthew testified, both sides rested and the prosecution declined rebuttal. CA8 App. at 1205. The prosecution later submitted proposed findings of

DHS records showed the kids reporting being left alone overnight unsupervised by both parents, CA8 App. 1074, and naming both “mom and dad” as sources of physical attacks. CA8 App. 1041. They document Christina cursing at her daughter and hitting her in the back of her head, leaving a mark after the daughter told her “you are not going to beat me anymore.” CA8 App at 1037. They document another child describing Christina spanking her kids, CA8 App. at 1039, 1044, and hitting her daughter with a belt so hard that authorities had to photograph the bruising on her arm. CA8 App. at 1032, 1034, 1038. They show only Christina being placed on the Child Maltreatment Registry, at least twice, including within a half a year of her murder. CA8 App. 1088–89, 1137.

At the same time—within the last year of Christina’s life—the records also favorably describe the Springs’ mutual good-faith attempts to jointly improve managing difficulties with their children. CA8 App. at 1130–32; 1134–35.

⁸ At the oral argument below (at 17:30–19:30; available at <http://media-oa.ca8.uscourts.gov/OAaudio/2024/1/223399.MP3>), the Eighth Circuit skeptically queried Respondent’s counsel, who could not surmise any reason for why the State declined to cross-examine Matthew. But the Eighth Circuit’s decision (like the Arkansas Supreme Court’s) begged this question outright by ruling that Matthew, hypothetically, “could have” been impeached.

fact, which were in the form of a draft proposed order. Pet. App. 114a. The prosecutor’s own findings do not suggest that Matthew’s testimony opened any door to impeachment or rebuttal, nor otherwise hint at a desire to use facts from the DHS records. Pet. App. 114a–118a. This was sensible, as any attempt to cherry-pick anecdotes from Matthew’s family story would likely reveal the full tapestry of the children’s plight, thus making his emotionally complex plea more compelling considering his love for the mother he already lost. *See also supra* 26–27 & n.7.

The postconviction court made its own findings, declining to sign the ghostwritten order. The court denied the claim by reasoning that “much of” Matthew’s testimony was cumulative to trial mitigation, Pet. App. 108a. Pet. App. 33a. The order, like the record on which it was founded, never hints at any possibility of impeachment or rebuttal—as to any witness or any subject matter.

The origin of the “could be impeached” notion came later. On appeal, the Sebastian County prosecutor transferred the case to the Arkansas Attorney General’s office. The State’s appellee brief, for the first time, baldly asserted that Matthew “could have” been impeached with evidence that he lived in a crisis shelter and from the DHS file. CA8 App. at 1231. The brief did not argue, however, that he actually *would have* been impeached. And critically, neither the State in its briefing, nor the Arkansas Supreme Court in its opinion, said anything about the alleged choking incident relied upon by the Eighth Circuit to deny relief. *Id.*

What is more, the new appellate assertion that Matthew “could have” been impeached was part of a scattershot paragraph covering both deficient performance *and* prejudice. CA8 App. at 1231. That is a key nuance, because an abstract fear of

impeachment is relevant to counsel’s performance,⁹ despite having no place in a prejudice analysis. *See* Part II.A, *supra*. Ultimately, the Arkansas Supreme Court found that trial counsel *was* deficient, but adopted the “could have” assertion from the State’s brief to deny relief on prejudice alone. Pet. App. 89a.

As recounted above, the record shows the State “almost certainly would [not] have” impeached Matthew. *Belmontes*, 558 U.S. at 20. No court has interpreted the record otherwise. Any contrary reading would have “no factual basis of any sort, in the trial record or elsewhere”; it would be simply “made[] up.” *Cf. Owens v. Duncan*, 781 F.3d 360, 364 (7th Cir. 2015) (Posner, J.) (granting habeas relief) cert. dismissed as improvidently granted, 577 U.S. 189 (2016).

C. This Court should summarily reverse to ensure respect for the Court’s clearly established *Strickland* prejudice law.

The law and the facts in this case warrant summary reversal. *See Sears v. Upton*, 561 U.S. 945, 954–55 (2010) (summarily reversing a lower court that “fundamentally . . . failed to apply the proper prejudice inquiry”); *Belmontes*, 558 U.S. at 16 (same); *Porter*, 558 U.S. at 42 (same, because the lower court “did not consider . . . evidence adduced in the postconviction hearing”).

⁹ *See Strickland*, 466 U.S. 689–90; *see also Bell v. Cone*, 535 U.S. 685, 700 (2002) (a “fear[] that the prosecution *might* elicit information about respondent’s criminal history” is relevant to performance) (emphasis added); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986) (concern that “the State could have responded [with rebuttal evidence]” is relevant to performance); *see generally ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1064 & n.291 (2003) (counsel should craft a mitigation case mindful of “damaging rebuttal evidence” that “may be admitted in response”).

The Arkansas Supreme Court and the Eighth Circuit ruled contrary to this Court's firmly established law. The law is clear: *Strickland* prejudice requires a threshold assessment of the actual evidentiary picture that would have existed without counsel's error. The record is equally clear: Matthew's testimony would not have resulted in damaging impeachment or rebuttal. This Court should summarily reverse and grant habeas relief or remand for the Eighth Circuit to reconsider *Strickland* prejudice without AEDPA deference and unburdened by a false "spectre of rebuttal evidence." *Mason*, 543 F.3d at 785.¹⁰

¹⁰ If there is any doubt about what the record shows the prosecution would have done had Matthew testified, this Court may remand for the Eighth Circuit to consider this threshold question in the first instance. *See Frye*, 566 U.S. at 151 (remanding for consideration of whether, but for counsel's error, the prosecution would have chosen a different litigation strategy).

CONCLUSION

Mr. Springs respectfully requests that this Court grant his petition for writ of certiorari on the first Question Presented to resolve the circuit conflict over the correct process for deciding whether a reasoned state-court decision was “contrary to” or “involved” an unreasonable application of this Court’s clearly established law.

Alternatively, the Court should summarily reverse on the second Question Presented. *See* S. Ct. R. 16(1).

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Respectfully submitted,

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