No. 17-70012

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Steven Lawayne Nelson,
Petitioner-Appellant,

v.

Bobby Lumpkin, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee,

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division, No. 4:16-cv-904-A

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August 26, 2020

ORAL ARGUMENT REQUESTED
*****THIS IS A CAPITAL CASE*****

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described by Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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DATED: August 26, 2020

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INTRODUCTION

Mr. Nelson's trial counsel made no effort to investigate the involvement of two men in the crime for which Mr. Nelson was assigned sole criminal responsibility. In the Director's circular telling, the one-sided record produced by trial counsel's omissions justifies the omissions themselves. But the Director sidesteps the actual question: whether a reasonable lawyer could refuse investigation into potential co-conspirators. The answer to that question is no, and the prejudice to Mr. Nelson from trial counsel's deficiency is obvious. Trial counsel tendered a defense based on Mr. Nelson's secondary role but failed to develop that defense in fact, handing the prosecution a gift that it leveraged to support its own "lone-wolf" theory. If this Court cannot reverse and render on prejudice now, then it should at least take the lesser step of remanding the case for further fact development or granting a *Rhines* stay.

The Director urges the Court not to pass on Mr. Nelson's claim based on purported obstacles that are easily dispatched. This Court already applied settled authority to hold that the IATC-Participation Claim was not "adjudicated on the merits" in state court. The IATC-Participation Claim was defaulted, and that default is excused because state post-conviction counsel was deficient in failing to investigate and present the claim. And the Director has forfeited his (meritless) argument that the case should be dismissed based on an inapplicable restriction on

federal hearings. This Court should reverse the district court's order denying relief, reverse the district court's order denying investigative services under § 3599(f), and order a *Rhines* stay.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING, WITHOUT PERMITTING FACT DEVELOPMENT, THAT THERE WAS NO IATC VIOLATION.

Mr. Nelson has established that his trial counsel were constitutionally deficient. A reasonable investigation into the roles of Mr. Nelson's co-conspirators would have uncovered evidence relevant to the Texas capital sentencing criteria. The district court erred in rejecting Mr. Nelson's claim, and compounded that error by refusing to authorize investigative services to develop the prejudice resulting from trial counsel's deficiency. The Director responds by attempting to reduce this claim to a failure to *present* evidence—only reinforcing that trial counsel's failure to *investigate* cannot be defended.

A. The District Court Erred In Determining That Trial Counsel Were Not Deficient.

Myriad red flags would have prompted any reasonable attorney to investigate the potential involvement of Jefferson and Springs in Mr. Dobson's death. These include, but are not limited to: bruising on Springs's knuckles and forearms, Springs's possession of Mr. Dobson's property, Springs's false statements to the police, Springs's biased alibi witness, physical evidence that another male—apart

from Nelson, Springs, and Dobson—was at the crime scene, and Jefferson's lie about his alibi. Nelson Opening Brief ("OB") 17-18 (May 21, 2020). Yet counsel did not attempt to interview Springs or Jefferson or even to verify their alibis. That failure was constitutionally deficient performance.

The Director argues that Mr. Nelson has forfeited reliance on several red flags that were not expressly pleaded in his petition. *See* Director Response Brief ("RB") 27, 33 n.12, 35 n.15 (July 22, 2020). But forfeiture applies to the failure to preserve a legal argument or claim of error; it does not limit the evidence the court can consider in support of a properly preserved claim. *See United States v. Vasquez*, 899 F.3d 363, 371-72 (5th Cir. 2018). Mr. Nelson may cite any evidence in the record—as each red flag is—in support of his properly preserved IATC-Participation Claim. *See Gregory v. Thaler*, 601 F.3d 347, 353 (5th Cir. 2010).

The Director's attempts to attack the significance of the red flags miss the mark.

1. The Director brushes aside Springs's bruising because "*foreign objects* were used to beat Dobson." RB34 (citing 36RR23-24). Evidence that an object was used does not mean hands and fists were not; the testimony the Director cites concerns only some of Mr. Dobson's injuries (to his head), 36RR23-24, but says nothing about the remaining bruises and wounds on Mr. Dobson's face, back, and arms. 36RR25. The Director's attempt to explain Mr. Nelson's clean appearance is

also nonsensical: changing clothes after the murder would not affect whether Mr. Nelson's *body* had bruising or other signs of a fight, as Springs's did. In any event, what matters is not whether a jury would have definitively concluded that Springs's bruising resulted from his participation in the crime, but whether—given those bruises—a reasonable attorney would have at least investigated the matter.

Next, the Director dismisses two facts—Springs's possession of Mr. Dobson's property and Springs's fingerprints in Ms. Elliott's car—since Mr. Nelson *also* had some of Mr. Dobson's property and drove in Ms. Elliott's car. RB34-35. Once again, the question is not whether Mr. Nelson was involved in the crime—he admits he was—but whether red flags would have prompted any reasonable attorney to investigate the role of *additional* individuals. Springs's own contact with the stolen property is plainly relevant to that question.

The Director also asserts that several red flags show only that "Springs was Nelson's friend and occasional partner in crime," not his "partner in *this* crime." RB35. But Allison Cotter told the police that she believed Springs was responsible for Mr. Dobson's death. ROA.511; ROA.2153. She further explained that Springs told her he was trying to sell an iPhone belonging to Mr. Dobson. ROA.2153-54. These comments connected Springs directly to *this* crime—not merely to general criminal activity.

Finally, the Director argues that every red flag related to Springs is

undermined by three facts: (i) the State "cleared" Springs of involvement in Mr. Dobson's death; (ii) no DNA evidence connected Springs to the crime scene; and (iii) Springs had an alibi corroborated by witnesses and phone records. RB32-34. Those facts do not move the needle.

The State's decision to pursue Mr. Nelson over Springs does not relieve counsel of their independent obligation to investigate Springs's involvement, in order to countermand the State's "lone-wolf" theory. *See Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003). And the lack of Springs's DNA at the scene means only that DNA did not confirm his presence—it does not prove he did not participate in the crime, particularly when other physical evidence suggests he did. *See supra* at 3-4. A reasonable investigation of co-conspirators is not limited to those who left their DNA at the crime scene.

Nor was Springs's alibi airtight, as the Director implies. Kelsey Duffer and Darrian McClain corroborated his alibi, it's true. But Ms. Duffer, the mother of Springs's child, had reason to lie to protect him, as the police themselves suspected. *See* ROA.2161. And Ms. McClain may have lied to help her longtime friend, Ms. Duffer. Ms. McClain's testimony was contradictory and inconsistent, raising doubts about her story's veracity.[1] Additional investigation by counsel was necessary to at

[1] On direct examination, for example, Ms. McClain testified that she and Ms. Duffer left Springs alone at the house while they visited a store. 35RR31. But when questioned by defense counsel, she stated they did not leave the house until the trip

least explore that possibility.

The Director also relies on Springs's phone records to support his alibi. Those records show only that the SIM card from Springs's phone made and received calls at certain times and in general locations. The location of Springs's SIM card does not say where Springs himself was, or what he was doing, at any given time. The connection between the two is particularly tenuous when the evidence establishes that Springs had multiple cell phones, 36RR85, and switched SIM cards between cell phones to which he had access, 36RR167-168.

2. The Director also attempts to minimize the red flags that would have prompted any reasonable counsel to investigate Jefferson's potential involvement in the offense.

First, he contends that no reasonable counsel would have investigated Jefferson because Mr. Nelson did not implicate Jefferson in his first police interview. RB27-28. A defendant's statements are the starting point for trial counsel's investigative strategy, not the end. *See* 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7(A) (counsel must conduct an investigation, regardless of incriminating evidence or inculpatory statements by the defendant). And the record discloses that

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to drop Springs off at a gas station. 35RR38.

trial counsel knew about Jefferson's potential role before Mr. Nelson testified at trial, as they asked him questions specifically about Jefferson's involvement. *See, e.g.*, 36RR75 ("AG and Twist still inside?"); *id.* at 76 ("All three of y'all are outside at this point?").

The Director next relies on Jefferson's alibi, but that alibi's flaws are the reason that counsel should have investigated further. Jefferson testified before the grand jury that he was taking a test in his chemistry class on the day of the crime. But when asked if she gave a test on that day, the instructor stated unequivocally that she did not. ROA.2247-53.[2]

Jefferson's phone records only undermine his alibi. They show Jefferson's phone making and receiving calls eight minutes *after* the class began (improbable if he was there at all, much less taking a test). RB29 (screenshot of phone records). The gap in Jefferson's phone activity also matches the timing of the crime. The Director suggests that the crime must have been committed after Mr. Dobson left a voicemail at 11:10 am and before Mr. Nelson left the crime scene around 12:20 pm. That timing corresponds perfectly with Jefferson's phone's silence. That Jefferson made three brief calls to Springs after 12:20 pm changes nothing: the calls could

[2] The Director contends that Mr. Nelson cited no evidence in his opening brief regarding Jefferson's lie about the test. RB31. But Mr. Nelson pleaded this allegation in his habeas petition. Am. Petit. 4. Without an evidentiary hearing, the Court must treat it as true. *See Jimenez v. Hunter*, 741 F. App'x 189, 194 (5th Cir. 2018). The grand jury transcript speaks for itself in any event.

have been between someone inside the church and someone outside of it (as Mr. Nelson insisted), accidental dials, efforts to locate a lost phone, or indications that the two separated while inside the church or shortly thereafter.

B. The District Court Erred In Holding That Trial Counsel's Deficiency Was Nonprejudicial Without Permitting Further Factual Development.

Mr. Nelson has also showed the requisite prejudice or, at the very least, has justified the need for additional fact development. To show prejudice, a claimant need not prove by a preponderance of evidence that counsel's errors determined the outcome. Instead, he must show only a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Mr. Nelson demonstrated as much when he explained that if trial counsel had conducted a reasonable investigation, there is a reasonable probability that at least one juror would have given a different answer to one of the three special issues: Mr. Nelson's role in the offense (anti-parties issue), the likelihood of his being a continuing threat to society (future dangerousness issue), and the presence of any mitigating circumstances (mitigation issue). An absence of unanimity on any of those issues would have precluded a death sentence.

The Director contends that no reasonable juror could have answered the questions differently because, in his view (i) the evidence that Mr. Nelson was an

active participant in Mr. Dobson's death was overwhelming and (ii) even if Mr. Nelson did play a lesser role, that still would not have convinced a single juror to answer a question differently.

The Director's first argument defies logic. The State specifically requested a "parties instruction"—*viz.*, an instruction that Mr. Nelson could be found guilty even if he did not directly cause Mr. Dobson's death, because he was nonetheless responsible for it as a party to the robbery—and confirmed during voir dire that jurors would convict under that theory. OB5-6. The State would not have done so if "overwhelming" evidence established that Mr. Nelson acted alone. And the supposedly "overwhelming" evidence the Director cites—Nelson's fingerprints at the crime scene, pieces of his belt on the floor, and the victims' blood on his shoes (RB37)—is as consistent with Mr. Nelson's version of events as it is with the State's. Mr. Nelson admitted that he entered the church office twice, picked up the laptop from the desk, and even that he knelt on the floor and reached under the desk to grab the laptop bag. 36RR73-76. But he testified that he did not partake in the crime alone.

The Director's second argument also fails. As to the anti-parties issue, the Director asserts that Mr. Nelson's role in the offense satisfies constitutional requirements for imposition of the death penalty. His role as a lookout represents "major participation" in the robbery and since he did not help the victims, the

Director argues, he was recklessly indifferent to human life. RB39-40. But, as explained in opening, the anti-parties issue in Texas sets a bar for death above what the Constitution requires: it forbids the death penalty unless the evidence establishes, beyond a reasonable doubt, that the defendant intended or actually anticipated a death, and was not just recklessly indifferent to it. *See* Tex. Code Crim. Proc. art. 37.071, § 2(b). If the jury had heard evidence suggesting that Springs and Jefferson were the primary perpetrators of the crime—with Mr. Nelson serving as a lookout—at least one juror reasonably could have concluded that Mr. Nelson did not anticipate Mr. Dobson's death.

The Director argues that no juror would have answered the future dangerousness or mitigation questions differently because Mr. Nelson revealed a "penchant for extreme violence" by allegedly killing another prisoner before trial. RB38, 41. The Director mischaracterizes the record. No jury ever found that the State proved beyond a reasonable doubt that Mr. Nelson caused that prisoner's death. In the punishment phase, the State offered testimony about the death from a third prisoner (who received a sentencing deal as a result). 40RR7-32. But the defense rebutted that evidence and presented its own evidence that Mr. Nelson did not cause the prisoner's death. *See* 43RR31-32, 34-36 (forensic pathologist testifying that the deceased was an "active participant" in his own death). This Court cannot know whether the jury believed that Mr. Nelson had committed a murder, setting this case

apart from those the Director cites, in which numerous unrebutted witnesses testified that the defendant was involved in multiple murders. *See, e.g.*, *Clark v. Thaler*, 673 F.3d 410, 414, 424 (5th Cir. 2012); *Belyeu v. Scott*, 67 F.3d 535, 541 (5th Cir. 1995).[3]

* * *

Given the red flags surrounding Springs and Jefferson, trial counsel's failure to investigate the two co-conspirators was deficient and prejudicial, as conducting that investigation would have had a reasonable probability of affecting one juror's sentencing-phase vote.

II. THIS COURT CORRECTLY HELD THAT 28 U.S.C. § 2254(d) DOES NOT PRECLUDE RELITIGATION, AND THAT HOLDING IS BINDING.

In granting Mr. Nelson's COA, this Court concluded that Mr. Nelson's IATC-Participation Claim—though superficially similar to his state court IATC claim—relies on completely new allegations and legal theories and thus "fundamentally alters" Mr. Nelson's state court IATC claim. *See Nelson v. Davis*, 952 F.3d 651, 671 (5th Cir. 2020) ("This claim, and the state court's discussion thereof, addressed whether trial counsel's investigation into Nelson's character and background was deficient. It did not touch on Nelson's allegations in this IATC-Participation

[3] The Director also cites what he describes as Mr. Nelson's "feigned remorse," but ignores the parts of his testimony where he actually discussed his remorse. *See* 36RR86. The Director cites Mr. Nelson's expert's testimony that he had antisocial and psychopathic tendencies—only amplifying *additional* deficiencies by trial counsel in preparing and offering that expert.

claim.”). For that reason, Mr. Nelson’s IATC-Participation Claim was not “adjudicated on the merits” in state court and is not subject to § 2254(d)’s relitigation bar.

The Director suggests that a different standard governs the determination whether a federal-court claim was previously adjudicated in state court. In his view, a federal-court claim was “adjudicated on the merits” in state court if its legal basis traces to the same Supreme Court precedent as a state-court claim. RB15 (“However many reasons a petitioner may offer why counsel’s performance was deficient under *Strickland* during a particular stage of a proceeding, those reasons all support a single claim.”). Under that standard, a federal-court *Brady* claim asserting that the prosecution suppressed exculpatory forensic evidence has been “adjudicated on the merits” if there was a state-court *Brady* claim asserting that the prosecution suppressed favorable eyewitness accounts. Likewise, a federal-court *Strickland* claim asserting that trial counsel ignored a favorable DNA-test result would have been “adjudicated on the merits” if there was a state-court *Strickland* claim that trial counsel failed to interview the star witness.

The Director’s proposed standard—beyond producing the absurd results noted above—violates well-settled Fifth Circuit precedent. As this Court underscored when it granted a COA, this Circuit has long held that a federal-court habeas claim that is superficially similar to a state-court claim was not “adjudicated

on the merits" in state court if new evidence "fundamentally alters the [state-court] claim" or "places the claim in a significantly different legal posture." *Nelson*, 952 F.3d at 671-72 (quoting *Ward v. Stephens*, 777 F.3d 250, 258, 259 (5th Cir. 2015), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018)); *see Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014) (same). It does not matter, in other words, that the claims are both sentencing-phase IATC claims so long as there is evidence that fundamentally alters the state-court claim and places it in a different legal posture.

The Director advances three arguments in an effort to evade this binding Circuit precedent. First, he contends that this precedent is designed only to protect federal-state comity, not to benefit petitioners—relying for support on *Lewis v. Thaler*, 701 F.3d 783 (5th Cir. 2012) and *Clark v. Thaler*, 673 F.3d 410 (5th Cir. 2012). RB16-18. But far from supporting the Director's position, those cases are part of the same unbroken string of precedent to which this panel adhered when it applied the fundamental-alteration test to assess whether Mr. Nelson's IATC-Participation Claim was previously adjudicated on the merits. *Lewis*, for example, expressly affirmed and applied the fundamental-alteration standard. *See Lewis*, 701 F.3d at 791 ("Here we explicitly reject [prior precedent] that where new affidavits *supplement rather than fundamentally alter* a state court claim, they may be

admissible for review of a habeas claim under § 2254(d)." (emphasis added)).[4] And in *Clark*, both parties agreed that the federal-court claim was the same as the state-court claim, so the only dispute was whether *Pinholster* precluded new evidence *on the same claim* in federal court. *See Clark*, 673 F.3d at 417.

Second, the Director argues that AEDPA—and § 2254(d) in particular—repudiated this line of Fifth Circuit procedural default precedent. But § 2254(d), by its terms, is triggered only *after* the court determines that a claim has been "adjudicated on the merits" in state court. It does not purport to control how the court makes that determination in the first instance. And it nowhere suggests that its evidentiary restrictions should apply also to federal-court claims that were *not* "adjudicated on the merits" in state court. *Pinholster*, moreover, does not independently preclude anything; it is simply an interpretation of § 2254(d)(1) and therefore applies only if there is an "adjudication on the merits" in state court.

The Director's cited authority doesn't say otherwise. To be sure, AEDPA defines a "claim" as an "asserted federal basis for relief from a state court's judgement" of conviction. RB14 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005)). But the "claim" here is different precisely because the "asserted federal

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[4] *Lewis* repudiated a pre-*Pinholster* line of cases that *Pinholster* expressly overruled. These pre-*Pinholster* cases allowed a federal habeas claimant to use new evidence to show that he satisfied the exception in § 2254(d)(1) on the same claim that was decided on the merits by the state court. *See Lewis*, 701 F.3d at 789-90 (collecting pre-*Pinholster* cases).

basis for relief" is different: it is the set of allegations and evidence related to trial counsel's failure to investigate Springs and Jefferson (the federal-court claim), not trial counsel's failure to investigate background and compile a life history (the state-court claim). It is also true (and unremarkable) that "identical grounds may often be proved by different factual allegations." RB24 (quoting *Sanders v. United States*, 373 U.S. 1, 16 (1963)). Indeed, the Fifth Circuit's fundamental-alteration rule is what distinguishes scenarios in which different factual allegations prove the same ground and scenarios in which they do not.[5]

Finally, the Director points to the broad wording in Mr. Nelson's state petition and the fact that Mr. Nelson presented his IATC claim as a single claim in his federal petition. Those facts are inconsequential.

In state court, Mr. Nelson challenged "his legal team's failure to adequately investigate and present mitigation evidence." OB37. But the "mitigation" referred to in the state application was related to Mr. Nelson's personal background, not his

[5] The Director invokes *Peoples v. U.S.*, 403 F.3d 844, 848 (7th Cir. 2005), but that case did not consider whether a claim was "adjudicated on the merits" in state court. Rather, it dealt with the separate question whether the assertion of an IATC claim in a direct federal appeal should be treated as preclusive of the issue in a subsequent federal proceeding, regardless whether it was decided on the merits. Peoples's claim was barred because the ground was the same presented in the appeal, and there was no new evidence available that was not earlier ascertainable through the exercise of diligence. *See id.* at 847. Also, *Peoples expressly* distinguishes its rule from the scenario here, where the allegation is that there was deficient representation in the first proceeding in which the claim could have been raised. *See id.* at 849.

offense conduct—as in his federal court claim. And the prejudice asserted in his IATC-Participation Claim is broader than in his state-court claim insofar as it reaches the future-dangerousness and anti-parties issue as well. *See supra* at 9-10.

The fact that Mr. Nelson presented his IATC claim as a single claim in his federal petition also says nothing about whether the state court previously adjudicated those claims on the merits. Indeed, Mr. Nelson maintains that it would be appropriate to treat all of trial counsel's sentencing-phase deficiencies as a single, omnibus claim that is distinct from the skeletal mitigation claim in state court, analyze whether default of that omnibus IATC-sentencing claim is excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), and grant relief on the merits. The fact that Mr. Nelson insists that this Court should aggregate prejudice across the different grounds of deficiency, however, does not mean that he thinks his federal claim was "adjudicated on the merits" in state court. If this Court nonetheless determines that it must analyze different clusters of sentencing-phase deficiency as different claims—as in its COA—then there must be a cluster-by-cluster "sameness" determination whether the new allegations map on to the ones before the state court.

III. MR. NELSON'S PROCEDURAL DEFAULT IS EXCUSED.

Because the IATC-Participation Claim was not "adjudicated on the merits" in state court, it *is not* restricted by § 2254(d)—but it *is* procedurally defaulted. Procedural default is excused if the petitioner shows that (1) the underlying

Strickland claim is substantial and (2) state habeas counsel was ineffective in failing to raise it. *Ramey v. Davis*, 942 F.3d 241, 255 (5th Cir. 2019) (internal quotation marks and citations omitted). For the reasons already explained, *see supra* at 2-8, Mr. Nelson has showed that his IATC-Participation Claim has merit and thus has satisfied the first requirement. *Trevino v. Davis*, 861 F.3d, 545, 548-49 (5th Cir. 2018).

Mr. Nelson has also demonstrated that state habeas counsel—John Stickels—was ineffective in failing to investigate that claim because the "[t]he deficiency in [trial counsel's] investigation would have been evident to any reasonably competent habeas attorney." *Trevino v. Davis*, 829 F.3d 328, 348-49 (5th Cir. 2016). According to the Director, Stickels was absolved of any duty to investigate Mr. Nelson's story because of contradictions between Mr. Nelson's trial testimony and other record evidence. Those purported "contradictions," however, prove not to be contradictions at all.

The Director contends, for example, that Mr. Nelson's testimony about the robbery's timing is inconsistent with two pieces of evidence: a voicemail Mr. Dobson left at 11:10 am and phone records that place Mr. Nelson's phone close to the church at around 12:20 pm. That contradicts Mr. Nelson's testimony, the Director argues, which had him leaving his home for the church at 10:00 am and arriving at Jefferson's cousin's house in Euless at 12:00 pm.

But Mr. Nelson did not speak with military precision about the robbery's timing. When pressed to recall when the trio began walking to the church, Mr. Nelson testified that it was "close to 10:00" but could have been "10 or 15 minutes" off that estimate. 36RR69. He also stated that before entering the church, the group stopped and discussed whether to commit the robbery. 36RR70. And he gives no indication of how quickly the three walked. It is entirely possible, in other words, that the three men left Mr. Nelson's apartment around 10:15 am, walked with no particular urgency towards the church, and spent enough time discussing the potential crime that they entered the church after Mr. Dobson left the voicemail.

The Director similarly mischaracterizes Mr. Nelson's testimony about arriving in Euless. Mr. Nelson never testified that the trio arrived at noon; instead, he said that it was "probably afternoon, probably not . . . even that late after 12:00." 36RR77. And while a witness testified that phone records showed Mr. Nelson's phone starting a call at 12:19 pm from a cell tower sector that included the church, 24RR213, that same witness testified that when the call ended, Mr. Nelson's phone had moved to a different area—presumably Euless, which is only a few miles north of the church. 24RR213.

The Director next suggests that Mr. Nelson's story fails to "account for multiple pieces of physical evidence" that show "conclusively that Mr. Nelson was involved in a violent struggle at the murder scene." RB24. Not so. It is unsurprising

that Mr. Nelson's fingerprints were found on Mr. Dobson's wrist rest given the wrist rest was part of the computer that Mr. Nelson admits to grabbing. 34RR254; 36RR73-74. Nor is it surprising that investigators found white metal studs from Mr. Nelson's belt in the office. 34RR140. Mr. Nelson admits to being in the room and crawling under the desk, which obviously could have dislodged the studs (there is certainly no evidence to the contrary). 36RR74. Finally, the Director asserts that it would be a "near-impossibility" for Mr. Dobson's and Ms. Elliott's blood to be on top of Mr. Nelson's shoe if he had not attacked them. But again, Mr. Nelson testified that he crawled on his hands and knees to grab a bag under the desk. 36RR74. His shoe could have come in contact with blood while he was on the ground; other objects on the floor also had blood on them. 34RR159.

In short, for every piece of evidence the Director cites as proof that Mr. Nelson physically attacked the victims, there is a straightforward explanation that corroborates Mr. Nelson's story. And again, the question is not whether the record evidence proves that Mr. Nelson's version of events is correct, but whether that evidence would prompt a reasonable habeas attorney to at least investigate the potential IATC-Participation Claim.

The Director also argues that Stickels could have concluded that it was reasonable for trial counsel to adopt a "subtle" strategy of stressing the State's weaknesses because tracking down leads would have been expensive and dangerous.

RB24. But that argument is based on the notion—disproved above—that Mr. Nelson's testimony was contradicted by other evidence presented at trial. Unlike the cases the Director cites, this was not a situation in which it was apparent to trial counsel that following up on leads would eviscerate Mr. Nelson's story. *See King v. Davis*, 883 F.3d 577, 587 (5th Cir. 2018) (defendant's DNA found at scene when he claimed not to be there). Nor was this a case in which trial counsel were presented with a large catalog of hypothetical experts or potential leads to trace. *See Harrington v. Richter*, 562 U.S. 86, 107 (2011). Trial counsel here had only to interview a few witnesses and follow up on verifiable alibis. Stickels cannot justify trial counsel's decisions because they did not fulfill a basic obligation to conduct a thorough investigation of witnesses and evidence, no matter what their strategy at trial ultimately proved to be.[6]

Nor was Stickels engaged in "subtle" decision-making. The record is replete with examples of Stickels's deficiency—his petition contained boilerplate, non-cognizable challenges that were wholly irrelevant and copied from other briefs. *See* OB8. Stickels reviewed trial counsel's files for only four-and-a-half hours and presumably learned that trial counsel completely ignored Springs and Jefferson, but

[6] To the extent the Director argues that Stickels's performance was reasonable given the difficulty of showing prejudice on the existing record, that only reinforces the conclusion that Mr. Nelson is entitled to funding for investigative services. *See infra* at 25.

ignored the IATC-Participation Claim without conducting any of the omitted investigation. Because Mr. Nelson's claim is substantial and post-conviction counsel's performance was deficient, his procedural default is excused.

IV. 28 U.S.C. § 2254(e)(2) DOES NOT BAR MR. NELSON FROM INTRODUCING NEW EVIDENCE.

In the alternative, the Director argues that Mr. Nelson should lose even if his IATC-Participation Claim is new and procedurally defaulted, because—under 28 U.S.C. § 2254(e)(2)—he cannot introduce evidence to prove his entitlement to relief on the merits. Section 2242(e)(2) provides: "If the applicant has *failed to develop* the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant [meets exceptions not relevant here]." (emphasis added). The Director argues that a petitioner "fail[s] to develop" the pertinent factual basis for his claim whenever he seeks to show cause for procedural default. That argument fails for five reasons.

First, the argument is forfeited because, as the Director concedes, he is raising it for the first time on appeal. RB45. No matter, the Director contends, because § 2254(e)(2)'s use of the words "shall not" impose an unwaivable jurisdictional limit. RB45. But the Director is unable to cite a case supporting that proposition because § 2254(e)(2) is a "claim-processing rule," not a jurisdictional one. It is well-settled that courts must treat mandatorily-worded statutory prescriptions as non-jurisdictional claim-processing rules when, as here, there is no clear statement

indicating that the prescription is jurisdictional. *See Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1850 (2019); *see also Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012) (emphasizing importance of clear-statement rule in AEDPA context). And claim-processing rules are only "mandatory in the sense that a court must enforce the rule if a party properly raises it"—if a challenge under those rules is not raised, as is the case here, it is waived. *Fort Bend Cty.*, 139 S. Ct. at 1849 (internal quotation marks omitted).

Second, the Director's interpretation confounds statutory text. Again, § 2254(e)(2) applies only where a petitioner has "failed to develop" the factual basis for his claim in state court proceedings. That phrase—"failed to develop"—mirrors the Supreme Court's pre-AEDPA precedent on evidentiary hearings. Specifically, in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Court held that a prisoner who shows cause for excusing procedural default *has not* "failed to adequately develop" the factual basis of the defaulted claim and thus is entitled to an evidentiary hearing. *Id.* at 5 n.2, 8. And, as the Supreme Court explained shortly after AEDPA's enactment, "there is no basis in the text of § 2254(e)(2) to believe Congress used 'fail' in a different sense than the Court did in [*Tamayo-Reyes*]." *Williams v. Taylor*, 529 U.S. 420, 433 (2000). All § 2254(e)(2) did, in other words, was reinforce the longstanding alignment between the standards for excusing procedural default and permitting a hearing. It did not create a new standard that would deny a petitioner a

hearing any time his state habeas counsel was deficient.

When *Williams* was decided, federal courts applied a fault-attribution rule under which habeas claimants were vicariously faulted for any deficiency of state post-conviction counsel. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991). But *Martinez* abrogated *Coleman*'s vicarious-fault rule when the petitioner demonstrates that state post-conviction counsel ineffectively litigated a substantial IATC claim. *Martinez*, 566 U.S. at 94; *see also Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (explaining *Martinez* as a rule of agency attribution). Because a prisoner with a *Martinez*-postured claim is no longer considered to be *at fault* for forfeiting the claim, he has not "failed to develop" it under § 2254(e)(2). The Fifth Circuit adheres to the rule that procedural default law and § 2254(e)(2) must use symmetric definitions of fault. *See Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000).

Third, the Director's interpretation would effectively nullify *Martinez* and *Trevino*. *Martinez* reflects the concern that prisoners deprived of adequate state post-conviction counsel would be "in no position to *develop the evidentiary basis* for [the] claim, . . . which often turns on evidence outside the trial record." 566 U.S. at 12 (emphasis added). *Trevino* observed that the central task of much federal IATC litigation is to "investigate [a claimant's] background, determine whether trial counsel had adequately done so, and then *develop evidence* about additional mitigating background circumstances." *Trevino v. Thaler*, 569 U.S. 413, 425 (2013)

(emphasis added). A rule that permits a prisoner to assert a claim, but denies him the ability to support it, mocks the principles underlying those seminal decisions.

Fourth, the Director's interpretation contravenes fundamental due process principles. By definition, virtually every prisoner asserting a *Martinez*-eligible IATC claim will be asserting a claim that was unlitigated in state court. Under the Director's interpretation, an Article III court must entertain these claims but may not consider evidence offered in support. That violates the core due process principle that Congress may not create a presumption and then unfairly preclude a party from introducing evidence capable of disproving the fact(s) presumed. *See Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910); *see also Manley v. Georgia*, 279 U.S. 1, 6 (1929) ("A statute creating a presumption that . . . operates to deny a fair opportunity to repel it violates [due process]."); *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 82 (1911) (Congress may constrain merits adjudication so long as it "neither prevents the presentation of other evidence to overcome [a presumption] nor cuts off the right to make a full defense.").

Finally, adopting the Director's interpretation would bring this Court into conflict with the only circuits to have expressly addressed the Director's interpretation, all of which have rejected it. *See*, *e.g.*, *Jones v. Shinn*, 943 F.3d 1211, 1222 (9th Cir. 2019)[7]; *Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013). It would

[7] In his August 24 letter, the Director invites this Court to split from the Ninth Circuit

conflict, too, with the courts that have endorsed the broader proposition that the standard for fault under § 2254(e)(2) and procedural default should remain aligned. *See*, *e.g.*, *Wilson v. Beard*, 426 F.3d 653, 665-66 (3d Cir. 2005).[8]

V. NELSON IS ENTITLED TO EXPERT AND INVESTIGATIVE SERVICES UNDER 18 U.S.C. § 3599(f).

A § 3599(f) motion for investigative services must be granted if "a reasonable attorney would regard the services as sufficiently important." *Ayestas*, 138 S. Ct. at 1093. The district court's failure to apply this standard is reason alone to reverse its denial of Mr. Nelson's funding request.

But this Court should also render judgment for Mr. Nelson—and grant the funding request—because he has satisfied the applicable standard. The Director does not dispute that Mr. Nelson's claims are potentially meritorious or that additional funding is likely to generate useful evidence. Instead, he focuses on the same procedural hurdles that he contends limit this Court's ability to address the substance of Mr. Nelson's claims. RB16 n.5, 19 n.7. But for the reasons explained, *see supra* at 11-24, those hurdles are non-existent. Accordingly, Mr. Nelson's motion should be granted.

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and adopt the position of a dissent from denial of rehearing en banc in *Jones*. To do so would be illogical, burdensome, and contrary to Supreme Court precedent. *See supra* at 23-24; *Jones*, 943 F.3d at 1221-22.

[8] *Purkey v. United States*, 964 F.3d 603 (7th Cir. 2020), did not reach a "similar conclusion." RB47-48. *Purkey* was about another issue entirely—namely, a bar on claims that *did not include* the very rule of fault attribution at issue here.

VI. MR. NELSON IS ENTITLED TO A *RHINES* STAY.

This Court should also grant a *Rhines* stay. The Director mentions this request for relief in only two footnotes. In the first, the Director asserts that there are no unexhausted claims for which a *Rhines* stay is necessary, RB16 n.5—an argument that vanishes if this Court agrees with Mr. Nelson's analysis *supra* at 11-16. In the second, the Director asserts that there can be no *Rhines* stay if state post-conviction counsel was not deficient. RB19 n.7. But the standard does not call for an ultimate conclusion as to state post-conviction counsel's deficiency; it requires only that the allegation "is not plainly meritless." *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010). In short, if the Court concludes there is an unexhausted claim and the allegation of Stickels's deficiency is non-frivolous, then a *Rhines* stay should issue.

CONCLUSION AND PRAYER FOR RELIEF

The district court's denial of the writ of habeas corpus should be vacated and this Court should either grant the writ or allow for additional investigation for Mr. Nelson to demonstrate prejudice. If this Court determines that Mr. Nelson has not procedurally defaulted the IATC-Participation Claim, this Court should either reverse the district court's denial of Mr. Nelson's motion for a *Rhines* stay or grant its own *Rhines* stay, and then allow Mr. Nelson to present that claim in state court.

Respectfully submitted,

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/s/ *Meaghan VerGow*
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Dated: August 26, 2020

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, an electronic copy of the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit and served on counsel for Defendant-Appellee using the appellate CM/ECF system.

/s/ *Meaghan VerGow*
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