CAPITAL CASE

(No. ____)

IN THE

Supreme Court of the United States

STEVEN LAWAYNE NELSON,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Steven Nelson was convicted of capital murder under the Texas "law of parties," meaning that the guilt-phase jury found that he agreed to commit a felony in which a capital killing later took place. Nelson's sentencing-phase jury therefore received the "anti-parties" instruction, which exists to ensure that individuals on the periphery of a felony murder do not receive unconstitutional death sentences.

After Nelson was sentenced to death, his state post-conviction counsel filed an ineffective-assistance-of-counsel ("IATC") claim based on *Wiggins v. Smith*, 539 U.S. 510 (2003). Nelson presented a different IATC claim to the federal habeas court: that his trial counsel failed to develop evidence regarding Nelson's accomplices that would have influenced at least one juror's assessment of Nelson's culpability. The Fifth Circuit nevertheless held that those two claims were the same for purposes of the relitigation bar in 28 U.S.C. § 2254(d), deepening a circuit split over how to analyze "claim sameness" under that statute.

This petition presents two questions:

1. Has a claim been "adjudicated on the merits" in state court under 28 U.S.C. § 2254(d) when it consists wholly of allegations the state court never considered?

2. Does a non-killing defendant always exhibit the necessary culpability for a sentence of death when he is aware that his accomplices have severely injured a victim?

PARTIES TO THE PROCEEDINGS

Petitioner is Steven Lawayne Nelson, Appellant below.

Respondent is Bobby Lumpkin, Director, Texas Department of Criminal Justice (Institutional Division).

RELATED PROCEEDINGS

A direct appeal, *Nelson v. Texas*, CCRA Case No. AP-76,924, Texas Court of Criminal Appeals (judgment entered April 15, 2015).

Texas postconviction proceedings, *Ex Parte Steven Lawayne Nelson*, No. WR-82,814-01, CCRA Case No. AP-76,924, Texas Court of Criminal Appeals (judgment entered October 14, 2015).

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PETITION FOR A WRIT OF CERTIORARI (CAPITAL CASE)

Petitioner Steven Lawayne Nelson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 72 F.4th 649, and reprinted in the Appendix to the Petition ("Pet. App.") at 1a to 32a. The judgment of the district court is available at *Nelson v. Davis*, 4:16-cv-00904-P (N.D. Tex. Mar. 29, 2017), ECF No. 58, and is reprinted at Pet. App. 87a to 143a.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The court of appeals issued its decision on June 30, 2023, Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

The relevant statutory provisions, Section 2254 of Title 28 of the United States Code; and Section 3559 of Title 18 of the U.S. Code, are reproduced at Pet. App. 203a to 209a.

INTRODUCTION

Section § 2254(d) bars merits review of any "claim that was adjudicated on the merits" in state court. Following the Court's recent decisions delimiting the preclusive effect of this provision, the courts of appeals have divided over how to distinguish the claims that have been adjudicated in state court from those that have not.

The Fourth, Ninth, and Eleventh Circuits all apply variations of the exhaustion rule set forth by this Court in *Vasquez v. Hillery*, 474 U.S. 254 (1986). Under *Vasquez*, a federal-court claim is not the same as a state-court claim if it is "fundamentally altered." The boundaries of "claims" are defined by their factual predicates, and thus wholly distinct allegations give rise to distinct claims. Under the rules that prevail in the Fourth, Ninth, and Eleventh Circuits, § 2254(d) does not preclude federal-court claims comprising factual allegations that are distinct from those considered in state court.

The decision below breaks ranks with those other jurisdictions and announces a new test for claim-sameness under § 2254(d). Only in the Fifth Circuit does state merits adjudication of *one* sentencing-phase IATC claim preclude the federal litigation of *any other* IATC claim, even one that rests on entirely separate sentencing-phase IATC allegations. That broad new rule of § 2254(d) preclusion cannot be squared with the provision's text—which incorporates settled law defining a "claim" by the substance of its allegations, not just its legal predicate—but a divided panel nonetheless believed it needed to broaden the § 2254(d) preclusion rule to avoid "gamesmanship."

The Court should grant review to ensure that a single § 2254(d) standard is applied in all circuits, and it should reject the atextual test that the Fifth Circuit has adopted.

The IATC claim at issue in this petition demonstrates the overbreadth of the Fifth Circuit's approach. Steven Nelson's state post-conviction application contained a straightforward "*Wiggins* claim," comprising allegations that trial counsel deficiently failed to investigate the capital defendant's life history to the detriment of the mitigation showing on sentencing. Nelson's federal-court claim, however—denominated the "IATC-participation" claim by the panel—leveled factually distinct, non-overlapping IATC allegations. It concerned trial counsel's failure to investigate accomplices, which affected how the jury answered the Texas "anti-parties" question dictating when, in felony murder cases, Texas may legally impose death penalties on non-killers.

Because the *Wiggins* and IATC-Participation claims share no factual allegations, courts in the Fourth, Ninth, and Eleventh Circuits would all agree those two claims are distinct. In those jurisdictions, the adverse state merits adjudication of the *Wiggins* claim would not preclude federal review of the IATC-Participation claim. The Fifth Circuit, however, rejected the core element of *Vasquez* sameness: that there is a distinct federal-court claim where "new, material factual allegations … place the claim in a significantly different legal posture." Pet. App. 14a.

Section 2254(d) exists to ensure that federal courts respect the state-court disposition of claims on the merits. But the Fifth Circuit's strained extension of

that preclusion rule, now reaching claims the state court *never decided*, serves no such purpose. Instead, the rule offends both the statute's text and the principle that federal courts should honor decisions actually rendered by the state courts.

The Fifth Circuit's alternative merits holding poses no barrier to consideration of the circuit split. The divided panel held that there could be no prejudice on the anti-parties issue *as a matter of law* because the sentencing jury would have sentenced Nelson to death even if presented with evidence about the roles of his accomplices. That holding rested on a novel interpretation of Texas's capital sentencing statute that defies settled authority and would permit unconstitutional death sentences for non-killing defendants. It is reasonably probable that one member of Nelson's jury would have been influenced by evidence of Nelson's limited role in the crime, and the Fifth Circuit's conclusion that Nelson is barred from litigating that claim therefore matters to the outcome in this case.

STATEMENT OF THE CASE

A. Trial and Direct Review in State Court

1. On March 3, 2011, Clinton Dobson, the pastor of an Arlington, Texas church, was beaten and killed during a church burglary. Judy Elliot, the church's secretary, was also beaten. The assailants stole a laptop, Mr. Dobson's iPhone and credit cards, and Ms. Elliot's car.

The next day, two women told police that a man matching Nelson's description had approached them at a gas station, told them he had a deceased pastor's

iPhone, and asked them for help leaving town. ROA 2152.[1] Surveillance showed that the two women were lying, and one of them of later admitted to withholding information from the police; in fact, both had been hanging out with their friend Antony "A.G." Springs, in addition to Nelson, on the evening of March 3. ROA 511. That evening Springs—not Nelson—told the group that he was trying to sell an iPhone "that belonged to the dead Pastor." ROA 2152–54. One of the women (Morgan Cotter) eventually told the police that she believed Springs was involved in Mr. Dobson's death. ROA 511.

Police arrested Springs and Nelson. Springs possessed Ms. Elliot's car keys and Mr. Dobson's iPhone. 34 R.R. 167. Photos taken on March 7, 2011 showed "a large bruise on Springs['s] inner left arm at or near his lower biceps/elbow" and extensive bruising and swelling on the knuckles of both his hands, which he attributed to a "nervous fidget" of "beating his fists together." ROA 2161, 2174. Nelson, who showed no physical signs of a violent encounter, told police that he was a lookout during the burglary. He admitted to using the stolen credit cards, but he maintained that he neither killed anyone nor expected anyone to get hurt. ROA 2158–59.

The Arlington Police Department filed sworn complaints alleging that both Springs and Nelson committed capital murder. The State charged only Nelson, on the theory that he had acted as a lone

[1] "ROA" refers to the Fifth Circuit record on appeal.

assailant. 1 C.R. 12, 26 (Indictment, Complaint).[2] An investigating officer stated that the State did not charge Springs because phone records were inconsistent with his participation, but those records showed only that Springs's phone "was quiet for a number of hours" during the time of the murder. Pet. App. 118a.

2. Despite Nelson's insistence that Springs was the assailant, trial counsel failed to pursue evidence confirming the scope of Nelson's criminal participation. They did not interview critical, available witnesses who could have implicated Springs, including Springs himself, despite the considerable evidence linking Springs to the crime: Cotter's statements to police, Springs's possession of Dobson's phone and Elliott's car keys, and the extensive bruising to Springs's knuckles and elbow signaling a recent physical altercation. ROA 1824-37.

Trial counsel likewise failed to investigate Claude "Twist" Jefferson, 34 R.R. 165-66, a second accomplice who, Nelson testified, participated in the crime. 36 R.R. 69-73.[3] Testimony from Jefferson's aunt placed him with Springs and Nelson on the afternoon of the crime, and video footage showed Jefferson with Springs and Nelson using the stolen credit cards at a mall thereafter. ROA 2155-56, 2158. Finally, phone records showed that Jefferson extensively

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[2] "C.R." refers to the Clerk's Record filed in the Texas Court of Criminal Appeals.

[3] "R.R." refers to the Reporter's Record in the state trial court.

communicated with Springs and Nelson before and after the crime. ROA 516, 968.

Jefferson claimed to be taking an in-class chemistry quiz when the crime took place, but that alibi was full of holes. There was no chemistry quiz that day, his teacher reported, ROA 2252, and Jefferson's initials on the class sign-in sheet appeared to have been written by another person. ROA 2247– 53. Jefferson's phone records also show that he answered a call during class time that day. ROA 2180–2243. Trial counsel did not investigate these leads (or any others regarding Jefferson). ROA 2247–53.

At voir dire, the State sought jurors amenable to convicting based on the parties instruction—which would allow for a capital murder conviction even if Nelson neither killed Mr. Dobson nor intended his death. *See, e.g.*, 28 R.R. 172-74; 21 R.R. 70-74; 31 R.R. 19.

The guilt phase began on October 1, 2012. 32 R.R. 1. The State called over three dozen witnesses, 32 R.R. 3; 33 R.R. 3; 34 R.R. 3-4; 35 R.R. 3; 36 R.R. 3, including two alibi witnesses for Springs (the mother of his child and her close friend), 35 R.R. 10-40. Trial counsel did not cross examine these alibi witnesses to demonstrate their bias, and they called only Nelson to testify, 35 R.R. 25-29; 35-40. Nelson testified that he was to serve as lookout while Springs and Jefferson burgled the church, and that Mr. Dobson and Ms. Elliot were already wounded when Springs told Nelson to come inside. Consistent with Nelson's testimony, the State's DNA expert testified that DNA found on the ligatures binding the victims belonged to an unidentified third person—neither Nelson nor the

victims. 36 R.R. 69-76, 86-87, 109; 35 R.R. 205. During guilt-phase closing arguments, the State repeatedly emphasized that Nelson acted as a lone assassin. *See* 37 R.R. 7-13, 31.

The trial court instructed the jury that there were two avenues to convict Nelson: (1) finding that he was directly responsible as Mr. Dobson's killer; or (2) finding that he was a party to a robbery by Springs and/or Jefferson and should have anticipated that a death was likely to occur ("parties instruction"). 2 C.R. 393-95. The parties instruction permitted the jury to find Nelson guilty of capital murder under the theory that he did not directly cause the death, but that he nonetheless agreed to commit a crime in which a capital killing took place. On October 8, 2012, the guilt-phase jury found Nelson guilty of capital murder as a party. *See* 2 C.R. 401.

4. Because Nelson was convicted under the law of parties, evidence of Nelson's limited involvement in the murder was critical to his sentencing-phase defense. But trial counsel developed and presented virtually no evidence about Nelson's limited role. Before a Texas defendant can be sentenced to death in a case where the guilt-phase jury receives a parties instruction, the sentencing-phase jury must unanimously find all of the following: (1) the defendant poses a continuing threat to society; (2) the defendant actually caused the killing, intended the death at issue, or "anticipated that a human life would be taken" (the "anti-parties" question); and (3) other mitigating circumstances do not prohibit the death penalty. TEX. CODE. CRIM. PROC. art. 37.071, §§ 2(b). Unlike the parties instruction for guilt—which requires anticipation that

a death was *likely* to occur—the anti-parties instruction for capital sentencing requires anticipation that a death will in fact occur.

The co-conspirators' primary responsibility for Mr. Dobson's death would have militated against each of the three jury findings required for a death sentence, particularly the anti-parties question. But the only evidence trial counsel offered in support of their anti-parties argument was the testimony of a DNA expert who found a hair on Mr. Dobson's body containing DNA from an unknown third party. 43 R.R. 99-102. Counsel neither offered a theory on the source of the hair, nor any other evidence showing Nelson was not a lone assassin. They were unable to provide such evidence because they never investigated it. 44 R.R. 20-21.

The jury made the three findings triggering a death sentence, 44 R.R. 32-36; 2 C.R. 417-419, and the trial court sentenced Nelson accordingly. 2 C.R. 424-46.

5. Nelson appealed to the Texas Court of Criminal Appeals ("TCCA"), which affirmed Nelson's conviction and sentence. Opinion, *Nelson v. Texas*, No. AP-76,924 (Tex. Crim. App. Apr. 15, 2015). This Court denied Nelson's certiorari petition on October 19, 2015. Order, *Nelson v. Texas*, No. 15-5265 (U.S. Oct. 19, 2015).

B. State Post-Conviction Proceedings

On October 16, 2012, the trial court appointed John W. Stickels to represent Nelson in state post-conviction proceedings. 2 C.R. 432.

Stickels performed no meaningful investigation. In 2012, Stickels completed just three hours of work on Nelson's case. ROA 2042. Stickels did not meet with Nelson for six months following his appointment, and he did not request Nelson's files from trial counsel for another two months. ROA 2041–42. Stickels spent only about four-and-half hours reviewing those files and never investigated the offense. ROA 2037-42. (Stickels retained a mitigation specialist who did not investigate Nelson's accomplices. ROA 2035, 2044–49.) In March 2014, Nelson wrote a letter to the trial court expressing concern about Stickels's representation and pleading for new counsel. State Habeas C.R. 131. The court docketed the letter but took no action.

On April 15, 2014, Stickels filed Nelson's state habeas application, raising 17 claims: 11 boilerplate and non-cognizable challenges to the Texas capital punishment scheme; 4 claims that had already been raised and denied on direct appeal; a claim based on "excessive and prejudicial security measures"; and a pro forma IATC claim that vaguely alleged trial counsel's failure to "gather relevant records" relating to "mitigation evidence." ROA 310–314, 343. Stickels lifted large portions of the application from a different client's briefing, including arguments based on Fetal Alcohol Spectrum Disorder ("FASD") that did not apply to Nelson but nevertheless appeared in five claims. ROA 310–314, 342. Stickels repeatedly advanced arguments on behalf of "Tony," the FASD-afflicted client whose briefing had been pasted wholesale into the Nelson application. ROA 1964.

The ineffective-assistance theory asserted as "Claim 1" in the state application is usually called a

"*Wiggins* claim," *see Wiggins v. Smith*, 539 U.S. 10 (2003), and it was based on trial counsel's "failure to adequately investigate and present mitigation evidence as required by *Wiggins v. Smith* … *and Lewis v. Dretke*." ROA 310. Stickels's *Wiggins* claim addressed trial counsel's failure "to investigate Applicant's background, history, family, and friends and, as a result, failed to discover relevant and important migration evidence." ROA 337. Accordingly, the *Wiggins* claim alleged nothing about Springs's or Jefferson's roles in causing Mr. Dobson's death.

On January 29, 2015, the trial court entered an order recommending that the TCCA adopt the State's proposed findings of fact and conclusions of law and deny all relief. Pet. App. 146a–201a. On October 14, 2015, the TCCA adopted that recommendation denying relief. Pet. App. 144a–145a. The TCCA treated the IATC-based "Claim 1" as a straightforward *Wiggins* claim: "Applicant alleges that he was denied effective assistance of counsel at trial with regard to the investigation and presentation of mitigati[ng] evidence." ROA 3188.

C. Federal Habeas Proceedings

1. District Court

Federal habeas counsel discovered that no investigation into Springs's and Jefferson's involvement ever occurred. The operative federal habeas petition, filed on December 22, 2016, therefore included sentencing-phase IATC allegations that trial counsel failed to adequately investigate and litigate the participation of accomplices. None of those IATC allegations overlapped with the state-court *Wiggins* claim. ROA

1724–38. On February 6, 2017, Nelson filed several motions seeking fact-development services under 18 U.S.C. § 3599(f). ROA 3486-3510. On March 17, Nelson filed a motion to stay federal proceedings pending exhaustion (the "*Rhines* stay") along with his Reply in support of the amended petition. ROA 3717.

Twelve days later, the district court denied the § 3599(f) motions, the *Rhines* stay, and relief on all underlying claims. Pet. App. 87a–143a. The district court decided that state-court merits adjudication of *any* IATC claims barred relitigation of *all* IATC claims in federal court, under 28 U.S.C. § 2254(d). Pet. App. 106a109a. The district court held that the IATC-Participation claim was either part of or the same as the state-court *Wiggins* claim because both related to the failure to develop mitigation evidence. Pet. App. 107a–108a. The district court denied the motions for fact development under § 3599(f) and for a *Rhines* stay. Pet. App. 142a–143a. On April 10, it denied a certificate of appealability ("COA"). ROA 3846.

2. Fifth Circuit

On October 27, 2017, Nelson filed a COA application in the Fifth Circuit. In a lengthy, published opinion, the Fifth Circuit analyzed Nelson's sentencing-phase IATC allegations as three different claims, certifying an appeal on what it styled as the "IATC-Participation claim." Pet. App. 64a (*Nelson v. Davis*, 952 F.3d 651 (2020) ("*Nelson I*")). The IATC-Participation claim alleged that trial counsel insufficiently investigated accomplices, which allowed the prosecution to exaggerate Nelson's culpability and his role in the murder. The COA panel deferred final decisions on

Nelson's § 3599(f) and *Rhines*-stay motions, and it denied a COA on all other claims. Pet. App. 86a. It explained that § 2254(d) did not restrict consideration of the IATC-Participation claim because the state-court *Wiggins* claim "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 claim." Pet. App. 67a. It thereafter determined that reasonable jurists could debate whether Nelson met the remaining criteria for federal habeas relief. Pet. App. 68a–78a.

A divided panel issued a published decision in the appeal on June 30, 2023, repudiating *Nelson I*'s § 2254(d) holding, finding that the IATC-Participation claim had been encompassed by the *Wiggins* claim, and holding that it had therefore been adjudicated on the merits in state court. Pet. App. 1a–32a. The panel at one point indicated that it should consider whether there was any "fundamental[] alter[ation]" to the claim, Pet. App. 14a–17a, but it held that two sentencing-phase IATC claims are necessarily the same even when "new, material factual allegations … place the [federal-court] claim in a significantly different legal posture." Pet. App. 14a. Since both the IATC-Participation claim and the state-court *Wiggins* claim were sentencing-phase IATC claims, Pet. App. 14a–17a, the panel reasoned that the TCCA had adjudicated the IATC-Participation claim on the merits via the *Wiggins* claim. Pet. App. 17a. It therefore barred consideration of the IATC-Participation claim under § 2254(d). Pet. App. 17a.

The panel also affirmed summary judgment on the merits of the IATC-Participation claim, holding that

any deficient performance was nonprejudicial as a matter of law. Pet. App. 18a–23a. Even assuming Nelson had been no more than a lookout and first saw the victim only after he had been fatally injured, Pet. App. 21a, the court said, there was still no reasonable probability that a single juror would have answered any sentencing-phase issue differently—including the anti-parties issue. Pet. App. 21a–22a.

Judge Dennis dissented, asserting that the district court abused its discretion in denying § 3599(f) services and the *Rhines* stay, and concluding that the IATC-Participation claim was "likely meritorious." Pet. App. 25a. He disagreed with the majority's rule for § 2254(d) preclusion of the sentencing-phase IATC claim, arguing that "[the majority] fails to meaningfully grapple with the case-specific differences [between the *Wiggins* and IATC-Participation] claims." Pet. App. 29a-30a.

The Fifth Circuit denied a petition for rehearing or rehearing en banc on August 11, 2023. Pet. App. 202a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER § 2254(D) RESTRICTS RELIEF WHEN THE SUBSTANCE OF A FEDERAL-COURT CLAIM WAS NOT ADJUDICATED IN STATE COURT

The Fifth Circuit's test for claim-sameness breaks from the tests in the Fourth, Sixth, and Ninth Circuits, deepening a conflict over whether a bundle of allegations that a state court never decided can nonetheless have been "adjudicated on the merits" under

§ 2254(d). On that question, the Fifth Circuit is wrong: Its test contravenes the plain meaning of the word "claim" in § 2254(d) and conflicts with the test for sameness set forth in *Vasquez v. Hillery*, 474 U.S. 254 (1986). The panel disregarded the provision's textual meaning because of concerns about a "loophole" for habeas claimants to bring claims in federal court. But it is not necessary to adopt an atextual construction of § 2254(d) to avoid a loophole, and the meaning of the statute is clear: the relitigation bar does not apply when state courts never adjudicated the substance of the claim.

A. The Decision Below Deepens A Circuit Split Over The Test For Claim-Sameness Under § 2254(d)

1. Post-2011 Decisions Have Prompted Lower Courts To Refine The Test For Claim-Sameness

For claim-exhaustion purposes, *Vasquez* set forth a well-known test for claim-sameness: exhaustion depends on whether "the prisoner has presented the substance of his claim to the state courts" or whether, instead, "supplemental evidence … fundamentally alter[s] the legal claim already considered by the state courts." *Vasquez*, 474 U.S. at 257, 260. After *Vasquez* and until about 2011, habeas claimants would argue that federal-court claims were exhausted because they were the same as some state-court claim, and state respondents would argue that the federal-court claim had to be dismissed as unexhausted because it was distinct from some similar state-court claim.

Subsequent decisions of this Court, however, required that claim-sameness be analyzed in a new, non-exhaustion context—to pinpoint what claim exactly has been "adjudicated on the merits in State court proceedings" within the meaning of § 2254(d). *Cullen v. Pinholster* held that a claimant could not rely on new federal-court evidence to satisfy the exceptions to the relitigation bar specified in 28 U.S.C. § 2254(d). 563 U.S. 170, 181 (2011). Per *Harrington v. Richter*, state decisions were not unreasonable unless they deviated from the decision-making of every "fair-minded jurist." 562 U.S. 86, 102 (2011). And *Martinez v. Ryan* held that the deficient performance of state post-conviction counsel can excuse procedural default of a new IATC claim. 566 U.S. 1 (2012).

Pinholster, *Richter*, and *Martinez* prompted state respondents to abandon *Vasquez* in favor of a more expansive conception of claim-sameness for purposes of § 2254(d). If a federal-court claim is the same as some state-court claim subject to an adverse merits determination, then § 2254(d) will usually preclude federal relief. *Pinholster* itself anticipated this problem, and expressly reserved for development in the lower courts the question of "where to draw the line between new claims and claims adjudicated on the merits." 563 U.S. at 186 n.10.[4] The lower courts have fractured in answering that question.

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[4] The Court was responding to a concern raised in Justice Sotomayor's dissent, which offered the example of a *Brady* claim supported by evidence that emerged after the state court's consideration of earlier *Brady* allegations. *Pinholster*, 563 U.S. at 214–15 (Sotomayor, J., dissenting). The majority responded that the new federal-court content could potentially form a new claim:

2. The Courts Of Appeals Now Apply Four Different Tests To Analyze Claim-Sameness

The decision below adds an outlier to a growing circuit split. The other three circuits to address § 2254(d) claim-sameness honor the basic rule that federal-court and state-court claims are different when there are "new, material factual allegations that place 'the claim[s] in a "significantly different legal posture[,]"'" Pet App. 14a, though they have articulated different standards for applying that rule. The Fifth Circuit stands alone in rejecting it. The Court should grant certiorari to resolve the divide.

a. *The Fourth Circuit's "heart of the claim" test*

The Fourth Circuit looks to the legal "substance" of claims in order to determine § 2254(d) sameness. *See Moore v. Stirling*, 952 F.3d 174, 182-85 (4th Cir. 2020). In *Moore*, the leading Fourth Circuit case, the federal-court IATC claims were "presented in substantially identical terms to the state court," using "legal arguments [that] remain[ed] substantially the same." *Id.* at 183. *Moore* held that the claimant's "new evidence" did not "fundamentally alter[]" the state-court claims because the "heart of th[ose] claim[s]"—the specific deficiency alleged—remained the same. *Id.* at 184–85.

Since *Moore*, the Fourth Circuit has regularly applied the "heart of the claim" test to determine

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"Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements may well present a new claim." *See id.* at 187 n.10.

whether a federal-court claim was "adjudicated on the merits" in state court. *See*, *e.g.*, *Mahdi v. Stirling*, 20 F.4th 846, 898 (4th Cir. 2021) ("The heart of the claim remains the same: his trial attorneys should have done more to show how Mahdi's troubled childhood lessened his culpability." (alterations, internal quotation marks, and citations omitted)); *Vandross v. Stirling*, 986 F.3d 442, 451 (4th Cir. 2021) ("But [fundamental alteration] does not occur where the new evidence does not 'change the heart of the claim' but instead 'merely strengthens the evidence presented in the state PCR hearing.'").

b. *The Eleventh Circuit's "gravamen" test*

The Eleventh Circuit's test is functionally identical to the Fourth Circuit's, but phrased differently, turning on whether federal and state claims share a "basic *thrust or gravamen*." *Sears v. Warden GDCP*, 73 F.4th 1269, 1286 n.10 (11th Cir. 2023) (emphasis added; citations omitted). In *Sears*, the claimant alleged that a state-court discovery rule violated due process. *See id.* at 1279. When pleading the federal-court claim, he argued that "new evidence" transformed the state-court allegations into a new claim because "the current version of his claim relies on additional facts that were not before" the state court. *Id.* at 1285. The Eleventh Circuit rejected the argument because the "gravamen" of the two claims remained the same. *See id.* at 1286 n.10.

Sears's "gravamen" test for sameness derives from the test under 28 U.S.C. § 2244(b)(1), which governs claims across successive habeas petitions. *See id.*; *In*

re Dailey, 949 F.3d 553, 558 (11th Cir. 2020) ("What matters for purposes of § 2244(b)(1) is whether 'the basic thrust or gravamen' of the petitioner's legal argument [in prior and present petitions are] the same."); *In re Everett*, 797 F.3d 1282, 1291 (11th Cir. 2015) (claims that both asserted that trial counsel improperly "rel[ied] on [the petitioner's] father to find character witnesses and fail[ed] to make an adequate effort to find and interview witnesses after [the petitioner's] father died" shared gravamen)). Consistent with the Fourth Circuit's "heart of the claim" test, the Eleventh Circuit's "gravamen" test focuses on whether two claims both allege the same legal theory of deficiency.

c. *The Ninth Circuit's "fundamental alteration" test*

The Ninth Circuit applies the exact § 2254(d) sameness test from the exhaustion context, and so it recognizes different legal claims whenever factual allegations form distinct legal theories for trial-phase ineffectiveness. *Dickens v. Ryan* articulates the rule that federal-court claims and state-court claims having distinct legal theories are not the same: Even if a state court "previously adjudicate[d] a similar IA[T]C claim," a later IATC claim is not barred if "the *new allegations and evidence 'fundamentally altered' that claim*," thereby presenting a "'new' claim … based on 'new' evidence not previously presented to the state courts." 740 F.3d 1302, 1320 (9th Cir. 2014) (emphasis added). The Ninth Circuit has since reaffirmed that *Vasquez*'s fundamental alteration test, *see supra* at 2, applies *in toto* to the question of whether a federal-court claim was "adjudicated on the merits" in state

court. *See Rogers v. Dzurenda*, 25 F.4th 1171, 1181 (9th Cir. 2022) ("If a claim has been fundamentally altered, *it was not adjudicated on the merits in state court* and is procedurally defaulted." (emphasis added)).

Applying this test, the Ninth Circuit has expressly held that different allegations of deficiency form different IATC claims—directly contradicting the Fifth Circuit's *Nelson* decision. In *Poyson v. Ryan*, the claimant alleged state-court IATC claims that trial counsel had been deficient for (1) failing to seek the appointment of mental health experts and (2) failing to present mitigation evidence about his abusive childhood. 879 F.3d 875, 895 (9th Cir. 2018). The Ninth Circuit held that the federal-court claim—"counsel's failure to investigate . . . fetal alcohol spectrum disorder"—was new because it was "a substantially different claim[.]" *Id.* The Ninth Circuit held that the sentencing-phase IATC claim in federal court was not the same as the sentencing-phase IATC claims in state court because "Poyson presented not only new facts in support of a claim presented to the state court, *but also a fundamentally new theory of counsel's ineffectiveness* …." *Id.* at 896 (emphasis added); *see also Wood v. Ryan*, 693 F.3d 1104, 1120 (9th Cir. 2012) (holding that a "general allegation of ineffective assistance of counsel is not sufficient to alert a state court to separate specific instances of ineffective assistance").

* * *

Were this case decided in the Fourth, Ninth, or Eleventh Circuits, § 2254(d) would not preclude relief.

Instead, in denying relief, the Fifth Circuit fashioned a new test and deepened the split on claim-sameness.

B. The Fifth Circuit Rule Is Wrong

The decision below marks a breathtaking change for capital cases: Under the Fifth Circuit's refashioned fundamental alteration test, all sentencing-phase IATC allegations made in federal court are "adjudicated on the merits"—and therefore foreclosed by § 2254(d)—whenever *any* sentencing-phase IATC allegations were decided on the merits in state court. Pet. App. 14a–17a. The panel expressly rejected the salience of "new, material factual allegations." Pet. App. 14a. The panel held that a federal-court and a state-court claim can be the *same* even though they have *no* shared allegations.

That rule offends the statute's text and this Court's precedents on claim-sameness. If a federal-court claim has legal substance that is entirely distinct from the legal substance of a state-court claim, then the federal-court claim has not been adjudicated on the merits. The Fifth Circuit's contrary rule elevates a policy preference over the plain text of § 2254(d) and *Vasquez*, and that policy preference is already secured in other ways.

Start with the text. Under § 2254(d), the relitigation bar applies only to a federal-court "*claim* that was adjudicated on the merits" in state court. (Emphasis added). The word "claim" cannot bear the definition that *Nelson II* assigns it. A claim is "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530, 533 (2005) (discussing definition of "claim" in related

context and cited at Pet. App. 12a). The word "claim" in § 2254 mirrors its usage in Federal Rule of Civil Procedure ("FRCP") 8, where the term "denote[s] the aggregate of *operative facts* which give rise to a right enforceable in the courts." *Original Ballet Russe v. Ballet Theatre*, 133 F.2d 187, 189 (2d Cir. 1943) (citing 1 Moore, Federal Practice, pp. 3, 145-150, 605; Clark, Code Pleading, Secs. 19, 70) (emphasis added); *see also Cristin v. Brennan*, 281 F.3d 404, 417–18 (3d Cir. 2002) (also emphasizing "claim" in § 2254 has same scope as in FRCP 8).

Although the habeas statute does not define the term, "courts have construed ['claim'] to bear its *usual meaning* in federal pleading of a set of facts giving rise to a right to a legal remedy." BRIAN R. MEANS, POST-CONVICTION REMEDIES § 27:4 (emphasis added). In an oft-cited opinion, Judge Posner insisted that this "usual meaning" was to govern in habeas cases: "The habeas corpus statute … [does] not define 'claim,' but we take it to bear its *usual meaning* in federal pleading of a set of facts giving rise to a right to a legal remedy." *Bennett v. United States*, 119 F.3d 470, 471–72 (7th Cir. 1997) (emphasis added). Courts apply this "usual meaning" of the word "claim" in case after case. *See*, *e.g.*, *In re Hill*, 715 F.3d 284, 294 (11th Cir. 2013) (emphasis added) (defining claims with reference to "core factual allegation … *and* the core legal basis"); *Franklin v. Jenkins*, 839 F.3d 465, 475 (6th Cir. 2016) (citing *Brannigan v. United States*, 249 F.3d 584, 590 (7th Cir. 2001) (Cudahy, J., concurring in judgment) ("[a] claim is therefore distinguished by its facts (specifically, by its 'nucleus of operative facts'), not just by

the legal principle that it invokes or the body of law from which it derives")).

Under this broadly shared understanding of "claim," the word cannot encompass two wholly distinct sets of legally operative factual allegations, as the Fifth Circuit held. On the "usual meaning" of the word "claim," different allegations of deficient performance are distinct facts that form different Sixth Amendment claims. *See*, *e.g.*, *Franklin*, 839 F.3d at 475 (claimant alleged the same "nucleus of operative facts" because both claims centered on the failure to "request[] a new competency hearing upon witnessing [the claimant's] bizarre behavior at the time of his trial"); *Allen v. Massie*, 236 F.3d 1243, 1245 & n.2 (10th Cir. 2001) (per curiam) (noting scope of "claim" depends on whether petitioner proffered "a new factual predicate in support of her claim of ineffective assistance"). After all, federal courts can discern what claim the state court "adjudicated on the merits" only by reference to the specific allegations before the state court.

The Fifth Circuit rule also contravenes the definition of the word "claim" as framed by *Vasquez*, the pre-AEDPA case that considered claim-sameness for state-court exhaustion purposes. *See* 474 U.S. at 257. *Vasquez* held that the "substance" that is "fairly presented" in the state proceeding defines the scope of state-court claims. 474 U.S. at 257, 258. But, under *Vasquez*, federal-court allegations that "fundamental[ly] alter[]"state-court allegations constitute distinct federal-court claims. *See id.* at 260. By contrast, the decision below says *twice* that a federal-court

claim that is a fundamental alteration of a state-court claim is still the same claim. *See* Pet. App. 12a–16a.

The panel opinion rests less on text and precedent than a policy intuition about "loopholes" allowing federal claimants to sneak losing claims around § 2254(d). *See* Pet. App. 16a–17a. These concerns, however, must yield to the text, and they are overblown in any case. Whatever the reasons for caution when the new federal allegations simply endeavor to substantiate the old claim, that is not the case here. The state-court *Wiggins* claim has no allegations that the IATC-Participation claim repeated. The IATC-Participation claim did not "evolve" with the addition of new evidence in support of existing allegations. It proffered categorically distinct factual allegations supporting a different legal theory.[5]

Moreover, the panel's concerns about abusive habeas litigation are exaggerated. If claimants attempt to game the statute by adding evidence to existing allegations, then § 2254(d) and *Pinholster* will thwart them. And if a claimant artificially manufactures distinct allegations (a new claim), then there is no reason for courts to strain to apply § 2254(d). In that situation, a federal habeas claimant still faces daunting hurdles before there can be any merits consideration. Such a new claim cannot receive merits adjudication before procedural default is excused by a showing of cause and prejudice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). And even if there is formal

[5] The panel also stated that Nelson "concedes … that both claims are 'similar.'" Pet. App. 16a. But its decision contains no citation to such a concession because none occurred.

merits consideration, claimants can only use evidence to prove the underlying violation if they are not at fault for failing to develop its factual basis. *See Shinn v. Ramirez*, 596 U.S. 366, 371 (2022).[6]

* * *

The Fifth Circuit's sameness rule departs from *Vasquez* and from the tests used by sister jurisdictions, profoundly affecting the way courts enforce the Sixth Amendment in capital cases. The consequence in this case is that Nelson is denied a federal forum for his claim that trial counsel failed to support the anti-parties instruction with evidence demonstrating Nelson's relatively limited culpability for the crime. The claim at issue centered on trial counsel's failure to investigate *the offense*, not Nelson's *background*. That is a distinct claim, as the Fourth, Ninth, and Eleventh Circuits would hold. Because the Fifth Circuit has held otherwise, the Court should grant review.

II. THE FIFTH CIRCUIT ERRED IN DECIDING PREJUDICE AS A MATTER OF LAW RATHER THAN PERMITTING FACT DEVELOPMENT AND A *RHINES* STAY

As an alternative holding, the Fifth Circuit skipped to the merits of Nelson's underlying IATC-Participation claim and held that trial counsel's

[6] The decision below concludes by comparing the state-court IATC claim to a different set of federal IATC allegations. But the Fifth Circuit COA panel itself carved off the IATC-Participation allegations as a distinct IATC, Pet. App. 82a, and the other IATC allegations are not at issue here.

deficiencies were nonprejudicial as a matter of law. Pet. App. 17a-18a. According to the panel, even if Nelson was just a lookout, there still was not a reasonably probable chance that a single sentencing-phase juror would have answered a special issue differently.

The Fifth Circuit's alternative merits holding has no effect on the cert-worthiness of this petition because it rests upon multiple errors, any one of which is adequate to reverse. The panel fundamentally misconstrued the Texas anti-parties issue, to start. And the court improperly resolved Nelson's claims on the pleadings without affording him an opportunity to develop his claims factually under 18 U.S.C. § 3599 and using a *Rhines* stay. Nelson's IATC-Participation claim has likely merit, as Judge Dennis urged in dissent below, and a federal court should have the opportunity to consider the merits of the claim on remand.

A. The Fifth Circuit Prematurely Granted Summary Judgment On *Strickland* Prejudice

A successful IATC claim requires claimants to prove deficiency and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice may arise at the capital sentencing phase. *See*, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *Wiggins v. Smith*, 539 U.S. 510, 514 (2003); *Williams v. Taylor*, 529 U.S. 362, 367 (2000). Sentencing-phase prejudice requires a "reasonable probability" that the sentencer would have not imposed the death penalty. *See Rompilla*, 545 U.S. at 390. In jurisdictions (like Texas) that require unanimity, a reasonable probability that a *single juror* would vote to spare a defendant's life

constitutes sentencing-phase prejudice. *See Wiggins*, 539 U.S. at 537.

Without permitting any fact development, the Fifth Circuit held that Nelson failed to establish sentencing-phase prejudice because all jurors still would have sentenced him to death as a lookout. That holding disregarded the applicable summary judgment standard and fundamentally misunderstood the substance of Texas's special jury issues.

B. Nelson's Allegations Of Prejudice Are Meritorious

"As in civil cases generally," summary judgment "test[s] whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence." *Blackledge v. Allison*, 431 U.S. 63, 80 (1977). Where "specific allegations before the court show reason to believe that the petitioner may, *if the facts are fully developed*, be able to demonstrate that he is confined illegally and is therefore entitled to relief," then the court's "duty … to provide the necessary facilities and procedures for an adequate inquiry" proscribes summary judgment. *Harris v. Nelson*, 394 U.S. 286, 300 (1969) (emphasis added).

The Fifth Circuit erred in awarding summary judgment on prejudice, without permitting appropriate fact development. As this Court has "consistently explained[,]" the prejudice inquiry under *Strickland* "requires … probing and fact-specific analysis[.]" *Sears v. Upton*, 561 U.S. 945, 955 (2010) (per curiam). While such inquiry "necessarily require[s] a court to 'speculate' as to the effect of the new evidence," *id.* at 956, the speculation cannot ignore allegations

reasonably substantiated by a developed factual record consisting of admissible evidence. *See Roe v. Flores-Ortega*, 528 U.S. 470, 487 (2000). Nelson's substantiated allegations of prejudice foreclosed summary judgment against him; the Fifth Circuit rejected his claim as a matter of law only by applying a legally erroneous capital sentencing standard, as explained below.

1. The Panel Erroneously Applied Texas Anti-Parties Law

The anti-parties issue applies whenever a Texas guilt-phase jury convicts a capital defendant using a parties instruction. Here, it required sentencing-phase jurors to find unanimously that Nelson "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or *anticipated* that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1)-(2). (emphasis added). That is a finding of greater culpability than the jury needed to convict Nelson of capital murder—anticipation that a human life would be taken, as opposed to anticipation that a death was likely to occur in the course of the felony. *Supra* at 8-9.

In rejecting anti-parties prejudice as a matter of law, the Fifth Circuit adopted a construction of the statute that settled Texas authority forecloses. It held that all reasonable jurors would find Nelson to have had sufficient "anticipation," even if he was just a lookout. Nelson sufficiently "anticipated" Dobson's death, the Fifth Circuit reasoned, when he saw the victims "bleeding out on the floor—but still alive—and did nothing to assist them." Pet. App. 19a–22a.

The Fifth Circuit's interpretation of "anticipation" contravenes the Texas statute, which was enacted to ensure that death sentences in the state would not violate the Eighth Amendment.

The anti-parties issue ensures that, for individuals who did not themselves kill a person, only the most culpable capital defendants get the death penalty. Under the Eighth Amendment, someone who did not kill, attempt to kill, or intend to kill does not exhibit the "cold calculus" that might warrant capital punishment as retribution or deterrence. *Enmund v. Florida*, 458 U.S. 782, 796–99 (1982). Rather, the State must prove that the non-killing defendant had "reckless indifference" to human life and "substantial participation" in the underlying felony. *Tison v. Arizona*, 481 U.S. 137, 154, 158 (1987).

So that Texas death sentences comply with *Tison*, the TCCA has emphasized that, for the purposes of the anti-parties rule, the term "anticipation" entails a "highly culpable mental state." *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999). The "anticipation" requirement goes well beyond the concept of bare factual awareness—the standard that the Fifth Circuit believed sufficient for a capital sentence. To determine whether a defendant engaged in (a) deliberate conduct (b) with the intent or anticipation that death would result, "[t]he jury must consider the defendant's conduct in aiding, encouraging, or directing the killing[.]" *Harris v. Texas Dep't of Crim. Just.*, 806 F. Supp. 627, 635–36 (S.D. Tex. 1992) (applying Texas law). "The evidence must show that the defendant's individual conduct constituted a conscious decision, more than mere will or intent, to cause death" and

that his "level of intention" is "toward reflection rather than like reaction[.]" *Id.* at 636.

The Fifth Circuit's reduced standard for "anticipation" defies Texas precedent reserving the death penalty in felony murder cases for only the most culpable defendants. *See Harris*, 806 F. Supp. at 635. It construes "awareness" as "anticipation," even when the defendant was not present for the assault, and even when the defendant did not intend that it occur. Similar after-the-fact awareness could be attributed to most participants in a felony murder, but sentencing such defendants to death based on that lower mental state would violate the Eighth Amendment. *See Tison*, 481 U.S. at 154; *Enmund*, 458 U.S. at 797.

Texas did not write an unconstitutional statute, and therefore a defendant does not necessarily "anticipate that a human life would be taken" when he learns of a violent assault after its commission. It is reasonably probable that at least one juror would find Nelson did not "anticipate that a human life would be taken" under the anti-parties instruction, properly construed, in view of evidence that he was not present and did not know about the assault that his accomplices committed. Trial counsel's failure to develop that evidence was thus prejudicial, and the Fifth Circuit's legally erroneous, constitutionally defective reasons for avoiding that result should be rejected.

C. Nelson Should Have Been Afforded Investigative Services Under 18 U.S.C. § 3599(f)

Federal law "authorizes federal courts to provide funding" to a death-sentenced person who cannot

otherwise afford "investigative, expert, or other reasonably necessary services." *Ayestas v. Davis*, 138 S. Ct. 1080, 1092 (2018) (citing 18 U.S.C. § 3599). A § 3599(f) movant need only show that a "reasonable attorney would regard the services as sufficiently important," which entails a three-factor inquiry: (1) "the potential merit of the claims that the applicant wants to pursue," (2) "the likelihood that the services will generate useful and admissible evidence," and (3) "the prospect that the applicant will be able to clear any procedural hurdles standing in the way[,]" *id.* at 1093–94.

The denial of § 3599(f) services to Nelson was a per se abuse of discretion. A district court "necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). When the district court denied Nelson's funding request, the "applicable authorities" it invoked require a petitioner to show a "*substantial* need" for investigative services. ROA 3843–44. This Court rejected that standard in 2018, holding that an applicant for funding under § 3599(f) need only satisfy the less burdensome "*reasonably* necessary" standard. *Ayestas*, 138 S. Ct. at 1084, 1094 (emphasis added). Nelson is entitled to have his request considered under the correct standard.

That standard is easily cleared here: Trial counsel failed to prepare for and litigate how Nelson's limited participation reduced his culpability. It is likely that additional funding will generate useful evidence because reduced participation increases the likelihood of sentencing-phase prejudice; the district court failed

to consider the potential "useful and admissible evidence" that Nelson's investigation might unearth. ROA 3843-44; *Ayestas*, 138 S. Ct. at 1094. And Nelson can excuse procedural default under *Martinez*, 566 U.S. 1, and *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (substantial IATC claim not procedurally defaulted if state post-conviction counsel deficiently forfeited it).

The Fifth Circuit did not explain why it affirmed the district court's denial of services notwithstanding the district court's use of the wrong legal standard. The only way to reach that result would be to hold that it would have been an abuse of discretion for the district court to *grant* services—but there could have been no such abuse, as just shown. This Court should either reverse on the ground that Nelson is entitled to § 3599 funding or vacate and remand so that the district court can apply the *Ayestas* standard.

D. Nelson Should Be Permitted To Exhaust His Claims In State Court

The courts below improperly denied Nelson the opportunity to investigate and exhaust his claims in state court. Pet. App. 1a–2a. Under *Rhines v. Weber*, an order staying a federal proceeding pending a return to state court is appropriate when: (1) "the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court[;]" (2) the claim is not "plainly meritless[;]" and (3) there is no indication that the petitioner is engaging "in abusive litigation tactics or intentional delay." 544 U.S. 269, 277–78 (2005). Neither the district court nor the Fifth Circuit addressed that standard in their rulings. The district court simply denied Nelson's motion "[i]n light of the court's rulings" on Nelson's

habeas petition, ROA 3844; and the Fifth Circuit denied the motion without comment, C.A. Dkt. 202-1.[7]

The error in denying Nelson's stay motion is worth correcting. The *Rhines* procedure gives state courts an opportunity to pass upon serious claims of constitutional error, like those at issue here, that were deficiently forfeited by state post-conviction counsel. *See Ruiz v. Quarterman*, 504 F.3d 523, 529 n.17 (5th Cir. 2007). The state court has not been presented with Nelson's claim that he was deprived of his Sixth Amendment right to counsel when his counsel deficiently failed to investigate the involvement of co-assailants, to his prejudice.[8] There has been no gamesmanship justifying an equitable denial of a *Rhines* stay: Nelson filed his federal petition for relief shortly after discovering the underlying bases for his IATC-Participation Claim. Courts review denials of *Rhines* stays for abuse of discretion, *Rhines*, 544 U.S. at 276, and it was an abuse of discretion to deny Nelson's motion for a *Rhines* stay in this instance.

E. With A Sufficient Opportunity To Develop Facts, Nelson Would Prevail On The Merits Of His IATC-Participation Claim

If the Court were to reverse the decision below, Nelson could demonstrate that he is entitled to relief under *Strickland*.

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[7] "C.A. Dkt." refers to the Fifth Circuit docket.

[8] To the extent *Rhines*' "merits" prong requires a non-frivolous showing that movants can avoid state procedural bars, Nelson can show that here under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071 § 5(a)(1) and (a)(3).

1. Trial Counsel's Deficiency

A lawyer's failure to investigate in the face of "known evidence [that] would lead a reasonable attorney" to inquire further is constitutionally deficient. *Wiggins*, 539 U.S. at 527 (2003); *see also Rompilla*, 545 U.S. at 391 n.8 (counsel may not reasonably ignore "red flags"). The deficiency of Nelson's trial counsel cannot reasonably be disputed, and the Fifth Circuit did not even reach that question. Trial counsel ignored "known evidence" implicating Springs and Jefferson, whose involvement bore directly on critical sentencing issues.

The "red flags" signaling Springs's involvement in the crime were legion. His friends withheld inculpatory information from the police, ROA 510–11; one later admitted that she believed that Springs was involved in Mr. Dobson's death, ROA 510–11; Springs told others he was trying to sell the iPhone of "the dead Pastor," ROA 2152–54; Jefferson's aunt's testified to a grand jury that Springs told her about the crime, 35 R.R. 136–37; security footage showed Springs, with Nelson, using a victim's stolen credit card on the day of the offense, ROA 513; Springs had Mr. Dobson's iPhone and Ms. Elliot's car keys when arrested, ROA 517; 521; 34 R.R. 167; Springs had assault-consistent bruising on his knuckles and arm shortly after the crime, ROA 415; Springs's fingerprints were on Ms. Elliot's car, 34 R.R. 163–64; ROA 3820; Springs's alibi witnesses were intrinsically biased, 35 R.R. 10–40; Springs admitted he was with Nelson the day of the crime, after lying to the police that the two first met later, ROA 514; and Ms. Elliot

confirmed that more than one assailant beat her, ROA 517.

Known facts about Jefferson likewise required investigation into his involvement: DNA recovered from the ligatures binding Mr. Dobson and Ms. Elliot matched an unidentified male—not Nelson, Mr. Dobson, or Springs, 43 R.R. 53–58; statements to police linked Jefferson with Nelson the night before the crime, ROA 516; Nelson's testimony placed Jefferson, Springs, and Nelson together the afternoon of the crime, 36 R.R. 69–73; video captured Jefferson with Springs and Nelson using the stolen credit cards at a mall after immediately after the crime, ROA 2155–56, 2158; Jefferson asked Cobb why she "had 'snitched' on all of them" after Springs's and Nelson's arrests, ROA 2296; and considerable evidence suggested that Jefferson had lied about his alibi. *Supra* at 7.

Trial counsel had clear avenues to investigate these red flags. But they made no attempt to locate, contact or interview Jefferson, Springs, or any other witnesses who might have relevant testimony. ROA 1824–37. They conducted no further inquiry into physical evidence calling Jefferson's and Springs's alibis into question. ROA 2252-53. A reasonable counsel would have run down the facts about these critical people. Trial counsel's failure to do so was deficient.

2. Counsel's Deficient Failure To Investigate Springs And Jefferson Prejudiced Nelson's Sentencing Defense

With evidence about Jefferson's and Springs's involvement in the crime, there is a reasonable

probability that a single juror would have voted differently on one or more of the special issues. For example, an adequate investigation would have generated evidence that Nelson lacked the intent and participation necessary to satisfy the anti-parties instruction—because Nelson's participation in the robbery was secondary and he never anticipated the victim's death. Without this evidence, the State was able to credibly argue to the jury that this was a lone-wolf crime. 37 R.R. 8; 44 R.R. 8 (sentencing argument). Questioned later, jurors found defense counsel's factually unsubstantiated arguments about Nelson's secondary participation wanting. ROA 2082 (juror declarations), 2085.

This same evidence could likewise have changed at least one juror's findings on mitigation or future dangerousness. If trial counsel had uncovered and presented additional evidence reflecting that Springs and Jefferson—not Nelson—were the assailants, it would have undermined the jurors' perceptions of Nelson's personal moral culpability and reduced their appraisal of his future dangerous. It is at least reasonably likely that a juror would view a less culpable participant, like Nelson, as deserving of life.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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