No. 24-5163

In the Supreme Court of the United States

THOMAS LEO SPRINGS,
Petitioner,

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal habeas court, in applying AEDPA deference, may only consider facts that support a state court's rationale for denying postconviction relief if those facts were expressly mentioned in the state court's opinion.

2. Whether this Court's precedents clearly establish the rule that in order to consider the risk that a hypothetical penalty-phase mitigation witness supporting an ineffective-assistance claim would have been impeached with rebuttal aggravation evidence, courts must make a threshold finding that the witness likely would have been impeached.

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STATEMENT

1. On January 21, 2005, Petitioner Thomas Springs murdered Christina Springs, his wife and the mother of his children. Pet. App. 2a. Springs had abused Christina for years. *Id.* In December 2004, a month before the murder, Christina left Springs and took their five youngest children with her. *Id.* First they moved to a crisis center in their hometown, Fort Smith, Arkansas; then, after Springs began stalking the crisis center, they moved to another shelter in Tulsa, Oklahoma. *Id.*; Pet. App. 12a. But by mid-January, Christina was forced to return to the Fort Smith crisis center so her children could return to school and she could attend a hearing in Arkansas to seek a protective order against Springs. Pet. App. 2a.

The morning of the murder, Springs went to his children's elementary school. Pet. App. 2a. Christina was notified and called her sister, Kelly Repking, who picked her up and drove her to the elementary school, where Christina found Springs "screaming and making threats and demands." *Id.* Christina spoke to a police officer on the scene and left in Repking's car. *Id.* Repking's three-year-old daughter sat in the back seat. *Id.*

Not far from the school, Repking stopped at a red light. *Id.* At that moment, Springs rammed head-on into Repking's car. *Id.* He then get out of his car, smashed in the passenger-side window where Christina was sitting, and repeatedly slammed her head into the dashboard. *Id.*; Pet. App. 13a. He then paused, returned to his vehicle, grabbed a hunting knife, and stabbed Christina "too many times to count," as multiple people tried to stop him. Pet. App. 2a (alterations omitted). "He did not

relent until someone exclaimed that Christina was dead." *Id.* Christina died from 24 stab wounds to the back, chest, legs and hands. Pet. App. 13a.

2. Later that year, Springs was charged in Arkansas with capital murder and aggravated assault. Pet. App. 3a. In addition to evidence of Springs's three prior second-degree battery convictions, the jury heard victim impact statements from Repking, who testified to the trauma she and her three-year-old daughter suffered from witnessing the murder; from Christina and Springs's twelve-year-old son, Jacob, who testified about his mother and the effect of her loss; and Christina's father and another sister. *Id.* In mitigation, Springs called seventeen witnesses who testified that he was a loving, involved father and a good neighbor and family member. *Id.* Only one of the seventeen, his sister, was a relative. *Id.*

The jury unanimously found three aggravating circumstances: that Springs previously committed another violent felony, that in committing the murder, he knowingly created a great risk of death to a person other than the victim, and that the murder was committed in an especially cruel or depraved manner. Pet. App. 3a. At least one juror found four mitigating circumstances, including that Springs had six children and one of them, Jacob, had expressed a wish to get an answer as to why Springs killed his mother. *Id.* The jury, however, unanimously found that the aggravating circumstances outweighed beyond a reasonable doubt those mitigating circumstances, and justified beyond a reasonable doubt a sentence of death. Pet. App. 3a-4a.

After the jury returned its verdict, three of Springs's children who hadn't previously testified read victim impact statements to the court. Pet. App. 40a. One of them, Matthew, testified that Christina was "a wonderful woman" and his best friend. *Id.* But he also testified that Springs "was a good guy and more than half the time he was a great dad," that he and his siblings "love[d] him to death" and that Springs "still ha[d] his chance to redeem himself." Pet. App. 41a. After hearing the additional victim impact statements, the trial court sentenced Springs to death. Pet. App. 4a.

Springs appealed his conviction, challenging, inter alia, the admission of the victim-impact evidence. *Springs v. State*, 244 S.W.3d 683, 693-94 (Ark. 2006). The Arkansas Supreme Court unanimously affirmed. *Id.* at 694.

Springs then sought postconviction relief in state court, claiming his trial counsel was ineffective for failing to call Matthew as a mitigation witness. At the postconviction hearing, Matthew testified that he would have been willing to testify in mitigation, Pet. App. 42a, and that if he had, he would have testified that he wouldn't want himself or his siblings to "lose their father" because then they would have no parents, Pet. App. 43a. The trial court denied relief, Pet. App. 113a, reasoning that Matthew's testimony would have been largely cumulative to the mitigation testimony the jury did hear, and that testimony expressly requesting a lesser sentence than death would have been inadmissible under state law, Pet. App. 108a.

On appeal, the Arkansas Supreme Court held trial counsel had performed deficiently in failing to call Matthew, reasoning in part that counsel didn't interview Matthew to see what his testimony might be. Pet. App. 86a, 88a. But it concluded that

declining to call Matthew wasn't prejudicial. It largely reasoned that additional mitigation simply wouldn't have tipped the scales. "Despite the fact that the jury found four mitigating circumstances"—including one closely related to Matthew's potential testimony, Jacob's desire to learn from Springs why Springs killed his mother—the jury still found that the multiple serious aggravating circumstances outweighed the mitigating circumstances and justified a sentence of death. Pet. App. 90a. It saw no reasonable probability that an additional mitigating circumstance, if found, would have changed the outcome. *Id.* But the court also gave a number of reasons why Matthew's testimony would not have been as powerful as Springs suggested. Among them, it noted the risk that the prosecution could have impeached Matthew's testimony by introducing evidence that Springs abused Matthew from the state Department of Human Services' case file on the family. Pet. App. 89a.

3. Springs then turned to federal habeas, renewing his ineffective-assistance claim. The district court held the Arkansas Supreme Court reasonably concluded that defense counsel's declining to call Matthew didn't prejudice Springs. Pet. App. 54a-55a. The district court questioned some of the Arkansas Supreme Court's specific rationales for doubting the mitigating value of Matthew's testimony, Pet. App. 45a-49a, though it did not hold any rationale was unreasonable. But it held the Arkansas Supreme Court's basic reason for finding no prejudice—that the additional mitigating evidence that Matthew would have offered would not have changed the outcome given the number of mitigators jurors had already found and the severity of the aggravators—was reasonable. Pet. App. 50a-55a.

4. Springs appealed, and the Eighth Circuit unanimously affirmed. Pet. App. 10a. Applying AEDPA's deferential standard of review, it held that the Arkansas Supreme Court's denial of Springs's ineffective-assistance claim, and several of the specific reasons it gave for that denial, were reasonable. First, the Eighth Circuit deferred to the Arkansas Supreme Court's overall prediction that additional mitigation of the kind Matthew's testimony would have provided wouldn't have altered the outcome. Pet. App. 7a-8a. It noted that multiple witnesses had already testified that Springs was a good father. Pet. App. 7a. Though it acknowledged that testimony to that effect from Matthew might have been given more weight, it held the Arkansas Supreme Court reasonably concluded it wouldn't have affected Springs's sentence, given "the gruesome nature of the crime," *id.*, and the fact that at least one juror had already found four mitigating circumstances to no effect on the sentence, *id.*

Second, it deferred to the Arkansas Supreme Court's rationale that "the value of Matthew's testimony was further reduced by the risk" of impeachment it posed. Pet App. 8a. Specifically, it noted that the Arkansas Department of Human Services' records, which the Arkansas Supreme Court specifically cited as a source of impeachment evidence, included a report that Springs had choked Matthew and struck him on the head shortly before Christina and the family left Springs. *Id.* Had Matthew testified, it reasoned, the prosecutor could have asked him about that incident, "further offset[ting] the mitigating value of his testimony." *Id.*

The Eighth Circuit denied Springs's petition for rehearing without dissent. Pet. App. 119a.

DISCUSSION

I. The first question presented does not merit review.

In *Wilson v. Sellers*, this Court said that under AEDPA, "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply receives the specific reasons given by the state court and defers to those reasons if they are reasonable." 584 U.S. 122, 125 (2018). Springs claims that the decision below deepened a circuit split over whether, notwithstanding that instruction, "a federal court applying AEDPA deference to a reasoned state court opinion may ignore the explanation provided by the state court" and instead defer to alternative reasoning. Pet. ii. In truth, this case does not present that question and no such split exists.

On the first score, the Eighth Circuit did not ignore the Arkansas Supreme Court's reasons for denying Springs relief; instead, it deferred to several of them. Springs suggests that in order to defer the Eighth Circuit had to defer to all of them, and that the Eighth Circuit exceeded the bounds of AEDPA review by considering facts the Arkansas Supreme Court's opinion didn't mention. But as this Court has held, a habeas court must defer under AEDPA unless it "rebut[s]" "all the reasons . . . supporting the state court's decision." *Mays v. Hines*, 592 U.S. 385, 391-92 (2021) (per curiam). So once the Eighth Circuit found that some of the Arkansas Supreme Court's reasons were reasonable, it had to defer. And the Eighth Circuit only addressed facts the Arkansas Supreme Court's opinion didn't mention—specifically, the

contents of a case file that court said could have been used to impeach Matthew—by way of explaining why the Arkansas Supreme Court's own rationale for denying relief was reasonable. The Eighth Circuit's decision rests solely on "the explanation provided by the state court." Pet. ii.

Yet even if this case presented Springs's question, there is no split on it, as the Eleventh Circuit explained in its recent en banc decision in *Pye v. Warden* and Georgia argued in opposing certiorari in that case. On the one hand, no circuit holds that habeas courts may simply ignore state court reasoning. Rather, the courts of appeals whose decisions Springs criticizes hold that habeas courts can only give deference to state courts' general reasons for denying relief, but are not limited to considering the precise reasoning a state court opinion gives in support of those reasons. On the other, no circuit holds that when considering if a state court's reasons for denying relief are reasonable, the only reasoning it can consider is the precise words a state court writes in support of those reasons. Rather, the courts of appeals whose decisions Springs praises either consider alternative reasoning in evaluating a state court's ultimate rationales, or haven't addressed the question presented at all. The Court should deny review.

A. <u>This case does not present Springs's first question.</u>

Springs claims this case presents the question of "[w]hether a federal court applying AEDPA deference to a reasoned state court opinion may ignore the explanation provided by the state court and instead" defer to alternative reasoning that "could have supported" the state court's decision. Pet. ii. Yet this case does not present that question at all. The Eighth Circuit did not "ignore" the Arkansas Supreme Court's

reasoning, and Springs doesn't even claim it did. Instead, as Springs ultimately concedes, it deferred to a portion of the Arkansas Supreme Court's reasoning without supplying any alternative reasoning of its own. So whether federal courts may defer to alternative rationales isn't presented here; in this case it sufficed to defer to the state courts' stated reasoning alone.

The Arkansas Supreme Court agreed with Springs that his counsel performed deficiently in declining to call Matthew as a mitigation witness. Pet. App. 88a. But it gave several reasons that Matthew's testimony wouldn't likely have affected Springs's sentence. Pet. App. 89a. Among them, it noted that the State "could have impeached Matthew's testimony by introducing evidence" that Matthew and his siblings were "living in a shelter at the time of the murder" on account of Springs's abuse, and by using the state Department of Human Services' "case file" on that abuse. *Id.* But it also gave a more holistic assessment of the likely effect of Matthew's testimony. "Looking at the totality of the evidence," it noted that at least one member of the jury found four different mitigating circumstances—including that Springs had six children and that one of them expressed a desire to get an answer from Springs about why he killed their mother—yet the jury still unanimously found that the three aggravating circumstances outweighed those mitigating circumstances and justified a sentence of death. Pet. App. 90a. The Arkansas Supreme Court concluded that it was unlikely that additional mitigating testimony from another of Springs's children would have affected the outcome.

The Eighth Circuit deferred to this reasoning, offering no alternative reasoning of its own. To begin with, as Springs concedes, it "recounted" the Arkansas Supreme Court's impeachment rationale, Pet. 14, agreeing that, "as the Arkansas Supreme Court highlighted, the value of Matthew's testimony was further reduced by the risk [of impeachment] it posed." Pet. App. 8a. In particular, it noted that the Arkansas Department of Human Services' records, which the Arkansas Supreme Court specifically cited as a source of potential impeachment evidence, showed that Springs had choked Matthew and struck him on the head. *Id.* And the Eighth Circuit also deferred to the Arkansas Supreme Court's overall predictive judgment. Quoting that judgment, Pet. App. 7a-8a (quoting Pet. App. 90a), the Eighth Circuit held it was reasonable to predict that Matthew's testimony wouldn't have changed the outcome given the "overwhelming aggravating evidence" against Springs, Pet. App. 8a, and the "four mitigating circumstances" that jurors had found already to no effect on their ultimate sentence, Pet. App. 7a (quoting Pet App. 90a).

Springs fails to explain how this unremarkable application of AEDPA deference to the Arkansas Supreme Court's stated reasons presents the question whether federal courts may "ignore the explanation provided by the state court." Pet. ii. He first claims that question is presented because the Eighth Circuit didn't mention some of the Arkansas Supreme Court's rationales for finding a lack of prejudice, but "only recounted one" (really two) of them. Pet. 14. But whether federal courts may apply AEDPA deference to alternative rationales or only a state court's stated ones, there's no dispute that federal courts not only may but must defer so long as any of a state

court's stated rationales is reasonable. As this Court recently held, under AEDPA a federal court cannot hold a state court's decision was unreasonable "without . . . rebutting" "all the reasons . . . supporting the state court's decision." *Mays v. Hines*, 592 U.S. 385, 391-92 (2021) (per curiam). Conversely, so long as any of a state court's stated reasons for its result is reasonable, a federal court must defer, and it isn't necessary to address whether other rationales the state court gave were reasonable too.

Springs's second reason for claiming this case presents whether federal courts may defer to alternative rationales is that the Eighth Circuit slightly elaborated on the state-court reasoning to which it deferred. Where the Arkansas Supreme Court wrote that Matthew's testimony could have been impeached with the contents of the Department of Human Services' case file, Pet. App. 89a, the Eighth Circuit noted that that file contained reports that Springs hit and choked Matthew, Pet. App. 8a. Springs depicts this as reliance on "arguments that were never articulated by the Arkansas Supreme Court." Pet. 15. To the contrary, it is merely an explanation of why the Arkansas Supreme Court's impeachment rationale was reasonable: it was reasonable to conclude that Matthew's testimony could have been impeached with the family's case file because that case file contained reports that Springs choked Matthew. Springs apparently believes AEDPA limited the Eighth Circuit to considering the mere fact of the case file's existence because the Arkansas Supreme Court's opinion did not detail its contents. But the Arkansas Supreme Court presumably considered the case file's contents in concluding that they could have impeached Matthew, not just that there was a case file.

Third, Springs notes (Pet. 13-14) that in a parenthetical, the Eighth Circuit quoted its prior statement that it "evaluate[s] the reasonableness of the state court's ultimate conclusion, not necessarily the reasoning used to justify the decision." Pet. App. 5a (quoting *Zornes v. Bolin*, 37 F.4th 1411, 1415 (8th Cir. 2022), *cert denied*, 143 S. Ct. 411 (2022) (No. 22-5714)). But this Court "reviews judgments, not statements in opinions," *California v. Rooney*, 483 U.S. 307, 310 (1987) (per curiam), much less citations in parentheticals. And whatever the Eighth Circuit's willingness in theory to "not necessarily" limit itself to reviewing state courts' reasoning, in this case it only had to review the Arkansas Supreme Court's reasoning to defer to its decision.[1]

B. There is no conflict on the first question presented.

Even if this case presented Springs's first question, it would not warrant review because there is no conflict on that question. As Judge Newsom explained for the en banc Eleventh Circuit in *Pye v. Warden*, 50 F.4th 1025, 1040 n.9 (11th Cir. 2022) (en banc), and as Georgia explained in opposing cert in that case, *see Pye v. Emmons*, 144 S. Ct. 344 (2023) (No. 23-31), after *Wilson v. Sellers* the circuits have widely agreed that while they may only defer to the high-level reasons a state court gave for its result, they are not restricted to reviewing the precise reasoning a state court gave in support of those reasons. *See Pye*, 50 F.4th at 1036 (holding that though habeas courts must review "the specific reasons" a state court gives for its result, it "may consider any . . . *justification* for those reasons"). The various decisions Springs cites

[1] In *Zornes*, from which this Court denied cert, the statement was dictum too; the Eighth Circuit deferred to what "the Minnesota court observed," 37 F. 4th at 1416, what it "considered" in "reaching [a] conclusion," *id.* at 1417, and its "decision to apply a 'triviality' standard" to a courtroom closure claim, *id.*

to claim a split merely cite *Wilson*'s directive to apply AEDPA deference to a state court's reasons; none holds federal courts are limited to reviewing the precise reasoning state courts give, and several expressly consider alternate reasoning. There is no conflict.

1. Springs's claim of a circuit split primarily rests on a string-cite to "rote quotations of *Wilson*'s language." *Pye*, 50 F.4th at 1040 n.9; *see* Pet. 12-13. That lower courts quote this Court's opinion in *Wilson* is no surprise. What matters is how they apply it, and none of the decisions Springs cites read *Wilson* to limit their review to the precise reasoning a state court gave for its result.

Springs first cites the First Circuit's decision in *Porter v. Coyne-Fague*, 35 F.4th 68 (1st Cir. 2022). That decision cites *Wilson*'s instruction to "review[] the specific reasons given by the state court." *Id.* at 75 (quoting *Wilson*, 584 U.S. at 125). But in reviewing a reasoned opinion, it raised "another possible explanation" for why the state court failed to discuss a key fact than the non-explanation the state court gave, hypothesizing it could have "considered . . . [it] unimportant." *Id.* at 79; *see Pye*, 50 F.4th at 1040 n.9. Under Springs's reading of *Wilson*, that would be impermissible.

Wilson next cites the Second Circuit's decision in *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019). There, after initially saying that under *Wilson* it "consider[ed] the rulings and explanations" of the state court, *id.* at 111-12, and determining "it was error to exclude [certain w]itnesses' testimony for [its] reason," the Second Circuit partially upheld the state court's decision because "the trial court *could* have excluded the testimony" on an alternative ground, *id.* at 120, and "such a ruling would not have been

an abuse of discretion," *id.* That is, the Second Circuit deferred to alternative reasoning outside the state court decision. *See Pye*, 50 F.4th at 1040 n.9.

Springs next cites the Fourth Circuit's decision in *Richardson v. Kornegay* for its mere quotation of *Wilson*'s instruction to identify "the particular reasons . . . why state courts rejected a state prisoner's federal claims." 3 F.4th 687, 697 (4th Cir. 2021) (quoting *Wilson*, 584 U.S. at 125). Yet the Fourth Circuit "defined the state court's 'particular reason' at a relatively high level of generality," *Pye*, 50 F.4th at 1040 n.9, saying its reason for affirming a trial court's exclusion of testimony was that "the trial court did not 'abuse its discretion,'" *Richardson*, 3 F.4th at 697-98. It then held it was reasonable to conclude that the trial court didn't abuse its discretion without closely attending to the particular reasoning the state court gave for reaching that conclusion, and instead supplying some of its own. *See id.* at 698 (deeming the ruling reasonable because the Fourth Circuit had upheld similar evidentiary rulings in federal cases).

Springs next cites the Sixth Circuit's decision in *Thompson v. Skipper*, in which that court described a prior panel opinion as "explain[ing] that AEDPA requires a habeas court 'to review the actual grounds on which the state court relied.'" 981 F.3d 476, 480 (6th Cir. 2020) (quoting *Coleman v. Bradshaw*, 974 F.3d 710, 719 (6th Cir. 2020)). But as Judge Nalbandian noted in concurrence, in the prior case the Sixth Circuit "did not constrain its analysis to the exact reasons the state court discussed," instead giving "three reasons" to reject a *Brady* claim where "the state court gave

only one." *Id.* at 485 (Nalbandian, J., concurring) (citing *Coleman*, 974 F.3d at 718-19).

The last case in Springs's string-cite is the Seventh Circuit's decision in *Winfield v. Dorethy*, 956 F.3d 442 (7th Cir. 2020). That is a particularly perplexing citation. In *Winfield*, the Seventh Circuit "assum[ed] without deciding that the state court [wa]s not owed AEDPA deference," *id.* at 453, then noted in a footnote that given that assumption, it "need not decide" whether its pre-*Wilson* rule that "a petitioner is not entitled to de novo review 'simply because the state court's rationale is unsound'" was still good law, *id.* at 455 n.2 (quoting *Whatley v. Zatecky*, 833 F.3d 762, 775 (7th Cir. 2016)). *Winfield* holds nothing about how AEDPA deference works in light of *Wilson* at all.

2. Springs also relies on pre-*Wilson* cases from two circuits, the Third and Ninth, which he claims hold review under AEDPA is limited "to the state court's specific justifications." Pet. 16. That isn't right. In *Dennis v. Secretary, Pennsylvania Department of Corrections*, the Third Circuit, anticipating *Wilson*, held that when a state court renders a reasoned opinion AEDPA deference does not "entail speculating as to what other theories could have supported the state court ruling . . . or buttressing a state court's scant analysis with arguments not fairly presented to it." 834 F.3d 263, 281-82 (3d Cir. 2016) (en banc). The Third Circuit didn't hold that habeas courts cannot elaborate on the theories a state court did rely on, or cite evidence in support of them a state-court opinion didn't specifically mention, as Springs faults the Eighth

Circuit for doing. Rather, it announced a ban on deferring to entirely alternate theories and unpresented arguments.

Springs also relies on a line of Ninth Circuit cases that hold a state court's "[f]ailure to consider key aspects of the record is a defect in the fact-finding process," *Kipp v. Davis*, 971 F.3d 939, 953-54 (9th Cir. 2020) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1008 (9th Cir. 2004)), that makes its resulting findings of fact per se unreasonable under Section 2254(d)(2). Pet. 16. Springs doesn't explain what this unique rule about state-court fact-finding has to do with the supposed split over how to review state courts' legal reasoning after *Wilson v. Sellers*. To be sure, the Ninth Circuit's rule illustrates its commitment to the general principle that habeas courts review state-court opinions, not just their results. But deciding that failing to address "highly probative and central" evidence makes a state court's factual findings unreasonable, *Taylor*, 366 F.3d at 1001, doesn't answer the question here: whether habeas courts are limited to reviewing the precise details of a state court's legal reasoning, or may review a state court's general reasons for denying relief for reasonableness.

Review on the first question should be denied.

II. Springs's second question presented does not merit review.

Belatedly training his attention on the opinion the Eighth Circuit actually wrote, Springs's second question presented argues that court should not have deferred to the Arkansas Supreme Court's rationale that Matthew could have been impeached. This Court's cases hold, he claims, that courts cannot weigh evidence when evaluating *Strickland* prejudice unless they first make a finding that absent defense counsel's deficient performance, the jury "would actually have" seen it. Pet. 20. So in

order to consider the risk that Matthew would have been cross-examined about Springs's abusing him had he testified, Springs claims the Arkansas Supreme Court first had to find that the prosecution *would* have cross-examined him along those lines. Failing to make that finding, he says, is contrary to clearly established law.

That argument gets this Court's precedents exactly backwards. The very cases Springs claims establish his rule say courts do *not* have to decide if a jury necessarily would have seen evidence before weighing it under *Strickland*—or even decide if that evidence would have been admissible. Instead, those cases only require courts to find that evidence they weigh under *Strickland* could have been introduced. That rule makes sense. Proving *Strickland* prejudice—and disproving it—requires a prediction of what might have happened had defense counsel performed differently, not what necessarily would have. So it would make no sense to require certainty or even a likelihood at any step of the analysis. Under the correct standard, whether the prosecution could have impeached Matthew had he testified, the Arkansas Supreme Court reasonably found it could have. And in any event, whether the Eighth Circuit appropriately deferred to the Arkansas Supreme Court's impeachment rationale isn't outcome-determinative; its decision rested much more heavily on deferring to the Arkansas Supreme Court's overall predictive judgment that additional mitigation evidence wouldn't have changed the outcome.

A. <u>This Court's precedents do not clearly establish the rule that evidence can only be weighed in evaluating *Strickland* prejudice upon a threshold finding that that evidence would have been used.</u>

The two cases Springs claims clearly establish his "threshold prejudice rule," Pet. 22, are *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Wong v. Belmontes*, 558 U.S. 15

(2009) (per curiam). In *Wiggins*, he claims, this Court said that before it could consider the prejudicial effect of defense counsel's failing to uncover mitigation evidence, it first had to decide "whether . . . counsel 'would have introduced it at sentencing in an admissible form.'" Pet. 22 (quoting *Wiggins*, 539 U.S. at 535). And to that end, he claims, this Court "examined (but rejected) a possibility" that the evidence would have been excluded, only weighing the evidence "after this finding." *Id.*

None of that is accurate. To begin, Springs's quotation of *Wiggins* omits the key part of the sentence. Before weighing the mitigation evidence, the Court only found "a *reasonable probability* that a competent attorney . . . would have introduced it at sentencing in an admissible form" had he been aware of it. *Wiggins*, 539 U.S. at 535 (emphasis added).[2] And to that end, this Court *declined* to decide if the evidence would have been admissible. Instead, holding that "we need not . . . make the state-law evidentiary findings that would have been at issue at sentencing," *id.* at 536, the Court said only that "it appears that [the evidence] may have been admissible," *id.* The Court then granted relief based on this "powerful" evidence, *id.* at 534, having concluded only that it was possibly admissible and reasonably probable that a competent attorney would have introduced it.

That rule follows from *Strickland*'s prejudice standard. Ultimately, *Strickland*'s prejudice standard requires a reasonable probability that attorney error affected the

[2] Similarly, in the plea-bargaining ineffective-assistance context, this Court has not held, as Springs claims, that "a court must find that 'but for counsel's errors, the defendant actually 'would have insisted on going to trial,'" Pet. 23 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)), but rather required courts to find "that there is a *reasonable probability* that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *Hill*, 474 U.S. at 59 (emphasis added).

outcome, so it wouldn't make sense to require certainty at any stage of the analysis. If there is only a reasonable probability that an attorney would have successfully introduced evidence had he known of it, but that evidence is extremely powerful, it might make sense to conclude that there's a reasonable probability that discovering the evidence would have affected the outcome. If that evidence is less powerful, a defendant logically needs to show a higher probability that it would have been admitted and used. But there is no hard-and-fast requirement of certainty at any step. Instead, a defendant needs to show that all the contingencies attending a claim of deficiently unpresented evidence, from introduction to admission to the prosecution's response to the evidence's effect on the jury, ultimately amount to a reasonable probability of a different outcome.

Wong v. Belmontes isn't to the contrary. That case also involved a claim of deficiently unpresented mitigation evidence. Repeating *Wiggins*'s holding that a defendant need only "establish 'a reasonable probability that a competent attorney, aware of the available mitigating evidence, would have introduced it at sentencing,'" *Belmontes*, 558 U.S. at 20 (alteration omitted) (quoting *Wiggins*, 539 U.S. at 535), the Court assumed that a competent attorney would have done so and turned to the evidence's likely effects, *id.* The Ninth Circuit had held there was "no basis for suggesting" that additional mitigating evidence would have opened the door to rebuttal evidence of a second uncharged murder. *Id.* at 25 (quoting *Belmontes v. Ayers*, 529 F.3d 834, 869 n.20 (9th Cir. 2008)). Summarily reversing the Ninth Circuit, this Court held the rebuttal evidence not only could have come in, but "would have," *id.* at 26,

and that in light of that evidence it was "fanciful" to predict a different outcome had defense counsel done more in mitigation, *id.* at 28.

Springs depicts this Court's statement that the rebuttal evidence would have come in as a "threshold finding" it had to make before weighing the rebuttal evidence. Pet. 21. But the Court didn't say so; it was simply extremely confident in its prediction that the evidence would have come in—hence its summary reversal, and its conclusion that it wasn't just improbable but fanciful to think more mitigation would have mattered.[3] The only threshold finding the Court had to make to consider the evidence is to reject the Ninth Circuit's view that the evidence certainly would not have come in. A contrary rule would be at odds with the Court's statement in the same opinion that where mitigation evidence is concerned, a defendant need only show a reasonable probability that competent counsel would have successfully introduced it.

Indeed, if anything rebuttal aggravation evidence is held to a lower standard. A defendant must show a reasonable probability of a different outcome had the jury seen mitigation evidence, so logically he must show a reasonable probability the jury would have seen the evidence in the first place. But the state need only show the defendant has failed to meet that burden, and even a relatively small risk that it

[3] Likewise, the Court's statement in *Strickland* itself that a rap sheet "would probably have been admitted" to impeach hypothetical mitigation evidence, *Strickland v. Washington*, 466 U.S. 668, 700 (1984), was not a threshold finding the Court said it had to make to consider the rap sheet as Springs suggests, Pet. 22-23, but simply a factual observation. Had the Court been less sure the rap sheet would have come in, it might have placed less weight on the rap sheet, but it still could have weighed it.

would have introduced damaging evidence in rebuttal can reduce a reasonable probability of a different outcome to something less. That is why the Court has required defendants to show a reasonable probability that mitigation evidence would have been used, but has never set a specific threshold for considering rebuttal aggravation evidence. The Arkansas Supreme Court applied the correct standard when it found that Matthew "could have" been impeached. Pet. App. 89a.

B. The Arkansas Supreme Court reasonably applied the correct standard.

Springs doesn't argue that the Arkansas Supreme Court unreasonably applied the correct, "could have" standard; he only argues that he would prevail under his incorrect "would have" one. Pet. 24-29. So although he claims at length the state "almost certainly" wouldn't have impeached Matthew, Pet. 24, he doesn't present a question under the correct standard. In any event, the record doesn't show the state wouldn't have impeached Matthew.

Springs's main rationale for his audacious claim that the prosecution almost certainly wouldn't have impeached Matthew is that it declined to impeach other, weaker mitigation witnesses with evidence of Springs's domestic abuse. Pet. 25-26. Though other witnesses—all but one of whom wasn't a member of the family, with the sole exception of Springs's own sister, Pet. App. 3a—gave "brief testimony" that Springs was a good father, Pet. 26, the prosecution chose not to impeach them with evidence to the contrary. So, Springs infers, the prosecution wouldn't have impeached Matthew either, even claiming there is no "basis for why the State would even want to change their litigation strategy based on Matthew." Pet. 25.

The obvious problem with that argument is the very premise of Springs's own ineffective-assistance claim: Matthew was a stronger mitigation witness than those that testified. While other mitigation witnesses briefly testified about Springs's treatment of a family they weren't a part of, Matthew would have testified that his father was "a great dad" and "a great person" whose children "love[d] him to death," Pet. App. 41a, and that he "wouldn't want [his siblings] to lose their father and I wouldn't want to lose mine because then it feels like we have nobody," Pet. App. 43a. The relative power of that testimony compared to the mitigation case Springs did put on is why the Arkansas Supreme Court held it was deficient performance not to call Matthew, Pet. App. 88a, even though Springs had already called seventeen other good-character mitigation witnesses, Pet. App. 3a. If Springs had offered that more powerful mitigation testimony, it is certainly possible that the prosecution would have felt compelled to show that Springs was not the father Matthew said he was.

Springs also claims that the prosecution's declining to cross-examine Matthew when he testified about his hypothetical trial testimony in postconviction proceedings proves it would not have impeached him at trial. Pet. 27. But that is illogical. At postconviction there was no jury Matthew's testimony could sway, and Matthew was only testifying to what he *would have* testified about his father's character, not to his father's character itself. So there was no need to impeach him—certainly not by live cross-examination. The records with which Matthew could have been impeached were already in evidence at postconviction when Matthew testified. *See id.* Springs points out that the prosecution's proposed findings didn't say Matthew could have

been impeached. Pet. 27-28. But those proposed findings, which addressed Matthew's testimony in a paragraph, simply said defense counsel's decision not to call Matthew was reasonable, Pet. App. 115a, which hardly shows the prosecution wouldn't have impeached Matthew if he had been called.

Finally, whether the Arkansas Supreme Court reasonably concluded that Matthew could have been impeached isn't outcome-determinative. The Eighth Circuit held that in light of the powerful aggravating evidence against Springs and "the gruesome nature of his crime," there was no reasonable probability that he would have received a different sentence had Matthew testified. Pet. App. 7a. It reasoned that the jury had already heard testimony from "numerous witnesses that Springs was . . . a good father," and that at least one juror had already found four different mitigating factors. Pet. App. 8a. It also explained that Matthew's testimony was substantially similar to the mitigation testimony the jury did hear, even if it might have been given more weight. Pet. App. 7a. Only after all this did the court add that "the value of Matthew's testimony was further reduced by the risk [of impeachment] it posed." Pet. App. 8a. Even if the Eighth Circuit erred in deferring to the Arkansas Supreme Court's supplemental impeachment rationale—and it didn't—that error would not warrant summary reversal.

CONCLUSION

The Court should deny the petition.

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