**CAPITAL CASE**

No. ____

IN THE

# Supreme Court of the United States

MOISES SANDOVAL MENDOZA,

*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

1. Whether a federal claim is "adjudicated on the merits" in state court under 28 U.S.C. § 2254(d) so long as the state court resolves the claim on substantive grounds, even if the petitioner did not have a full and fair opportunity to litigate the claim.

2. Whether the Fifth Circuit erred in denying habeas relief on petitioner's claim that his trial lawyers provided ineffective assistance by presenting a psychologist at the capital-sentencing phase who testified that petitioner lacked a moral compass, was a danger in and out of prison, and that the traditional mitigation factors were not present.

## RELATED PROCEEDINGS

*Mendoza v. Lumpkin*, No. 12-70035 (5th Cir.)

*Mendoza v. Director*, No. 5:09-cv-00086 (E.D. Tex.)

*Ex Parte Moises Sandoval Mendoza*, No. WR-70,211-01 (Tex. Ct. Crim. App.)

*Ex Parte Moises Mendoza*, No. W401-80728-04 (HC1) (Dist. Ct. Collin Cnty., Tex.)

*Texas v. Mendoza*, No. W401-80728-04 (Dist. Ct. Collin Cnty., Tex.)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Moises Sandoval Mendoza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The Fifth Circuit's opinion is reported at 81 F.4th 461 and is reprinted in the Appendix to the Petition (App.) at 1a-40a. The Fifth Circuit's denial of rehearing is not reported and is reprinted at App. 215a-216a. The district court's opinions denying habeas relief are not reported but available at 2019 WL 13027265 and 2012 WL 12817023, and reprinted at App. 41a-79a and App. 80a-92a.

## JURISDICTION

The Fifth Circuit entered judgment on August 31, 2023, App. 1a, and it denied a timely petition for rehearing on November 13, 2023, App. 215a. On December 1, 2023, Justice Alito extended the time to file a petition for certiorari to March 11, 2024. No. 23A496. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense." U.S. Const. amend. VI.

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on

> behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") restricts federal courts' authority to grant a writ of habeas corpus on a claim that was "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). As then-Judge Gorsuch observed, there is a "circuit split" over the meaning of this "important" federal statute. *Wilson v. Workman*, 577 F.3d 1284, 1316 (10th Cir. 2009) (*en banc*) (Gorsuch, J., dissenting), *abrogated on state-law grounds as noted in Lott v. Trammell*, 705 F.3d 1167, 1212-13 (10th Cir. 2013). Specifically, the First, Fifth, and Sixth Circuits hold that a state court "adjudicates" a claim "on the merits" whenever it resolves the claim on substantive rather than procedural grounds, even if the defendant did not have a full and fair opportunity to litigate the claim. By contrast, the Second, Fourth, and Tenth Circuits hold that a claim is not "adjudicated on the merits"

when the petitioner did not have a full and fair opportunity to litigate.

In *Bell v. Kelly*, 553 U.S. 1031 (2008), this Court granted certiorari to resolve the split. But the Court dismissed the petition as improvidently granted, 555 U.S. 55 (2008), after petitioner's counsel conceded at argument that the case did not squarely implicate the question presented.

This death penalty case squarely presents the question left unresolved by *Bell*. In state court, petitioner Moises Sandoval Mendoza was denied the opportunity to test critical evidence submitted in opposition to his ineffective-assistance claims. In the decision below, the Fifth Circuit held that these claims were "adjudicated on the merits" solely because the claims were resolved on substantive grounds, and thus that it was irrelevant whether Mendoza had a "full and fair" opportunity to litigate in state court or that the state court decided the claim without the benefit of "material evidence."

The Court should grant certiorari to resolve the conflict over how to interpret Section 2254(d). And the Court should reverse. Section 2254(d) erects a modified res judicata rule using the traditional language of res judicata. Under that well-developed body of law, a claim is "adjudicated on the merits" and entitled to preclusive effect only where the party opposing preclusion had a full and fair opportunity to litigate the claim in the first proceeding. And where Congress adopts a concept with an established legal meaning—as it did in Section 2254(d)—that legal meaning applies unless the statute dictates otherwise. Here, the text, structure, history, and

background principles of habeas law confirm that a claim is not "adjudicated on the merits" when the petitioner did not have a full and fair opportunity to litigate.

Independent of the split over Section 2254(d), the Court should grant plenary review of, or summarily reverse, the Fifth Circuit's denial of habeas relief on Mendoza's claim that counsel provided ineffective assistance by presenting an expert psychologist who proved the prosecution's case for death. This claim is not subject to AEDPA's relitigation bar because it was not adjudicated in state court. And it is meritorious. The key defense witness testified that Mendoza lacked a moral compass, that he was dangerous in and out of prison, and that the "traditional" factors in mitigation were "just not present." The expert's testimony thus established both special issues (future dangerousness and lack of mitigation) required for a death sentence under Texas law. And in a proceeding that at its core asks the jury to make a moral assessment about the worth of a human life, the expert told the jury that Mendoza was morally lacking. The prosecution immediately recognized the significance of this testimony, arguing that the jury should sentence Mendoza to death based on the testimony of his own expert, even though the State has since argued that Mendoza had "a very compelling case for mitigation"—one the jury self-evidently could have believed had Mendoza's own expert not convinced them otherwise. ROA.2025. To state what should be obvious: "No competent defense attorney would introduce such evidence about his own client." *Buck v. Davis*, 580 U.S. 100, 119 (2017).

## STATEMENT OF THE CASE

### A. Statutory Background

Congress enacted AEDPA in 1996 to ensure that state courts remained "the principal forum" for resolving "constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). To accomplish this objective, Congress first "channel[ed] prisoners' claims" into state courts, requiring them to "exhaust state remedies before filing for federal habeas relief." *Pinholster*, 563 U.S. at 182; *see* 28 U.S.C. § 2254(b). Congress then gave state court decisions on the merits res judicata effect subject to two narrow exceptions. Section 2254(d), the provision at issue here, "bars relitigation of any claim 'adjudicated on the merits' in state court," unless the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts. *Harrington*, 562 U.S. at 98 (quoting 28 U.S.C. § 2254(d)). This case principally concerns what is required to conclude that a federal claim was "adjudicated on the merits" in state court.

### B. Procedural Background

1. Mendoza was convicted by a Texas jury of capital murder for killing Rachelle Tolleson in Farmersville, Texas in March 2004. *See* App.2a-4a. After the jury found Mendoza guilty, the case proceeded to the punishment phase. To impose a punishment of death, the jury had to find two special issues unanimously. Tex. Code Crim. Proc. art.

37.071, §§ 2(d)(2), (f)(2). First, the jury had to find beyond a reasonable doubt that there was a probability that Mendoza "would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* § 2(b)(1). Second, the jury had to find that there were no "mitigating circumstance[s] … to warrant" sparing Mendoza's life. *Id.* § 2(e)(1).

Trial counsel's defense to the death penalty centered on a promise made to the jury during opening statements to "present" evidence that would "explain why Moises Mendoza acted the way he did." RR23:10; RR23:9.[1] Key to that promise was psychological expert, Dr. Mark Vigen, whom counsel positioned as the "focal expert" and primary "testifying witness" for Mendoza's argument that his life should be spared. ROA.639, ROA.642. Counsel could have used Vigen to emphasize for the jury what the State repeatedly has argued are facts forming "a very compelling case for mitigation." ROA.2025; *see* Opp'n to Appl. for Certificate of Appealability at 34 (5th Cir. Oct. 13, 2020) (same).

But Mendoza's lawyers did the opposite. The first opinion defense counsel elicited from Vigen was that Mendoza lacked the "inner self" that makes the rest "of us" human—"the internal compass that each of us has" and the ability "to connect with other people."

[1] "RR#:#" refers to the state trial record (volume and page number), "ROA.#" refers to the record on appeal in the Fifth Circuit, and #:SCHR:#" refers to the state court habeas record (volume and page number).

App. 231a-232a.[2] And instead of identifying mitigating facts that "explain[ed] or lessen[ed]" Mendoza's "culpability," *see* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines"), 31 Hofstra L. Rev. 913, 1055-56, 1058 (2003), Vigen testified that the "traditional" mitigating facts were "just not present." App. 294a-295a. He told the jury that there was "something missing in this case for [him] as a psychologist." App. 294a; *see also*, *e.g.*, App. 265a-267a.

Vigen's testimony also established that Mendoza was dangerous in and out of prison. Although the prosecution did not enter any evidence about Mendoza's conduct in jail in its case-in-chief, Vigen testified that Mendoza's "bad behavior persists now even in the jail." App. 234a ("just emotionally reactive," "causes trouble"). He described Mendoza as "[r]eactive and impulsive," testified to Mendoza's "explosive temper," App. 261a-262a, and that Mendoza was not "just trying to get attention," but was "acting out his anger," App. 263a. He agreed "that the best predictor of whether a person is going to be violent in prison is whether or not he's been violent in prison before." App. 283a. And most devastating of all, Vigen "certainly agree[d]" that "in a free society [Mendoza] is a very dangerous individual." App. 287a.

Vigen's testimony featured prominently in the

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[2] Vigen's testimony is located at RR24:101-94 and is reprinted at App. 217a-300a.

prosecution's ultimate argument for imposing the death penalty. On the future dangerousness issue, the prosecution told the jury: "you know the answer to that question" because Mendoza's "very own witness, Dr. Vigen … told you that this Defendant is dangerous in society." RR25:21. Not only did the prosecution use Vigen's testimony to make its affirmative case, but it used his testimony to rebut Mendoza's case in opposition. Defense counsel's strategy (*see* App. 31a-32a) was to argue that "the pattern of violence" would be broken in prison, but the prosecution urged the jury to reject that argument based on "what Dr. Vigen told you," RR25:44.

The prosecution also used Vigen's testimony to argue the lack of mitigation. The State asked the jury: "So why did he do it?" RR25:24. "Is there anything in his background that reduces his moral blameworthiness for what he's done?" *Id.* The State again pointed to Vigen's testimony for the answer: "Vigen looked and searched to try to find someone, something that caused [Mendoza] to do this. He couldn't find it. He said it was missing." RR25:25. "As the doctor [Vigen] told you, this isn't the way it always is." RR25:47.

The jury imposed a death sentence. RR25:57-58. The Texas Court of Criminal Appeals affirmed Mendoza's conviction and sentence on direct appeal. *See Mendoza v. State*, 2008 WL 4803471, at *1 (Tex. Ct. Crim. App. Nov. 5, 2008).

2. Following the appointment of state habeas counsel, Mendoza sought relief in state court based on the ineffective assistance of his trial counsel, *see* App. 93a-94a; App. 4a, the vehicle for such claims under

Texas law, *see Trevino v. Thaler*, 569 U.S. 413, 423-26 (2013). In his petition, Mendoza claimed that trial counsel rendered ineffective assistance by (among other things) failing to "(1) formulate an integrated defense theory throughout all phases of trial, (2) investigate condition-of-the-mind evidence to negate *mens rea*, (3) investigate and develop mitigation evidence, and (4) present crucial mitigating evidence." App. 7a; *see also* App. 80a-81a.

To support his claims, Mendoza sought discovery from his defense team and an evidentiary hearing. 1:SCHR:205-13. Mendoza's team did not respond to his requests for information about their investigation, including "any mitigation files, social history, and/or notes," 1:SCHR:205-06; instead, his former lawyers submitted a joint affidavit in support of the State's opposition, attesting to their own effective assistance, ROA.638-44 ("Mendoza was represented effectively in all aspects of trial."). His "mitigation expert" did the same. ROA.635-37. But the state habeas court denied Mendoza's request for discovery, App. 213a, leaving him with no opportunity to test his defense team's self-serving affidavits. And it denied his claims for habeas relief, relying heavily on the affidavits Mendoza had no opportunity to challenge. *See* App. 96a-177a (state habeas court's findings of fact), at ¶¶ 5-10, 16-25, 34-35, 43-47, 117, 123-24, 132-36, 147, 154-58, 185-89, 207-13, 265-67, 275.

The Court of Criminal Appeals "adopt[ed] the trial judge's findings and conclusions" and affirmed based on those "findings and conclusions" and its own review. App. 93a-94a.

3. Represented by the same counsel that

represented him in state habeas, Mendoza raised his ineffective-assistance claims in federal court. *See* App. 5a. The Eastern District of Texas denied Mendoza's petition, App. 80a, but found that Mendoza had made a "substantial showing of the denial of a constitutional right" on four of his claims, and issued certificates of appealability on those claims. Order at 1, *Mendoza v. Thaler*, No. 5:09-cv-00086 (E.D. Tex. Dec. 17, 2012), ECF No. 71.

While Mendoza's appeal to the Fifth Circuit was pending, this Court held in *Trevino* that Texas habeas petitioners could assert the ineffectiveness of state habeas counsel to excuse the procedural default of an underlying ineffective-assistance claim. 569 U.S. at 429. In light of *Trevino*, the Fifth Circuit remanded this case to the district court to appoint conflict-free federal habeas counsel and "to consider in the first instance whether the petitioner can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims … that he may raise, and if so, whether those claims merit relief." *Mendoza v. Stephens*, 783 F.3d 203, 203-04 (5th Cir. 2015) (per curiam); App. 5a.

On remand, Mendoza obtained new counsel who raised two additional ineffective assistance claims: that trial counsel's presentation of Vigen was ineffective, and that trial counsel failed to investigate a key rebuttal witness (and that state habeas counsel was ineffective for failing to preserve both claims). *See* App. 6a (summarizing new claims). The district court denied relief on both claims, App. 41a-79a, and the Fifth Circuit granted additional certificates of appealability, Order, *Mendoza v. Lumpkin*, No. 12-

70035 (5th Cir. Dec. 23, 2022).

4. In a published opinion, the Fifth Circuit affirmed the denial of habeas relief.

a. The court below first held that Mendoza's four non-defaulted claims (those raised in state habeas, which focused mainly on counsel's mitigation investigation, *supra* at 9, App. 19a) were subject to "Section 2254(d)'s highly deferential standard," and that the district court did not err in denying Mendoza's request for an evidentiary hearing because his claims had been "adjudicated on the merits in state court," App. 14a-18a. In deciding those claims, the state court relied on self-serving affidavits from Mendoza's prior defense team that Mendoza was denied the opportunity to test. *Supra* at 9. But according to the Fifth Circuit, that was irrelevant to the applicability of Section 2254(d). In the Fifth Circuit, a claim is "adjudicated on the merits" so long as "the state court reached the merits of the petitioner's claim rather than deciding it on procedural grounds." App. 16a (quotations omitted). Recognizing but rejecting contrary Fourth Circuit precedent, the Fifth Circuit thus held that it did not matter whether Mendoza had been afforded "a full and fair hearing" in state court or that the state court decided his claims without considering "material evidence." App. 15a-17a (quotations omitted).

Applying Section 2254(d), the Fifth Circuit affirmed the denial of habeas relief on Mendoza's non-defaulted claims. App. 18a-25a.

b. The Fifth Circuit also denied relief on Mendoza's defaulted claim (raised for the first time in

federal court after *Trevino*) challenging counsel's presentation of Vigen. App. 25a-37a. Unlike Mendoza's non-defaulted claims, this claim was not subject to "Section 2254(d)'s highly deferential standard," App. 18a, because it was not presented or adjudicated in state court. Reviewing the claim de novo, the Fifth Circuit recognized that it presented "a close question," App. 26a, and that aspects of Vigen's "testimony were not ideal," App. 28a, but concluded that Mendoza had not established deficiency or prejudice. The court below thus did not reach the question whether there was an excuse for state habeas counsel's procedural default. App. 37a.

c. The Fifth Circuit denied Mendoza's timely request for rehearing. App. 215a-216a.

## REASONS FOR GRANTING THE PETITION

### I. THE COURT SHOULD RESOLVE THE SPLIT OVER WHEN A CLAIM HAS BEEN "ADJUDICATED ON THE MERITS" WITHIN THE MEANING OF SECTION 2254(d)

#### A. The Courts Of Appeals Are Intractably Divided Over Whether Section 2254(d) Applies Where The Petitioner Did Not Have A Full And Fair Opportunity To Litigate In State Court

There is an open and acknowledged "circuit split" over the meaning of AEDPA's relitigation bar. *Wilson*, 577 F.3d at 1317 (Gorsuch, J., dissenting). Three circuits—the First, Fifth, and Sixth—hold that a claim has been "adjudicated on the merits" so long as the state court has resolved the claim on substantive (as opposed to procedural) grounds, even

if the petitioner did not have a full and fair opportunity to litigate the claim. Three other circuits—the Second, Fourth, and Tenth—apply a different rule. These circuits hold that a claim has not been "adjudicated on the merits" when the petitioner did not have a full and fair opportunity to litigate in state court.

1. *Fifth Circuit*. In the decision below, the Fifth Circuit reaffirmed its longstanding rule that a claim is "adjudicated on the merits" whenever "the state court reached the merits of the petitioner's claim rather than deciding on procedural grounds." App. 16a (quoting *Valdez v. Cockrell*, 274 F.3d 941, 952 (5th Cir. 2001)). Expressly rejecting contrary "Fourth Circuit decisions," the court below thus held that "a full and fair hearing is not a precondition … to applying § 2254(d)'s standards of review." App. 16a (quotations omitted).

According to the Fifth Circuit, the phrase "adjudicated on the merits" "does not speak to the quality of the process," but instead "refers solely to whether the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons." *Valdez*, 274 F.3d at 950. It consequently has held that Section 2254(d) applies even when (a federal district court determined) the state court failed to consider key exhibits because it lost them, and did not "read the record of the trial" because it did not "have the time." *Id.* at 944-45, 954.

Here, not only was Mendoza denied the opportunity to develop evidence through discovery, but he was denied one of the most critical rights in our

adversarial system: The right to test the evidence submitted against him (self-serving affidavits by his former defense team). *Supra* at 9. But the court below nonetheless applied Section 2254(d) based on its rule that a claim is "adjudicated on the merits" whenever the state court disposes of it on substantive grounds. App. 16a-17a.

*First Circuit.* The First Circuit is aligned with the Fifth. It holds that Section 2254(d) applies "as long as a substantive decision *was* reached," regardless of "the adequacy of the procedures" employed in state court. *Teti v. Bender*, 507 F.3d 50, 57 (1st Cir. 2007). Applying this interpretation, the First Circuit has rejected the argument that Section 2254(d) is inapplicable where the state court did not afford the petitioner "a full and fair evidentiary hearing." *Atkins v. Clarke*, 642 F.3d 47, 49 (1st Cir. 2011); *see also Garuti v. Roden*, 733 F.3d 18, 23 (1st Cir. 2013) (similar, relying on *Atkins*).

*Sixth Circuit.* Like the Fifth and First Circuits, the Sixth Circuit holds that a claim was "adjudicated on the merits" where the state court decided the substance of the claim—that is, where it evaluated "the intrinsic right and wrong of the matter." *Broom v. Shoop*, 963 F.3d 500, 508-09 (6th Cir. 2020) (quotations omitted). Accordingly, it has "twice rejected" contrary Fourth Circuit case law. *Id.*; *see also Loza v. Mitchell*, 766 F.3d 466, 494-95 (6th Cir. 2014); *Ballinger v. Preslesnik*, 709 F.3d 558, 562 (6th Cir. 2013) (describing First Circuit's decision in *Atkins* as an "analogous" case).

2. *Fourth Circuit.* As the decision below and the Fourth Circuit both have acknowledged, the Fourth

Circuit applies a different rule. *See* App. 16a; *Valentino v. Clarke*, 972 F.3d 560, 577 n.15 (4th Cir. 2020). In *Winston v. Kelly (Winston I)*, 592 F.3d 535 (4th Cir. 2010), the Fourth Circuit held that a claim is not "adjudicated on the merits" in state court where a petitioner offers "new, material evidence that the state court could have considered had it permitted further development of the facts." *Id.* at 555. The Fourth Circuit reasoned that "when a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures," and "[i]f the record ultimately proves to be incomplete" because of the state's procedures, there is no "adjudication on the merits for purposes of § 2254(d)." *Id.* at 555-56.

The Fourth Circuit has repeatedly reaffirmed that rule. *See Winston v. Pearson* (*Winston II*), 683 F.3d 489, 501-02 (4th Cir. 2012) (emphasizing that claim was not adjudicated on the merits where the state court "hindered" the petitioner's ability to develop material evidence). It holds that a claim is not "adjudicated on the merits" within the meaning of Section 2254(d) where the state court "'unreasonably refuses to permit'" factual development in support. *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015) (quoting *Winston II*, 683 F.3d at 496); *see Valentino*, 972 F.3d at 577 ("Valentino—like all state prisoners in Maryland, the Virginias, and the Carolinas—may evade § 2254(d)'s limitation on relief if he can show that the state post-conviction court has unreasonably refused to permit further development of the facts of a claim." (quotations and alteration omitted)).

*Tenth Circuit*. The Tenth Circuit is aligned with

the Fourth. In *Wilson*, the *en banc* court held that "[i]f, because of procedural obstacles to supplementing the record, the state court does not consider the material, non-record evidence that has been diligently placed before it," it does not adjudicate the claim on the merits within the meaning of Section 2254(d). 577 F.3d at 1291. Just as a petitioner must fairly present his claim to state court, so too must a state court fairly adjudicate the claim: If "the state court fail[s] to consider the evidence" on which a diligent petitioner basis his claim, there has been no adjudication on the merits. *Id*. at 1292-93; *see id*. at 1318 (Gorsuch, J., dissenting) (explaining that *en banc* majority had adopted a "species" of "full and fair hearing requirement").

*Second Circuit*. Finally, the Second Circuit has refused to apply Section 2254(d) where the petitioner did not have a full and fair opportunity to develop and litigate the claim. As that court has explained, the critical phrase "'[a]djudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced rather than on a procedural, or other ground." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001). Consistent with the traditional limits on res judicata, *see infra* Part I.C, the Second Circuit has held that a claim has not been adjudicated on the merits where "the state courts did not permit the development of the factual record." *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003); *see also Drake v. Portuondo* (*Drake II*), 553 F.3d 230, 239, 247 (2d Cir. 2009) ("no deference to the state courts' conclusions is required because the state

courts did not permit the development of the factual record").[3]

### B. The Question Presented Is Important And This Case Provides An Ideal Vehicle To Resolve It

There is no doubting the importance of the question presented. Section 2254(d) is in many ways the centerpiece of AEDPA. *Cf. Harrington*, 562 U.S. at 103 (explaining that "Section 2254(d) is part of the basic structure of federal habeas jurisdiction"). Congress enacted this provision to restrict the circumstances in which federal habeas courts may grant relief. A petitioner subject to "Section 2254(d)'s highly deferential standard," App. 18a, must prove not only constitutional error, but also that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence in

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[3] In *Wilson*, then-Judge Gorsuch put the Second Circuit on the other side of the split based on its holding in *Wilson v. Mazzuca*, 570 F.3d 490 (2d Cir. 2009), that "an intervening evidentiary hearing" in federal court does not take a claim outside Section 2254(d). *Id.* at 500; *see also Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002) (same). But *Mazzuca* illustrates that in interpreting Section 2254(d), courts employ varying rationales, to some degree underscoring the need for this Court's review. Some courts focus more on state court process, whereas others place more emphasis on later-developed evidence. In the Second Circuit, this distinction appears sharp. Other courts have not drawn such a fine distinction. Regardless, even if one puts the Second Circuit on the other side of the split, the important point is that there *is* a "circuit split on an important question of federal law," *Wilson*, 577 F.3d at 1316 (Gorsuch, J., dissenting), that this Court should resolve.

state court, 28 U.S.C. § 2254(d). "If this standard is difficult to meet, that is because it was meant to be." *Harrington*, 562 U.S. at 102.

Thus, if the Fifth Circuit's interpretation is correct, Congress's intent to restrict the availability of habeas relief is being thwarted in multiple circuits. But if, by contrast, the Fifth Circuit's interpretation is incorrect, criminal defendants in those jurisdictions are being prevented under circumstances Congress did not intend from challenging deprivations of their life and liberty.

Recognizing the importance of this issue, this Court granted certiorari in *Bell*. The question presented in *Bell* was whether a claim is "adjudicated on the merits" in state court where "the state court refused to consider [evidence] that was properly received for the first time in a federal evidentiary hearing." Pet. for Cert., *Bell v. Kelly*, 2008 WL 819276 at *1 (U.S. No. 07-1223). Where a state court has "refused to consider" evidence because its "procedures were inadequate to afford a full and fair hearing," *id.*, the petitioner has not had "a full and fair opportunity to litigate the claim," *supra* at i. This Court, however, did not resolve the question in *Bell*. Instead, it dismissed the petition as improvidently granted after the petitioner's counsel conceded at oral argument that the state court did not actually "refuse[] to consider" the evidence in question. Tr. of Oral Arg. at 4, *Bell v. Kelly*, No. 07-1223 (Nov. 12, 2008).

This case squarely implicates the question presented. Here, not only was Mendoza denied the opportunity to develop evidence in support of his claims that counsel failed to formulate an integrated

defense theory and investigate, develop, and present crucial evidence, App. 7a, but he was denied one of the most basic rights in our adversarial system: The right to test the evidence against him. Mendoza's defense team submitted self-serving affidavits opposing his ineffective-assistance claims, which Mendoza had no ability to challenge because the state court denied his request for discovery. *Supra* at 9. Yet the state court relied on those affidavits in denying his claims. *Id.* Relying on its longstanding rule that "a full and fair hearing is not a precondition … to applying § 2254(d)'s standards of review," App. 16a, the Fifth Circuit concluded that Mendoza's claims had been "adjudicated on the merits" despite this unfairness. App. 16a-18a (quotations omitted); *see* App. 17a (holding it was irrelevant that Mendoza's claim was adjudicated "without the benefit of additional material evidence").

### C. The Fifth Circuit's Interpretation Of Section 2254(d) Is Incorrect

1. A claim is "adjudicated on the merits" under Section 2254(d) only where the petitioner has had a full and fair opportunity to litigate the claim. Text, structure, history, and background principles of habeas law establish that Congress incorporated this traditional requirement from the doctrine of res judicata. In doing so, Congress expected courts applying Section 2254(d) to look to this well-established body of law and to draw from historical habeas practice.

*Text.* It is "[a] cardinal rule of statutory construction," *Molzof v. United States*, 502 U.S. 301, 307 (1992), that where statutory text "is obviously

transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it," *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (quotations omitted). That rule governs here.

Section 2254(d) applies only where there has been an "adjudication on the merits." That phrase has a well-settled meaning. It means "a decision finally resolving the parties' claims, *with res judicata effect*, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan*, 261 F.3d at 311 (emphasis added). And in the context of res judicata, that "old soil" includes "a full and fair opportunity" to litigate the claim, which has long been an essential precondition to precluding a party from contesting a prior determination. *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-81 & n.22 (1982).

*Structure*. Section 2254(d)'s structure reinforces this conclusion. Section 2254(d) *is* a "res judicata rule," "modified" slightly to accommodate two narrow exceptions. *Harrington*, 562 U.S. at 102 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)). Where those exceptions are not met, Section 2254(d) gives state court decisions full res judicata effect—it "impos[es] a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Id*. In using the language and design of res judicata, Congress clearly signaled its intent to "adopt[] the cluster of ideas that were attached," *Morissete v. United States*, 342 U.S. 246, 263 (1952), to that doctrine, including the prerequisite for a "full and fair opportunity" to litigate.

*History*. The historical backdrop against which Congress enacted Section 2254(d) confirms this conclusion. *Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020) (construing AEDPA's "second or successive" bar in light of "historical habeas doctrine and practice"). Historically, the rule in habeas was that "a judgment of conviction after trial was 'conclusive on all the world'" absent some jurisdictional defect. *Brown v. Davenport*, 596 U.S. 118, 129 (2022) (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-03 (1830) (Marshall, C.J.)). But as early as 1855, Members of this Court recognized the link between preclusion and the adequacy of the criminal court's procedures. Riding circuit in 1855, Justice McLean "expressed his view that a habeas court should consider a prior judgment conclusive 'where there was clearly jurisdiction and a full and fair hearing; but that it might not be so considered when any of these requisites were wanting.'" *Boumediene v. Bush*, 553 U.S. 723, 781 (2008) (quotations omitted).

That view became settled law. Early in the 20th century, this Court "recognize[d] federal claims by state prisoners if no state court had provided a full and fair opportunity to litigate those claims." *Wright v. West*, 505 U.S. 277, 285 (1992). "[A]bsent a jurisdictional defect, a state court judgment was entitled to absolute respect as long as the prisoner had been given an adequate opportunity to obtain full and fair consideration of his federal claims in the state courts." *Edwards v. Vannoy*, 593 U.S. 255, 278 (2021) (Thomas, J., concurring) (quotations and emphasis omitted).

To be sure, this Court went even further in *Brown*

*v. Allen*, 344 U.S. 443 (1953), holding as a categorical matter "that a state-court judgment 'is not *res judicata*' in federal habeas proceedings with respect to a petitioner's federal constitutional claims." *Davenport*, 596 U.S. at 130 (quoting *Brown*, 344 U.S. at 458). The enactment of Section 2254(d) in AEDPA cut back on that expansive view of federal power. But Congress's use of the phrase "adjudicated on the merits" made clear that state court judgments are entitled to preclusive effect (subject to Section 2254(d)'s exceptions) only where the petitioner has had a "full and fair opportunity" to litigate the claim.

*Background principles*. Background principles of habeas law and the consequences of a contrary rule resolve any lingering doubt. It is a fundamental principle of habeas law—and of criminal law more generally—that a petitioner must have "a full and fair opportunity" to litigate a claim in *some* court. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). Granted, that court need not be a federal habeas court. Where "a court of record provides defendants with a fair, adversary proceeding," deference by a habeas court is "justified." *Boumediene*, 553 U.S. at 782. But that deference is unwarranted where the court did not afford the defendant a full and fair opportunity to litigate his federal claim, for "the necessary scope of habeas review in part depends on the rigor of any earlier proceedings." *Id*. at 781-82.

Consider the doctrine of exhaustion. "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Keeney*, 504 U.S. at

10. This principle works both ways. Indeed, "the 'exhaustion' and 'adjudicated on the merits' elements of federal habeas practice are mirror images." *Wilson*, 577 F.3d at 1292. If the state does not resolve the petitioner's claim, then a federal court will review it de novo. *Cone v. Bell*, 556 U.S. 449, 472 (2009). Any other rule would deny criminal defendants a full and fair opportunity to litigate their federal claims. Yet that is the precise consequence of the Fifth Circuit's rule: A petitioner denied a full and fair opportunity to litigate in state court will necessarily be denied that opportunity in federal court because the federal court will be required to defer to the state court's decision.[4]

In enacting Section 2254(d), Congress did not create a scheme that sanctions the loss of life or liberty without one full and fair opportunity for judicial review. If it had, that scheme would raise serious constitutional questions. *See Boumediene*, 553 U.S. at 781.

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[4] Contrary to then-Judge Gorsuch's reasoning in *Wilson*, 577 F.3d at 1319-20 (Gorsuch, J., dissenting), the exceptions to exhaustion set out in Section 2254(b)(1)(B) do not alleviate these concerns. That a petitioner is not obligated to present a claim in state court where its procedures appear inadequate says nothing about the circumstances in which a claim that *has* been fairly presented is "adjudicated on the merits." Moreover, this is not a circumstance where Texas employs facially inadequate procedures—for example, by obstructing state court filings, *see Mayberry v. Petsock*, 821 F.2d 179, 184 (3d Cir. 1987)—such that Mendoza could have decided in advance not to exhaust his claims.

2. The interpretation advanced by the Fifth Circuit and other courts is incorrect.

a. The Fifth Circuit has reasoned that Congress's decision to "excis[e] from the pre-[AEDPA] version of Section 2254 references to a full and fair hearing," App. 16a, reflects its intent to abandon such a requirement across the board. That conclusion does not follow.

Before Congress enacted AEDPA, Section 2254(d) required federal courts to apply a presumption of correctness to state court factual findings made "after a hearing on the merits," unless the state court did not afford the petitioner "full and fair" procedures. 28 U.S.C. § 2254(d) (1994). Although codified at Section 2254(d), that provision was the precursor to modern-day Section 2254(*e*)(*1*). When Congress enacted AEDPA, it recodified the presumption of factual correctness in Section 2254(e)(1), struck from that provision the references to a "full and fair" hearing "on the merits," and enacted a new Section 2254(d) which, as described above, (re)instated a preclusion rule for state court adjudications on the merits.

These changes do not reflect Congress's intent to decouple Section 2254(d)'s res judicata rule from the traditional requirements of res judicata. It would be one thing if Congress had deleted a "full and fair hearing" requirement from a prior preclusion rule performing the same function as today's Section 2254(d)—and even then, a reasonable interpretation would be that Congress omitted such language because it is already embedded within the phrase "adjudicated on the merits." *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020). That Congress deleted

this requirement from a *different* provision using *different* language that served a *different* purpose sheds no light on the meaning of Section 2254(d).

If anything, Section 2254's drafting history points in the opposite direction. At the same time that Congress deleted the "full and fair hearing" requirement from modern-day Section 2254(e)(1), it also deleted the requirement that there be a hearing "on the merits." 28 U.S.C. § 2254(d) (1994). That Congress implemented these changes in tandem shows that it understood the link between the phrase "on the merits" and "full and fair" procedures.

b. Other courts of appeals have suggested that the Fourth and Tenth Circuits' decisions are inconsistent with this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). *See Atkins*, 642 F.3d at 49; *see also Broom*, 963 F.3d at 509. But the opposite is true: *Pinholster* undermines the Fifth Circuit's reasoning.

The Fifth Circuit has recognized the unfairness of its rule to petitioners who, despite their diligence, could not develop material evidence in support of their claims while in state court. Their claims are subject to Section 2254(d)'s restrictive standards even though the state court adjudicated their claims without the benefit of important evidence. To mitigate this unfairness "in cases where the state court's process is in question," the Fifth Circuit reasoned before *Pinholster* that later-developed evidence "may assist the district court in ascertaining whether the state court reached a reasonable determination under § 2254(d)(1) & (2)." *Valdez*, 274 F.3d at 951-52 & n.17.

But that reasoning does not survive *Pinholster*. In *Pinholster*, this Court held that Section 2254(d) review is "limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. So, contrary to the Fifth Circuit's reasoning, later-developed evidence cannot be used to prove the unreasonableness of a state court's decision. With its reasoning undermined by *Pinholster*, one might have expected the Fifth Circuit to adopt a different rule. But as the decision below illustrates, it has stayed the course. The upshot is that a federal petitioner who is denied a meaningful opportunity to develop the record on a claim decided on substantive grounds in state court will also be denied that opportunity in federal court—under *Pinholster*, the federal court will be restricted to the state court record even when the state court hindered that record's development. In enacting Section 2254(d), Congress could not have intended that result.

## II. THE COURT SHOULD REVERSE THE FIFTH CIRCUIT'S DENIAL OF HABEAS RELIEF ON MENDOZA'S EXPERT-PRESENTATION CLAIM

Regardless of the Court's resolution of the meaning of Section 2254(d), the Court should grant plenary review of, or summarily reverse, the Fifth Circuit's decision affirming the denial of habeas relief on Mendoza's claim that trial counsel's presentation of the key expert witness at sentencing was ineffective. That claim unquestionably is subject to de novo review, not Section 2254(d)'s exacting standard, because it was not presented or litigated in state court. And it is meritorious.

With Mendoza's life hanging in the balance, the expert, Vigen, testified that the "traditional" factors in mitigation were "just not present," that Mendoza was dangerous in and out of prison, and that Mendoza lacked a moral compass. The Fifth Circuit believed that these claims presented a "close question," App. 26a, but, relying in part on the self-serving affidavits submitted by Mendoza's defense team, App. 26a, 31a-32a, concluded that his claim failed on the merits. The Fifth Circuit was mistaken. Counsel's presentation of Vigen was deficient and Mendoza suffered severe prejudice as a result.

A. Counsel's performance is deficient where it falls "below an objective standard of reasonableness," defined by prevailing professional norms. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quotations omitted). Counsel's presentation of Vigen contravened several prevailing norms. In three overarching ways, it thoroughly and foreseeably undermined Mendoza's case for life.

*No mitigation.* Mendoza's counsel understood the importance of mitigation evidence, promising the jury that they would "present evidence to you that will explain why Moises Mendoza acted the way he did." RR23:9-10; *see* Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). Yet Vigen testified that Mendoza's conduct was inexplicable—that the "traditional" mitigation facts were "just not present" and that there was "something missing in this case." App. 293a-295a; *see also* App. 267a.

This testimony is not only inconceivable coming from a defense expert but also incomplete, ignoring other testimony that—as the State has argued—

provided a basis for a "very compelling case for mitigation." *Supra* at 6. But Vigen all but told the jury to ignore this compelling case. And Vigen went even further, casting doubt on powerful mitigating evidence: He characterized Mendoza's remorse as "superficial" and testified that Mendoza did not fully understand the "tremendous seriousness" of his crime. App. 243a.

The Fifth Circuit acknowledged that "aspects of [this] testimony were not ideal." App. 28a. Truly. But it erred in attempting to situate this testimony "in context" that did not exist. App. 27a. Vigen did not "redirect" the jury to mitigating facts that were present. *Id*. To be sure, he pointed to Mendoza's family life, but he also made clear that this case was "missing" the traditional factors that would explain Mendoza's "killing another human being." App. 294a-295a. The Fifth Circuit also stated that Vigen earlier "laid out the mitigation factors." App. 27a. But even if that were true, there was no chance the jury would credit that evidence once Vigen told them that "in this case there aren't those traditional things that we often" see "which contribute to [a person's] aberrant behavior of taking another person's life." App. 295a.

*Future dangerousness*. Mendoza's counsel also established through Vigen that Mendoza was dangerous in and out of prison, proving the prosecution's case on the future dangerousness special issue. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1).

To start, it was Mendoza's counsel, *not* the prosecution, who introduced evidence of Mendoza's jail record. Vigen testified that Mendoza's "bad

behavior persists now even in the jail," App. 233a-234a, and that Mendoza was "[r]eactive and impulsive" and has "an explosive temper," App. 261a-262a. Vigen also agreed "that the best predictor of whether a person is going to be violent in prison is whether or not he's been violent in prison before." App. 283a. Not only did counsel's presentation of Vigen "bolster[] the State's aggravation case," *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020), but it also "hamstr[u]ng counsel's chosen defense," *Rompilla v. Beard*, 545 U.S. 374, 390 (2005). It undermined trial counsel's *own* narrative, credited by the Fifth Circuit, that Mendoza would no longer be a danger once freed from the dominating influence of his "depraved" friends. App. 31a.

Perhaps most devastating of all, Vigen "certainly agree[d]" that "in a free society [Mendoza] is a very dangerous individual." App. 287a. This testimony alone—especially coming from a defense expert—was likely sufficient for the jury to find future dangerousness, as it answered whether Mendoza was "the sort of person who if left to [his] own devices would hurt or kill again—a bad person." *Estrada v. States*, 313 S.W.3d 274, 281-82 & n.5 (Tex. Ct. Crim. App. 2010) (quotations omitted). The prosecution recognized the error, capitalizing on this testimony in closing. RR25:21. Yet defense counsel made no attempt to contextualize Vigen's damning testimony on redirect and did not address it in closing. In the decision below, the Fifth Circuit reasoned that the prosecution's use of this testimony was not *that* prejudicial because it "segued" from Vigen's testimony into other aspects of "Mendoza's life that

signified future violence." App. 29a. But deficiency and prejudice are different issues, and there is no plausible explanation for counsel's performance on this score.

*No internal compass.* Finally, while trial counsel's most basic duty is "to advocate the defendant's cause," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), which in a death penalty case means "humanizing" the defendant, ABA Guidelines, 31 Hofstra L. Rev. at 1062, counsel's presentation of Vigen had the opposite effect.

Vigen's very "first opinion" was that Mendoza "has no internal sense of himself," has "no clear inner identity," and lacks "the internal compass that each of us has." App. 231a-232a. The Fifth Circuit concluded that counsel's strategy was "not so unreasonable" because "Vigen also testified that Mendoza was still an adolescent and that his brain would not be fully developed until his mid-twenties." App. 26a. But even if counsel's intent was to present Mendoza as psychologically immature, Vigen's testimony went *far* beyond that innocuous narrative. He testified that Mendoza lacked the "ability" to feel empathy and an "internal moral compass," App. 232a, 286a, which ordinary people understand to mean a value system that allows them to choose between "right and wrong."[5] Vigen told the jury that Mendoza lacked the very characteristics that make us human—our ability "to connect with other people in a way that

[5] Moral Compass, Merriam-Webster.com Dictionary, Merriam Webster, https://www.merriam-webster.com/dictionary/moral%20compass (accessed Mar. 9, 2024).

we know who they are, and … how they feel," App. 232a, and "a set of beliefs or values that help guide ethical decisions, judgments, and behavior," Merriam Webster, *supra*. It is incomprehensible that counsel chose to offer this testimony—let alone as their expert's first opinion.

B. Because Mendoza's "death sentence required a unanimous jury recommendation," Mendoza need only show "a reasonable probability that at least one juror would have" answered one of the special issues differently to establish prejudice. *Andrus*, 140 S. Ct. at 1886 (quotations and citations omitted); *see* App. 36a. The prejudice here is obvious.

1. Mental health experts play a crucial role at the punishment phase, typically—though not here—explaining for the jury the psychological factors that motivated or explain the defendant's behavior and moral culpability. *See, e.g.*, Fed. Jud. Ctr., Resource Guide for Managing Capital Cases § II.C, 2004 WL 1873850 (2004); ABA Guidelines, 31 Hofstra L. Rev. at 1055-56, 1061-62. As a "medical expert," Vigen's testimony bore "the court's imprimatur." *Buck*, 580 U.S. at 121. And the "effect" of such testimony is "heightened" when the expert testifies for the defense. *Id.* As a defense expert, Vigen's testimony was "in the nature of an admission against interest, more likely to be taken [by the jury] at face value." *Id.* at 122. Here, moreover, counsel's stated "strategy [was] to present [the] defense through Dr. Vigen," a strategy they selected because they believed that Vigen would "create a great rapport with" the jury. ROA.639; *see* App. 26a.

It is no surprise, then, that the prosecution seized

on Vigen in closing. Although Mendoza had, in the State's words, "a very compelling case for mitigation," *supra* at 6, the prosecution easily neutralized it by pointing to Mendoza's own expert on mitigation. Responding directly to defense counsel's opening promise, the prosecution argued to the jury: "Dr. Vigen looked and searched to try to find someone, something that caused [Mendoza] to do this. He couldn't find it. He said it was missing. Where was it?" RR25:25; *see also* RR25:47 ("As the doctor told you, this isn't the way it always is."). The prosecution likewise hammered home Vigen's testimony that Mendoza could have chosen a different path. *See* RR25:26 ("This case is about choices."); RR25:47 (citing Vigen as support for argument that Mendoza "chose to leave behind the good values" he was taught). The prosecution's repeated use of Vigen's testimony to argue the absence of mitigation is powerful evidence of prejudice. Even during the trial, without the benefit of hindsight, reasonable lawyers from the prosecution recognized its devastating impact. *See Buck*, 580 U.S. at 108.

The same is true of Vigen's testimony on future dangerousness. When an expert "testifies that a particular defendant would be a continuing threat to society, juries are almost always persuaded." *Flores v. Johnson*, 210 F.3d 456, 466 (5th Cir. 2010) (Garza, J., concurring) (quotations omitted); *see Buck*, 580 U.S. at 121-22. And Vigen's testimony about Mendoza's jail record—"the best predictor" of Mendoza's future violence, App. 283a—shattered the defense's *own* theory that Mendoza would no longer

be dangerous in prison.

Again, the prosecution immediately understood the significance of Vigen's testimony. The prosecution argued that the jury "kn[e]w the answer" to the future dangerousness question because Mendoza's "very own witness, Dr. Vigen … told you that this Defendant is dangerous in society." RR25:21. And the prosecution likewise argued that Vigen's testimony about Mendoza's jail record undermined defense counsel's theory that "the pattern of violence" would be "broken" in prison. RR25:44-45 ("[D]o you remember what Dr. Vigen told you?"). The jury then homed in on this issue, asking for evidence about Mendoza's jail record during its deliberations. RR25:51; *see Buck*, 580 U.S. at 120-21.

Then there was Vigen's testimony about Mendoza's alleged character. The sheer volume of harmful testimony is staggering, but a few key pieces stand out. In a proceeding that focuses largely on the defendant's character, Vigen testified that Mendoza has an "explosive temper" and "acts without thinking." *Compare* App. 262a, *with* RR25:46 (prosecution's closing) ("He has no regard for human life, and he will do whatever pleases him because, as the doctor [Vigen] told you, he's impulsive, he's got a terrible explosive temper, and he will do it anytime he wants to anywhere he wants to."). In a proceeding where the difference between life and death can be something as simple as a genuine display of remorse, Vigen testified that Mendoza's remorse was only "superficial." *Supra* at 28. And in a proceeding that, at its core, calls for a moral judgment about the worth of a person's life, Vigen's very first opinion was that

Mendoza had no moral compass, no sense of self, and was different from the rest of "us" in the most important ways. This testimony—from a defense witness, no less—ensured that not even a single juror would dissent on either of the special issues, thus sealing Mendoza's fate.

2. The Fifth Circuit's contrary analysis was sparse. It first observed that the prosecution put on a strong case in aggravation. App. 36a-37a. But the same could be said in almost every death penalty case, yet this Court has held that a petitioner may satisfy *Strickland*'s prejudice prong even when (for example) the state "emphasized the brutality of [the] crime and [the petitioner's] evident lack of remorse." *Buck*, 580 U.S. at 106; *see also, e.g.*, *Rompilla*, 545 U.S. at 377-78; *Terry Williams v. Taylor*, 529 U.S. 362, 367-68 (2000). What matters is the *qualitative* significance of counsel's error, and on this score, there is very little doubt. Vigen was *the* critical witness at sentencing. And not only was the prosecution able to rely on the defendant's own expert—whom the jury would believe was offering the best possible opinion in Mendoza's favor—but the prosecution used Vigen's testimony to argue the answer to the special issues.

On mitigation, the Fifth Circuit observed only that the jury heard some (weak) "evidence from other witnesses about the lack of mitigating circumstances." App. 37a. To the extent that evidence was impactful on mitigation—and it is hard to see how high school graduation and a good home disprove mitigation—it was likely only because Vigen, with his "experience in other capital cases," App. 26a, explained its significance to the jury: The

factors the jury should have been looking for were "just not present" in this case. And not even respondent agrees with the Fifth Circuit's characterization. It has described Mendoza's case in mitigation as "very compelling," *supra* at 6, and it is self-evidently true that a single juror could have credited a "very compelling" mitigation case if the defendant's own expert had not convinced the jury otherwise.

## CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari and reverse.

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