

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 REHEARING
AND INCORPORATED RULE 44 CERTIFICATION**

CAPITAL CASE

LISA G. PETERS
FEDERAL PUBLIC DEFENDER

Heather Fraley *
Alex Satanovsky
Anisha Jones
Assistant Federal Public Defenders
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
Heather_Fraley@fd.org
Alex_Satanovsky@fd.org
Anisha_Jones@fd.org

** Counsel of Record*

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PETITION FOR REHEARING

Petitioner Thomas Springs sought certiorari to review the Eighth Circuit’s denial of his habeas corpus petition. The Eighth Circuit deferred, under 28 U.S.C. § 2254(d)(1), to the Arkansas Supreme Court’s denial of Mr. Springs’s *Strickland* claim. The state court found counsel deficient for not calling Mr. Springs’s son, Matthew, to testify at the penalty phase, but found no prejudice. Matthew was also the son of the victim, in this tragic spousal homicide case. Matthew would have given un rebutted testimony about the love and forgiveness he and his siblings have for Mr. Springs, and what he means to them. The trial jury heard nothing about the children’s relationship with their father.

The Eighth Circuit found the no-prejudice ruling reasonable. The main reason was that calling Matthew created a “risk” that the prosecutor “could have” used the testimony to elicit impeachment evidence. Pet.App. 8a. But neither the Eighth Circuit, nor the Arkansas Supreme Court, addressed the likelihood of any such an abstract risk. The petition chronicled the record to show that Matthew would not be impeached—and that the State never even asserted otherwise in state court. Pet. 24–28. Therefore, Mr. Springs sought certiorari on the question of:

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.

On November 4, 2024, this Court denied certiorari. On the same day, the Court issued its opinion in *Hamm v. Smith*, 604 U.S. ___, No. 23-167 (Nov. 4, 2024) (per curiam). In *Hamm*, the Court found that its certiorari decision was hindered by

an ambiguity in the decision below. *Hamm* explained that “[t]he Eleventh Circuit’s opinion can be read in two ways”—one that would “suggest a *per se* rule,” but another that would “suggest a more holistic approach . . . that considers the relevant evidence.” *Id.* slip op. at 1–2. The Court vacated and instructed the Eleventh Circuit to clarify its legal basis, as that would assist the “ultimate assessment of any petition for certiorari.” *Id.* at 2.

The Court should grant rehearing and do the same in this case. As the petition laid out, the Eighth Circuit and the Arkansas Supreme Court opinions are best read as employing a *per se* rule that flagrantly violates *Strickland*. Under that rule, a court will weigh any asserted impeachment evidence in the prejudice analysis—even when the record shows that such evidence would not be used. Mr. Springs framed his Question Presented in accordance with the Eighth Circuit’s hypothetical framing of *Strickland* prejudice, which cited only an unquantified “risk” that impeachment “could be” used against new mitigation. Pet.App. 8a. The Eighth Circuit did so despite a clear showing that no such impeachment would actually be used. Although at least one member of the panel below appreciated this problem for the State, *see* Pet. 27 n.8, the eventual opinion was drafted in vague and hypothetical terms to avoid engaging this recognized problem.

The Court should grant rehearing and do as it did in *Hamm*. It should direct the Eighth Circuit to clarify its view of *Strickland* prejudice law—free of any hedging or evasiveness. Did the Eighth Circuit approve a “*per se* rule,” *Hamm*, slip op. at 2, whereby all asserted impeachment is automatically weighed—even when

there is no basis to suggest it would be used? Or did the Eighth Circuit implicitly use a “holistic approach . . . that considers the relevant evidence,” *id.*, to conclude that it was reasonable to believe Matthew would, in fact, likely be impeached?

A revised opinion directly answering this question is essential. The State’s own position before this Court agreed that *Strickland* prejudice is determined by predicting what a prosecutor is actually likely do, absent deficient performance.¹ If the Eighth Circuit saw the law otherwise, as is apparent from its opinion, it should say so explicitly to give this Court a clean path for review. On the other hand, if the Eighth Circuit “consider[ed] the relevant evidence” as to the likelihood of impeachment, *Hamm*, slip op. at 2, then it would need to grapple with the entire record that converges upon the unmistakable conclusion that Matthew would not be impeached—as a member of the panel below recognized. *See* Pet. 27 & n.8.

A summary order defending this Court’s *Strickland* law is a prudent use of certiorari resources. As the Court often acknowledges, capital cases receive close scrutiny regardless of which side prevailed below.² Because *Hamm* authorized a

¹ See BIO 16 (“Proving *Strickland* prejudice—and disproving it—requires a prediction of what might have happened had defense counsel performed differently[.]”), BIO 18 (“[A] defendant needs to show that all the contingencies attending a claim of deficiently unrepresented 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.”).

² Compare, *e.g.*, *Dunn v. Reeves*, 594 U.S. 731, 740 (2021) (reversing an error involving a “straightforward application” of *Strickland* and AEDPA principles), with *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (justifying certiorari because “our duty to search for constitutional error with painstaking care is never more exacting

limited remand to clarify a potential misapplication of law, the Eighth Circuit's apparent flagrant error in this case should get the same treatment.

CONCLUSION

The petition for rehearing should be granted. The Court should instruct the Eighth Circuit to clarify whether it reads *Strickland* to *per se* allow weighing hypothesized impeachment a jury would not actually see, or whether it believed that the prosecution in this case was truly likely to impeach Matthew. *See Hamm*, slip op. at 2; *see also Missouri v. Frye*, 566 U.S. 134, 151 (2012) (remanding for consideration of whether, but for counsel's error, the prosecution would have chosen a new litigation strategy to neutralize potential *Strickland* prejudice).

Dated this 12th day of November, 2024,

Respectfully submitted,

By: /s/ Heather Fraley
Heather Fraley
Counsel of Record
Alex Satanovsky
Anisha Jones
Assistant Federal Public Defenders
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
Heather_Fraley@fd.org
Alex_Satanovsky@fd.org
Anisha_Jones@fd.org

than it is in a capital case"). *See also, e.g., Shoop v. Cunningham*, 143 S. Ct. 37, 44 (2022) (Thomas, J., dissenting from denial of certiorari) (discussing the Court's recurring need to correct flagrant legal errors in capital habeas corpus cases).

RULE 44 CERTIFICATION

Pursuant to Supreme Court Rule 44.2, this petition for rehearing is restricted to grounds of intervening circumstances of a substantial or controlling effect and other substantial grounds not previously presented and is presented in good faith and not for delay.

/s/ Heather Fraley
Heather Fraley