No. 25-732

IN THE

Supreme Court of the United States

AMOS J. WELLS III,
Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals properly denied a certificate of appealability on Wells's claim that his trial counsel were ineffective at the sentencing phase of his capital trial for presenting expert testimony about his genetic predisposition to violence as part of a broader mitigation strategy, where the expert testimony was unrelated to Wells's race, trial counsel did not concede Wells's future dangerousness, and Wells suffered no prejudice from trial counsels' strategic decision to present such testimony?

LIST OF PROCEEDINGS

State v. Wells, No. 1405275R (432nd Dist. Ct. Tarrant County, Tex.) (convicted November 3, 2016, and sentenced to death November 18, 2016.)

Wells v. State, 611 S.W.3d 396 (Tex. Crim. App. 2020) (affirming conviction and death sentence)

Ex parte Wells, No. WR-86,184-01, 2021 WL 5917724 (Tex. Crim. App. Dec. 15, 2021), *cert. denied*, 142 S. Ct. 2722 (2022) (denying state habeas application)

Wells v. Lumpkin, No. 4:21-CV-01384-O, 2023 WL 7224191 (N.D. Tex. Nov. 2, 2023) (denying federal habeas petition and denying certificate of appealability)

Wells v. Lumpkin, No. 4:21-CV-01384-O, 2024 WL 69161 (N.D. Tex. Jan. 5, 2024) (denying motion to amend judgment)

Wells v. Guerrero, No. 24-70002, 2025 WL 2051145 (5th Cir. July 22, 2025) (denying certificate of appealability)

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INTRODUCTION

Wells claims that his trial counsel were ineffective for presenting expert testimony that he was genetically predisposed to violence. He argues the testimony established future dangerousness and invited the jury to sentence him based on an irrelevant immutable characteristic. Further, he argues the state court's rejection of the claim was based on an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and *Florida v. Nixon*, 543 U.S. 175 (2004).

However, Wells points to no reason justifying his request for the Court to grant review. He does not identify any relevant circuit split or other reason amplifying the need to grant his petition. Indeed, Wells alleges nothing more than that the state court misapplied a properly stated rule, which is an insufficient basis for this Court's review. *See* Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Moreover, Wells's claim fails to warrant the Court's attention because the Fifth Circuit's denial of a certificate of appealability (COA) as to Wells's ineffective assistance of trial counsel (IATC) claim was plainly appropriate. Trial counsel acknowledged the genetics evidence was double-edged but presented it because they believed the jury could find it sufficiently mitigating to warrant a life sentence as it was a factor that

contributed to Wells's violent conduct but was out of his control. The lower courts properly held that trial counsels' informed decision to pursue that strategy was reasonable and is entitled to a strong measure of deference. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (Under the "doubly deferential" review applied to *Strickland* claims evaluated under AEDPA, deference was owed to this reasonable, strategic decision of counsel.). Additionally, as the district court held, trial counsel were not ineffective because they presented a substantial mitigation case that centered on the traumatic nature of Wells's upbringing.

Accordingly, Wells's complaints do not warrant certiorari review.

STATEMENT OF THE CASE

I. Evidence at guilt-innocence

> [U]pset that his pregnant girlfriend, Chanice Reed, would not answer his calls, [Wells] drove to Chanice's house on Pate Street in Fort Worth where she lived with her grandmother, mother, and two younger brothers. Chanice was home with her mother, Annette, and ten-year-old brother, E.M., when [Wells] arrived. . . .
>
> Around 6:00 p.m., Annette called her aunt, Joylene Parsons, and asked her to come over. Parsons described Annette as sounding very troubled on the phone and in the background she heard a man yelling at the top of his voice in a

"bone-chilling scream." She also heard Annette say, "You not going in there." When Parsons asked who was there, Annette replied, "Chanice's boyfriend," whom Parsons know was [Wells]. . . . At 6:09 p.m., Annette called 9-1-1 for help. As the 9-1-1 operator was asking questions, Annette reported, "He's going to his truck." And then the phone went dead.

. . .

The first 9-1-1 call reporting the shootings came in at 6:15 p.m. Responding officers, firefighters, and paramedics arrived within minutes. Chanice had been shot four times. . . . Paramedics were not able to save her. Chanice's unborn baby also did not survive. Post-mortem testing revealed that [Wells] was the biological father.

Annette had been shot two times. . . .

E.M. had been shot four times. His dead body was found in a hallway inside the house. . . .

. . . [Wells] called his former girlfriend, Valricia Brooks, with whom he shared a daughter, and told her what had happened. At the time of the call, Brooks was walking in a park with her friend, Brittany Minor, who overhead the conversation. [Wells] told Brooks that he had shot and killed Chanice, Annette, and E.M. and that he was thinking about leaving, but he only had

one bullet left in his gun and ninety-seven miles remaining before running out of gas. Minor described [Wells] as sounding "distraught . . . talking fast, frantic, remorseful, [and] crying. . . ."

At approximately 7:30 p.m., [Wells] walked into the Forest Hills Police Department lobby and, in a rambling and incoherent manner, blurted, "Put me in jail; kill me." Noting that [Wells] was a "sweaty, big guy, muscular, [and] had a dazed kind of spacey look on him," Sergeant Christopher Hebert handcuffed him as a safety precaution. He described [Wells's] demeanor as being "like a calm storm . . . calm demeanor but aggressive," and "look[ing] like he could [ ] explode any second. . . ."

Fort Worth officers transported [Wells] to a Fort Worth police station where Detectives [Matthew] Barron and Tim O'Brien attempted to interview him around 8:35 p.m. Without reading *Miranda*[1] warnings, Barron began by asking [Wells] routine questions such as his name, birthdate, and address, all of which [Wells] provided. He then asked [Wells] questions such as: what he had done that day; why he went to the Forest Hills Station; whether he had been on Pate Street; and what had happened on Pate Street. [Wells] denied being on Pate Street that day. When Barron asked [Wells] to tell him what had happened on Pate Street, [Wells] stated

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1 *Miranda v. Arizona*, 384 U.S. 436 (1966)

> repeatedly, "You tell me what happened." After forty-one minutes of questioning and an eight-minute break without obtaining useful information, the detectives stopped [Wells's] interview and focused on interviewing other people who had been asked to provide statements at the station. By 1:00 a.m. on July 2, Barron determined that he had probable cause to arrest [Wells] and search his residence. Barron obtained a search warrant for [Wells's] residence at 1:55 a.m.
>
> . . .
>
> After the search, Barron obtained an arrest warrant at 4:00 a.m. Barron returned to [Wells's] interview room at 4:20 a.m. and informed him that he was being charged with capital murder. Barron read [Wells] his *Miranda* rights, which [Wells] waived. Barron then re-interviewed [Wells]. [Wells] broke down crying and eventually confessed in detail to the murders of Chanice, Annette, and E.M.

Wells v. State, 611 S.W.3d 396, 402–05 (Tex. Crim. App. 2020) (footnotes omitted).

II. Evidence at sentencing

A. The prosecution's evidence

> . . . [T]he State's punishment case began with evidence of [Wells's] history of violence against

Brooks. . . . On January 5, 2008, Brooks and [Wells] got into an argument when [Wells] wanted to borrow her father's truck. He became violent, and Brooks locked him out of her apartment. [Wells] kicked in the front door, punched and hit Brooks, kicked glass mirrors in the bedroom, and threw a chair out the window.

. . . When police responded, Brooks was "crying, agitated, afraid and nervous." Her ear was swollen, and she had "knots" on the back of her head from multiple punches. Keith asked Brooks a series of questions from what is referred to as a "family violence packet," a certain set of questions intended to document the investigation. Brooks responded that: [Wells] had been violent toward her in the past; [Wells] had access to firearms or weapons; she had been seriously injured by [Wells]; things had recently gotten worse, more frequent, or more severe; [Wells] had choked her; [Wells] was unusually jealous or possessive or considered her his property; and [Wells] had been violent when she talked about leaving him. . . .

. . .

Brooks testified that [Wells's] pattern of abuse repeated itself during their relationship. She described another assault that occurred on the night of November 28, 2010, when Brooks was visiting [Wells's] aunt, Letrinda Lee. At the time, Brooks and [Wells] had broken up. Although

Brooks did not specifically recall what caused that particular breakup, she explained that they usually separated due to [Wells's] cheating and assaults against her. While Brooks was with Letrinda, [Wells] walked into Letrinda's house, grabbed Brooks from behind, and choked her. [Wells] had the crook of his arm around Brooks's neck, and he dragged her outside. She blacked out and remembered waking up on the ground to [Wells] beating her in the face. He "just stopped" hitting her, and then he cried and said he was sorry, which was typical of him. The next thing Brooks remembered is that she was on the ground again in a field next to Letrinda's house, and [Wells] was kicking her in the face with his work boots. Brooks went to the hospital with injuries to her mouth and lip and bruising to her arms and shoulders.

. . .

. . . Tiffany Rose, a friend and former co-worker of Chanice, testified that she was concerned after seeing bruises and scratches on Chanice, and there was a time when Chanice missed work because she had a black eye. Rose also testified, over [Wells's] objection, that there was a situation when she was called by Chanice, who was upset. Chanice and [Wells] had gotten into an argument, and, when Chanice was brushing her teeth, [Wells] slapped her. Chanice asked Rose not to call the police over this incident because Chanice did not want [Wells] to go to jail. Rose encouraged

> Chanice to end the relationship with [Wells], but Chanice "kept going back."
>
> . . .
>
> . . . The State's last witness in its punishment case-in-chief was Dallas Theiss, an inmate who was serving a jail sentence at the Tarrant County Jail during the same time period that [Wells] was awaiting trial in the instant case. Theiss testified about an incident when he was walking to the jail's dayroom. His path was blocked by [Wells], who was seated on a bench and had his feet propped up onto another table. Theiss stepped over [Wells's] legs. [Wells] told Theiss that he needed to say "excuse me," but Theiss felt it unnecessary to apologize because [Wells] was at fault for having his legs in the way. [Wells] confronted Theiss and asked "do you want to do this in my cell or your cell?" Later that day, Theiss was asked to speak with [Wells] in a third party's cell. Theiss sat in the cell for about five minutes thinking that he and [Wells] would simply "talk it out," when [Wells] ran in and started swinging. The altercation lasted for about thirty seconds. [Wells] had "busted [Theiss's] eye open" and his "jaw was messed up bad," and Theiss was eventually taken to the hospital.

Wells, 611 S.W.3d at 419–21 (footnotes omitted).

B. Wells's evidence

Trial counsel for [Wells] presented extensive testimony from [Wells's] parents, family, and mental health experts showing that: (1) [Wells] endured a violent, unstable, emotionally abusive family life during his upbringing; (2) [Wells] was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") as a child, for which he was prescribed medication; (3) [Wells's] mother suffered from personality disorders that left her incapable of distinguishing right from wrong; and (4) [Wells's] biological father displayed a lack of personal and financial responsibility. The defense also presented extensive expert testimony showing that [Wells] was genetically predisposed to violence. [Wells's] trial counsel contended that this made [Wells] less morally culpable for his own acts of violence.

Finally, [Wells] himself took the stand during the punishment phase of trial and testified that: (1) he had participated in counseling sessions to address his violent acts toward Brooks and Reed; (2) he had no recollection of shooting any of his victims; (3) he had a long history of difficulty controlling his emotions, particularly when angry; and (4) he was sincerely remorseful for his offenses.

Pet. App. 20a–21a.[2]

III. Course of proceedings

Wells was convicted and sentenced to death for capital murder. ROA.5134, 5810, 5853, 5860–61.[3] The Texas Court of Criminal Appeals (CCA) affirmed Wells's conviction and sentence. *Wells*, 611 S.W.3d at 396. Wells did not seek certiorari review. Wells filed a 414-page state application for a writ of habeas corpus. ROA.16824–7257. The trial court entered findings of fact and conclusions of law recommending the denial of relief. ROA.17721–854, 17968–69. With the exception of one finding, the CCA adopted the trial court's findings and conclusions, and it denied habeas relief based on the adopted findings and its own review. *Ex parte Wells*, No. WR-86,184-01, 2021 WL 5917724 (Tex. Crim. App. Dec. 15, 2021), *cert. denied*, 142 S. Ct. 2722 (2022).

Wells also filed an amended federal habeas petition and a motion for a stay. ROA.517–658, 788-94. The district court denied the petition and the motion. Pet. App. 13a–82a; ROA.1235. Wells then filed a motion to alter or amend judgment, ROA.1236–74, which the district court also denied, Pet. App. 83a–99a.

Wells filed a motion for a COA in the Fifth Circuit, which the court denied on all claims. Pet. App. 1a–12a. He then filed a petition for rehearing, which the Fifth

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[2] "Pet. App." refers to Wells's appendix attached to his petition for certiorari.

[3] "ROA" refers to the record on appeal filed in the court below.

Circuit also denied. Pet. App. 100a. Wells now seeks certiorari review of the Fifth Circuit's decision as it relates to his IATC-sentencing claim.

REASONS FOR DENYING THE WRIT

I. The Petition Presents No Question Warranting This Court's Review.

The question that Wells presents for review does not warrant the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." Sup. Ct. R. 10. Wells identifies no conflict among the courts of appeals, no departure from accepted and usual judicial standards, and no important question of federal law that warrants this Court's intervention in a fact-bound, COA denial under AEDPA.

Furthermore, as explained *infra*, the Fifth Circuit did not misapply this Court's authority because Wells failed to demonstrate that reasonable jurists could debate the district court's denial of his claim. There is no automatic entitlement to appeal in federal habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). As a jurisdictional prerequisite to obtaining appellate review, a petitioner is required to first obtain a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). In determining whether to issue a COA, a court must

consider whether the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The COA standard:

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

Buck v. Davis, 580 U.S. 100, 115 (2017) (quoting *Miller-El*, 537 U.S. at 327); *see also Slack*, 529 U.S. at 484. Nevertheless, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *see also Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."). Under § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562

U.S. 86, 100–01 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)).

The Court emphasized § 2254(d)'s demanding standard, stating:

> [u]nder § 2254(d), a habeas court must determine what arguments or theories supported, or . . . could have supported, the state court's decision; and 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. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

Richter, 562 U.S. at 102 (emphasis added); *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'").

The Court has noted that "[i]f this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Here, Wells's petition presents no compelling reasons, important questions of law, or genuine conflicts among the circuit courts to justify this Court's exercise of its certiorari jurisdiction and certiorari should be denied.

II. The Fifth Circuit Correctly Denied a COA for Wells's IATC-Sentencing Claim.

In denying a COA on Wells's IATC-sentencing claim, the Fifth Circuit applied this Court's familiar *Strickland* standard governing IATC claims and concluded that reasonable jurists would not debate the district court's denial of Wells's claim that trial counsel was ineffective "by presenting expert testimony that [Wells] was genetically predisposed to violence at the penalty phase" because "[w]hether to present such evidence lies within the heartland of 'strategic decisions' that appellate courts cannot second-guess unless the defendant rebuts their 'strong presumption of reasonableness.'" Pet. App. 5a–7a (citing *Dunn v. Reeves*, 594 U.S. 731, 739 (2021)).

Nevertheless, Wells now argues that the Fifth Circuit's denial of a COA conflicts with this Court's precedent because "[c]ounsel's concession of future dangerousness constitutes deficient performance," and the "[p]resentation of the discredited violence-genetics theory unquestionable prejudiced [Wells]." Pet. Cert. 14, 25. However, the Fifth Circuit correctly denied Wells a COA regarding his IATC-sentencing claim, and the Fifth Circuit's determination complies with this Court's precedent.

Claims of ineffective assistance of counsel are analyzed under *Strickland*, 466 U.S. at 687. Wells's claim that he was denied constitutionally effective assistance requires him to affirmatively prove counsel rendered deficient performance and their actions resulted in actual prejudice. *Id.* A failure to prove either deficient performance or prejudice will defeat an ineffectiveness claim. *Id.*

In applying AEDPA deference to an ineffectiveness claim, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101. "This is different from asking whether defense counsel's performance fell below *Strickland*'s standard[,] because "'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Id.* (quoting *Williams*, 529 U.S. at 410) (emphasis in original). Satisfying *Strickland*'s highly deferential standard is no small task, and "[e]stablishing that a state court's application of *Strickland* was unreasonable under [28 U.S.C.] § 2254(d) is all the more difficult." *Id.* at 105. Indeed, federal courts are required to "use a doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (citation omitted); *Dunn*, 594 U.S. at 739 (deference is owed "to both [Wells's] counsel and the state court[,]" and relief may be granted only if counsel "took an approach that no competent lawyer would have chosen.") (citing *Titlow,* 571 U.S. at 23–24). "Or, in more concrete terms, a federal court may grant relief only if *every* fairminded jurist would agree that *every* reasonable lawyer would

have made a different decision." *Dunn*, 594 U.S. at 739–40 (cleaned up).

A. Reasonable jurists would not debate that trial counsels' decision to present evidence of Wells's genetic propensity to violence was a reasonable trial strategy.

Wells first argues that "[c]ounsel's concession of future dangerousness constitutes deficient performance" because the "expert testimony that trial counsel elicited affirmatively established future dangerousness, thereby relieving the prosecution of its burden." Pet. Cert. 14, 17. Wells also argues that counsel's presentation of that evidence "constituted deficient performance" because "it invited the jury to sentence petitioner to death based on an irrelevant immutable characteristic." Pet. Cert. 23. But Wells failed to overcome the doubly deferential standard afforded to trial counsel's strategic decisions and the state court's rejection of this claim, and he fails to show the district court's rejection of the claim is debatable among jurists of reason.

1. Background

Trial counsel developed a trial strategy to show, inter alia, Wells's violence was due to factors beyond his control, including his genetics. ROA.6124. As indicated in a Memo of Understanding prepared by trial counsel, their investigation included genetic testing. ROA.15978; *see* ROA.15980–81, 16006 (defense expert Dr. Jolie Brams's letter noting the defense team had an extensive consultation "with a well-respected expert in behavioral

genetics"). The genetic testing revealed Wells "has a low-activity variant of the Monoamine Oxidase A (MAOA) gene." ROA.6129. A person with this genetic variant has low levels of serotonin to the brain and "an increased risk of being a violent adult if that person ha[d] an adverse or traumatic childhood." ROA.6129. Trial counsel retained Dr. William Bernet, a forensic psychiatrist, to testify regarding this phenomenon. ROA.6129.

The "general consensus" of the defense team's expert was that Wells had the genetic variant and a semi-traumatic upbringing, which together could cause Wells to exhibit violent outbursts. ROA.15978. Trial counsel acknowledged that such evidence "could very well lead to and support the State's contention that there [was] a probability of [Wells] committing acts of violence in the future[.]" ROA.15978. But since neither Wells's genetic makeup nor his childhood environment were within Wells's control, trial counsel believed the evidence could be sufficiently mitigating and could result in the jury imposing a life sentence instead of death. ROA.15978.

Dr. Bernet explained that he had studied and written about behavioral genetics and had testified several times regarding the topic. ROA.12863–64. He reviewed the genetic testing results of Wells, his mother Twyla Franklin, and his grandmother Carolyn Russell, as well as the mitigation specialist's and other experts' reports regarding Wells. ROA.12865–66; Sealed ECF No. 78-7 (Dr. Bernet's report). Dr. Bernet explained that the theory regarding the correlation between the low-activity variant of the MAOA gene combined with

childhood maltreatment increased the risk of violent behavior was peer reviewed and scientifically valid. ROA.12867–88. Dr. Bernet explained to the jury that a 2002 study showed an individual who had a low-activity MAOA gene and suffered maltreatment as a child was at a higher risk for exhibiting violent behavior. ROA. 13017, 13031–44, 13056–58. Dr. Bernet acknowledged some studies did not replicate those findings, but meta-analysis of the research showed an association between the genetic variant and an increased risk for violence. ROA.12882–83, 13063–65.

Dr. Bernet said Wells had a low-activity variant of the MAOA gene. ROA.13069. And evidence developed by the defense team showed Wells suffered maltreatment as a child, e.g., witnessing domestic violence and abandonment by his father. ROA.13072–73. Notably, Wells's violent outbursts began at a young age. ROA.13075. Dr. Bernet concluded Wells's genetic makeup and history of maltreatment as a child were risk factors that increased the probability he would act in a maladaptive manner. ROA.13076.

On cross-examination, Dr. Bernet testified that these risk factors for violence were still present with Wells, which "may make it harder for him to control his anger than it is for other people in the future." ROA.13077. But those risk factors did not "mean it's more likely than not that he's going to be violent in the future; it just means he's more at risk than a regular person." ROA.13077.

During closing argument, trial counsel argued the scientific evidence showed Wells's brain did not function

normally. ROA.13770–71. Counsel suggested the evidence gave the jury a reason to pause and consider whether they should sentence Wells to death for actions caused by things he could not control—his genes, brain, and environment. ROA.13771. Counsel told the jury Wells's upbringing and genetics "ought to be sufficiently mitigating." ROA.13784–85.

Wells raised a claim in his state habeas application alleging trial counsel were ineffective for presenting Dr. Bernet's testimony. ROA.16918–48. In their affidavits, trial counsel explained they thoroughly investigated Wells's background, including his school and work history, interpersonal relationships, and genetics.[4] Sealed ECF No. 78-13 at 2696–97, 2829–30. Trial counsel Ray explained his view that a mitigation defense based on genetics is similar to one based on mental illness, a history of sexual abuse, or a negative childhood environment, in that those factors are not under a defendant's control. Sealed ECF No. 78-13 at 2696.

The state habeas court rejected Wells's claim, finding "Dr. Bernet's testimony never attached [a] racial connotation to the low-activity MAOA gene, nor did he testify or imply to the jury that [Wells's] race predisposed him to future violence or that [Wells] should be executed because of his race." ROA.17793–94. The court also found Dr. Bernet acknowledged some studies

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[4] The state habeas court, presided over by the same judge who presided over trial, found trial counsel's affidavits credible. ROA.17736. Consequently, AEDPA's presumption of correctness is especially strong. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007).

did not support the conclusion that a person with the low-activity MAOA gene variant and who suffered maltreatment as a child was at a higher risk to exhibit violent behavior. ROA.17793. Moreover, the court found Dr. Bernet told the jury that Wells's genetics and childhood upbringing did not mean he was more likely than not to be violent, only that he was at a higher risk than others. ROA.17793. Moreover, there was other overwhelming evidence of Wells's future dangerousness—the facts surrounding the murders, his abuse of Brooks and Chanice, and his violence while in jail. ROA.17794. Indeed, Wells admitted a long history of anger and lacking control of himself. ROA.17794. Additionally, trial counsel presented numerous lay and expert witnesses "to build the strongest mitigation case possible based on the evidence they had." ROA.17795.

The state habeas court concluded trial counsel conducted a reasonable mitigation investigation. ROA.17795. The court recognized that defense counsel in capital cases are often faced with double-edged evidence that could be both aggravating and mitigating. ROA.17796–97. Wells's claim failed because Wells did not rebut the presumption that trial counsels' "carefully considered decision to present the genetic evidence" was within the range of reasonable professional assistance. ROA.17797. And even if counsel were deficient, Wells could not show prejudice in light of the "strong evidence" of his future dangerousness. ROA.17797–98. As discussed below, Wells failed to overcome either presumption that his trial counsel performed reasonably, or the deference afforded to the state court's adjudication of his claim.

2. Trial counsel did not concede the future dangerousness special issue.

Wells argues that because "Dr. Bernet testified that [Wells] was genetically predisposed to violence because his defective MAOA gene made it more difficult for him to control his anger," trial counsel "therefore unquestionably conceded future dangerousness." Pet. Cert. 17, 19. However, Wells's claim fails for several reasons.

First, Well's claim amounts to nothing more than a disagreement with trial counsel's strategic decision making. Trial counsel's strategy to present Dr. Bernet's concededly double-edged testimony was based on an extensive mitigation investigation, ROA.17795–96, and is the type of reasoned strategic decision that is beyond a reviewing court's purview to second-guess. *See Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009). The Memo of Understanding prepared by trial counsel explicitly reflects their strategic reasoning, including their understanding that the genetic evidence was double-edged. ROA.15978. Thus, the Fifth Circuit and district court properly held trial counsel's conscious and informed decision to present Dr. Bernet's testimony cannot be the basis for relief. Pet. App. 6a–7a, 56a–58a, 91a–92a; *see Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009).

Second, the district court correctly found trial counsel did not concede the future dangerousness special issue by presenting Dr. Bernet's testimony. Pet.

App. 56a–58a, 90a. Again Dr. Bernet testified that the MAOA genetic variant did *not* make Wells more likely than not to be violent. ROA.13077. Consequently, Wells fails even to show trial counsel conceded his future dangerousness.[5] Furthermore, because Wells's trial counsel did not concede future dangerousness, his petition calls for an advisory opinion because an opinion declaring "counsel can not reasonably concede future dangerousness" would not apply to the facts of this case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical set of facts.") (quotation marks and citation omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (same). As a result, Wells's petition should be denied. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) (no justiciable controversy is presented "when the parties are asking for an advisory opinion").

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[5] Wells also argues that Dr. Bernet's testimony amounted to a concession of the future dangerousness special issue because he testified that "people like [Wells]—those with the violence gene and adverse childhood experiences—are 'four and a half times' more likely to commit violent acts," and that the "upshot of that evidence was that 32% of people with a similar profile to [Wells] carry out violent crimes in the future. Pet. Cert. 18 (emphasis omitted). But Dr. Bernet subsequently explained that these statistics were "a very rough estimate," and that "this type of research varies from study to study, but this is an example of the kind of results they get from this kind of research." ROA.13057–58. Dr. Bernet testified that these results were from one experiment, ROA.13056–57, but as explained *supra*, he also acknowledged that some studies do not support these conclusions. ROA.12881–82.

Third, even if trial counsel outright conceded Wells's future dangerousness, he would still fail to show counsel were ineffective. Indeed, trial counsel can reasonably decide that a "concession of guilt" is the best strategy to avoid the death penalty. *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). And caselaw is replete with ineffectiveness allegations that trial counsel did *not* present various types of double-edged mitigation evidence, including evidence of predisposition to violence.[6]

Wells focuses much of his briefing on *Nixon*, 543 U.S. 175, suggesting that *Nixon* holds that trial counsel may concede an "issue on which the prosecution bears the burden . . . only to the extent that the strategy may reasonably yield commensurate advantages with respect to other aspects of the adversarial process." Pet. Cert. 16 (emphasis omitted). He argues that "the district court, and by extension the Fifth Circuit, failed to recognize the violence-genetics evidence" amounted to a

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[6] E.g., *Trevino v. Davis*, 138 S. Ct. 1793, 1794 (2018) (Sotomayor, J., dissenting from the denial of certiorari) ("In focusing on what it considered to be the 'double-edged' nature of the new evidence, the Fifth Circuit majority failed to view the prejudice inquiry holistically."); *Rompilla v. Beard*, 545 U.S. 374, 391–92 (2005); *Creech v. Richardson*, 59 F.4th 372, 388–89 (9th Cir. 2023); *Clark v. Chappell*, 936 F.3d 944, 987–88 (9th Cir. 2019); *Gardner v. Davis*, 779 F. App'x 187, 191 (5th Cir. 2019); *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1294 (11th Cir. 2012); *Woods v. Thaler*, 399 F. App'x 884, 896–97 (5th Cir. 2010); *United States v. Duran*, No. 201200440, 2014 WL 341587, at *5 (N.M. Ct. Crim. App. Jan 31, 2014) (addressing claim that trial counsel were ineffective for not presenting evidence regarding the low-activity MAOA genetic variant).

concession of future dangerousness because "the courts failed to analyze the reasonableness of counsel's concession under *Nixon*'s framework." Pet. Cert. 29. However, Wells's reading of *Nixon* is misguided. 543 U.S. at 191–92 ("[I]f counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter[.]"). And in any event, Wells's assertion that the genetics testimony "held no possible strategic advantage for [him]" is entirely based on hindsight. Pet. Cert. 20. As discussed above, trial counsel presented the genetics evidence with the express purpose of obtaining a favorable verdict on the mitigation special issue. ROA.13784–85, 17797. That the jury found insufficient mitigating circumstances to warrant a life sentence is not proof trial counsel performed deficiently. In this respect, the state court's rejection of Wells's IATC claim is entirely consistent with Supreme Court precedent. *See Strickland*, 466 U.S. at 689.

Nixon aside, Wells fails to show the district court's rejection of his claim is debatable. Indeed, the district court correctly found trial counsel did not concede the future dangerousness issue. Pet. App. 56a, 89a–90a. The district court also emphasized the arduous task given to trial counsel considering the vicious nature of the murders and the limitations Wells imposed on trial counsel, e.g., not to present evidence Wells was sexually abused. Pet. App. 58a. The district court's rejection of this claim is simply not debatable.

Importantly, the genetics evidence was one piece of a comprehensive mitigation presentation. As the district

court explained, "trial counsel rendered objectively reasonable assistance to [Wells] in presenting a comprehensive mitigation case." Pet. App. 59a. The mitigation presentation was supported by a thorough investigation with a forensic psychologist, a psychologist, a neuroscientist, and a mitigation specialist. ROA.15343 (Dr. Brams was retained to investigate and testify about Wells's "traumatic and adverse childhood experiences"), 15931 (Dr. Antoinette McGarrahan was retained to conduct a neuropsychological evaluation of Wells); *see* ROA.15933–55 (trial counsel Ray's time records).

Trial counsel obtained voluminous records regarding Wells's schooling and mental health treatment as well as medical and mental health records regarding his family members. ROA.14589, 14593–94, 14604–06, 14754–59; Sealed ECF Nos. 78-3, 78-4. The defense team conducted numerous interviews with Wells's family during which they learned of, among other things, domestic violence between Wells's parents, sexual abuse Wells's mother and aunt suffered, Wells's mother's and grandmother's mental health struggles, and Wells's angry outbursts that began when he was very young. ROA.15982–91.

Dr. Brams investigated numerous aspects of Wells's family and upbringing, including the impacts of Wells's mother's "serious mental health difficulties," abandonment of Wells by his father, Wells's exposure to domestic violence, and the stress Wells said he experienced leading up to the murders. ROA.16005–09. Notably, Dr. McGarrahan evaluated Wells and learned

Wells had no memory of domestic violence between his parents, and Wells denied experiencing abuse or neglect while growing up. ROA.15968–70 (Dr. McGarrahan's findings); Sealed ECF Nos. 78-5, 78-6 (Dr. McGarrahan's neuropsychological reports). Dr. McGarrahan's testing showed Wells was defensive about his shortcomings, had severe impairment in depression and hostility, believed his negative circumstances were not his fault, was resentful and extremely suspicious, and was resistant to admitting the need for personal change. ROA.15968–70.

Trial counsels' mitigation presentation included extensive evidence about the history of mental health difficulties in Wells's family. Pet. App. 20a–21a, 58a–61a; ROA.6124–37. The jury had before it extensive and comprehensive evidence regarding Wells's upbringing. Wells's complaint about trial counsels' decision to present the genetics testimony is nothing more than an exercise in hindsight and disagreement with trial counsels' strategy.[7] That is plainly insufficient to demonstrate trial counsel performed deficiently. *See Strickland*, 466 U.S. at 689.

3. Trial counsel did not invite the jury to sentence Wells based on an irrelevant an immutable characteristic.

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[7] Wells also argues the genetics testimony minimized the mitigating evidence regarding his upbringing because Dr. Bernet said that "under the definition of childhood maltreatment in a prominent study of the violence gene, [Wells] did not experience any maltreatment at all." Pet. Cert. 22 (emphasis omitted). However, Wells gives no reason to conclude the jury disregarded the extensive expert and lay witness testimony regarding Wells's background.

Wells next argues that trial counsels' presentation of the genetics evidence "invited the jury to sentence [Wells] to death based on an irrelevant immutable characteristic." Pet. Cert. 23. He also argues that the science underlying the testimony was unreliable, and he suggests the testimony appealed to racial stereotypes. Pet. Cert. 24–25. But none of Wells's complaints show that that the district court's rejection of this claim is debatable.

First, as the state court found, "Dr. Bernet's testimony never attached [a] racial connotation to the low-activity MAOA gene[.]" ROA.17793–94. Wells has done nothing to rebut the state court finding other than to repeatedly make the false assertion to the district court that Dr. Bernet told the jury Wells had the "Warrior Gene," e.g., ROA.592, 594–96, 622, an assertion he does not repeat in this Court or the lower court. Indeed, Wells has never cited to trial testimony that suggested his future dangerousness was tied to his race. For this, alone, Wells's reliance on *Buck*, 580 U.S. at 124, is baseless. *See Raby v. Davis*, 907 F.3d 880, 884–85 (5th Cir. 2018); *Beatty v. Davis*, 755 F. App'x 343, 349–50 (5th Cir. 2018); *Davis v. Kelley*, 855 F.3d 833, 836 (8th Cir. 2017) ("*Buck* focused on the race-based nature of the case and its far[-]reaching impact on the community by the prospect of a defendant having been sentenced to death because of his race. These extraordinary facts have no application to the present case."); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1172 (11th Cir. 2017). Notably, Wells acknowledges that "no party in this case explicitly

pressed any racial stereotype in the manner of *Buck*. Pet. Cert. 25.

Second, *Buck* does not stand for the proposition that a jury cannot consider any immutable characteristic of a defendant. *See id.* at 884. If that were so, it would be per se unreasonable for trial counsel to present mitigating evidence regarding a plethora of conditions, e.g., brain damage, mental illness, personality disorder, or developmental disorders, that may aggravate a jury's view of a defendant's dangerousness. And that is simply not the law.[8] For the same reason, Wells's argument that presentation of the genetics testimony was contrary to this Court's precedent, e.g., *Zant v. Stephens*, 462 U.S. 862, 885 (1983), is simply wrong. This Court in *Zant* did not prohibit the presentation of evidence of mental illness as mitigating evidence. *Id.* at 885. Indeed, this Court recognized that evidence of mental illness *is* mitigating and should not be submitted to a jury as a statutory *aggravating* circumstance. *Id.* And again, this Court in *Buck* found intolerable the "pernicious" injection of race into the justice system, 580 U.S. at 124, and that did not occur in Wells's case. The state court's decision, therefore, could not have been an unreasonable application of this Court's precedent.

Wells also argues that trial counsel were ineffective for presenting Dr. Bernet's testimony because "the

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[8] *See, e.g.*, *Rompilla*, 545 U.S. at 391–92 (finding trial counsel were ineffective for not discovering and presenting evidence the petitioner may have had, inter alia, schizophrenia, and noting experts found his capacity to conform his conduct to the law was substantially impaired); *Williams*, 529 U.S. at 398.

violence-genetics theory had been thoroughly debunked" and "courts have already long concluded that this sort of evidence was unreliable." Pet. Cert. 24. But as the district court explained, Wells failed to show the testimony was inaccurate or unreliable. Pet. App. 39a; *see State v. Yepez*, 483 P.3d 576, 584 (N.M. 2021) (holding the trial court did not abuse its discretion in concluding testimony about the low-activity MAOA variant was reliable); *see also People v. Adams*, 336 P.3d 1223, 1241–42 (Cal. 2014). Indeed, the *Yepez* case in which evidence regarding the low-activity MAOA genetic variant was presented undermines Wells's claim; it shows that not *every* fairminded jurist "would agree that *every* reasonable lawyer would have made a different decision" regarding whether to present this genetic evidence. *Reeves*, 594 U.S. at 740.

Nevertheless, as noted above, Dr. Bernet conceded to the jury that not all studies confirmed the early research but said meta-analysis of the research demonstrated the validity of the theory. ROA.13063–65. Trial counsel were entitled to rely on the information their experts provided. *See Green v. Lumpkin*, 860 F. App'x 930, 938–39 (5th Cir. 2021). ("[E]vidence that other mental health experts disagreed with a defense expert's evaluation would not in itself indicate that it was unreasonable for trial counsel to rely on the evaluation."); *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016). As the state court found, Wells's disagreement with counsel's strategic decision fails to show counsel were deficient. ROA.17795–96.

Notwithstanding, the relevant question for Wells's ineffectiveness claim is not whether Dr. Bernet's testimony was reliable but whether trial counsel performed reasonably. *Strickland*, 466 U.S. at 687. As discussed above, trial counsel developed the genetic evidence, conceding that not all studies regarding the MAOA gene supported the connection between the variant, childhood maltreatment, and violent behavior. The genetic evidence was part of a broad mitigation presentation, which largely focused on Wells's troubled upbringing. Trial counsel were faced with seeking a favorable sentencing verdict where their client had killed four people, including a child and viable unborn baby, where their client had a long and disturbing history of anger and violence, and where his violence continued even when he was in jail. Pet. App. 61a–62a. Wells's outbursts began when he was a child, ROA.6129, and trial counsel pursued a strategy of explaining what caused them and why they were not in Wells's control, ROA.6124. Sealed ECF No. 78-13 at 2696–97, 2829–30. "'There are countless ways to provide effective assistance in any given case,' and . . . trial counsel found and employed one." *Brewer v. Lumpkin*, 66 F.4th 558, 568 (5th Cir. 2023) (quoting *Strickland*, 466 U.S. at 689). Wells fails to show trial counsel were constitutionally ineffective for making the reasoned, conscious, and strategic decision to present Dr. Bernet's testimony.

B. Reasonable jurists could not debate that Wells failed to show prejudice as a result of trial counsels' decision to present evidence of Wells's genetic propensity to violence.

Wells fails to show that he was prejudiced by Dr. Bernet's testimony. Stated again, Dr. Bernet testified that Wells's low-activity MAOA gene did *not* make him more likely than not to be violent. ROA.13077. Regardless, Wells entirely fails to show that he would not have been sentenced to death but for Dr. Bernet's testimony. As the state court and district court found, the gruesome evidence of the murders, Wells's history of abuse against Brooks and Chanice, his violence while in jail awaiting trial, and *his own testimony* that he gets angry and has difficulty controlling himself overwhelmingly supported the jury's answers to the special issues. Pet. App. 57a–58a, 61a–62a; ROA.17794–98. Here, the aggravating facts make it "virtually impossible to establish prejudice." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (citation omitted).

Wells argues that his case is like *Buck* because, as in that case, his acts of violence occurred within the context of romantic relationships. Pet. Cert. 26 (citing *Buck*, 580 U.S. at 120–21). However, it was the "particularly noxious strain of racial prejudice" that this Court found warranted relief in *Buck*. *Id.* at 121. Nothing in *Buck* suggests an extensive history of beating women, four killings (including a young child and a viable fetus), and

exhibition of violence in jail is outweighed by the presentation of genetic evidence. Accordingly, the district court's holding that this evidence precluded a showing of prejudice is not debatable among reasonable jurists.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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