CAPITAL CASE
No. 23-1004

In the Supreme Court of the United States

MOISES SANDOVAL MENDOZA, PETITIONER

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Moises Mendoza does not dispute that he raped and strangled Rachelle Tolleson before "poking" the twenty-year-old mother's throat with a knife to make sure she was dead. Instead, he maintains that his trial counsel was ineffective in the way that counsel investigated Mendoza's mental state and later presented his mitigation case. Mendoza further insists that the state habeas court should not receive the deference ordinarily due to it under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), because it refused to allow him to conduct a fishing expedition into *whether* his counsel was ineffective. In so arguing, Mendoza largely ignores the district court's holding that Mendoza would lose this case even under de novo review. The questions presented are:

1. Whether a state court that has resolved the substance of a habeas petitioner's claim has "adjudicated [it] on the merits" within the meaning of 28 U.S.C. § 2254(d) even if the petitioner subsequently complains that the state court did not provide his preferred procedures before doing so.

2. Whether Mendoza is entitled to federal habeas relief on a procedurally defaulted ineffective-assistance-of-trial-counsel ("IATC") claim based on counsel's decision to offer the testimony of a psychologist about why Mendoza's emotional immaturity led him to be susceptible to influence from his peer group and thus (supposedly) less culpable for Rachelle's violent death.

RELATED PROCEEDINGS

State v. Mendoza, No. W401-80728-04, 401st Judicial District Court, Collin County, Texas. Judgment entered June 29, 2005.

Mendoza v. State, No. AP-75,213, Texas Court of Criminal Appeals. Judgment entered November 5, 2008.

Mendoza v. Texas, No. 08-9577, Supreme Court of the United States. Petition denied June 1, 2009.

Ex parte Mendoza, No. WR-70,211-01, Texas Court of Criminal Appeals. Judgment entered June 10, 2009.

Mendoza v. Quarterman, No. 5:09-cv-00086, U.S. District Court for the Eastern District of Texas. Judgment entered September 28, 2012.

Mendoza v. Quarterman, No. 5:09-cv-00086, U.S. District Court for the Eastern District of Texas. Judgment entered November 14, 2019.

Mendoza v. Lumpkin, No. 12-70035, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 31, 2023.

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INTRODUCTION

Almost exactly twenty years ago, Moises Mendoza admitted to the police that he raped and murdered Rachelle Tolleson, leaving the young mother's five-month-old baby alone on the bed. To "make sure" Rachelle was dead, he also "poked" her in the throat with a knife before abandoning her brutalized body in a field for days. Then, afraid of being found out, Mendoza burned Rachelle's body before hiding it again. To one of the officers who heard his confession, it "almost seemed as if he were bragging" about the murder. 20.RR.204.

Now, Mendoza primarily argues that he is entitled to federal habeas relief because his trial counsel's efforts to investigate his case were constitutionally insufficient. As every court to hear his claims has rejected them, Mendoza effectively acknowledges that AEDPA's relitigation bar would ordinarily preclude his claim. 28 U.S.C § 2254(d). Mendoza nevertheless insists that because the state habeas court denied an extraordinarily broad discovery request, the state court should be deemed not to have adjudicated the claim "on the merits." *Id.* He is wrong about that. But even if he were not, this case does not justify this Court's review given that Mendoza has forfeited any challenge to the district court's (entirely correct) holding that his claim fails even de novo review.

Mendoza's second claim that defense counsel should not have called a certain expert at sentencing fares no better, as it is a fact-bound dispute regarding a procedurally defaulted claim that rests solely on cherry-picked portions of the record. The full trial record demonstrates that counsel had few viable options, so their use of the expert was a reasonable strategic choice given what little Mendoza gave them to work with. The Court should deny Mendoza's petition.

STATEMENT

I. The Brutal Murder of Rachelle Tolleson

Feeling unwell, Rachelle Tolleson left her parents' home with her five-month-old daughter shortly before 10:00 pm on Wednesday, March 17, 2004. *Mendoza v. State*, No. AP-75,213, 2008 WL 4803471, at *1 (Tex. Crim. App. Nov. 5, 2008) (unpublished). When Rachelle's mother went to check on her the next morning, she found Rachelle's car in the driveway, her bedroom in shambles, and her baby "on the bed, cold, wet, and alone." *Id.*

Although search parties were immediately organized, it was not until six days later that Rachelle's body was found "badly burned" and "lying face down" in a field with "[t]all vegetation [that] had been piled on top of" the body to hide it. *Id.* at *2. Already "ha[ving] begun to decompose," Rachelle was identified through her dental records. *Id.* The medical examiner identified bruises at several different points on her body, evidence of "strangulation or another form of asphyxiation," and a knife wound that "penetrated her neck all the way to her spinal column." *Id.*

Based on interviews with several witnesses, police obtained an arrest warrant for Mendoza, who promptly confessed everything. *Id.*; *see* 30.RR.142-44. He told the police that, late on March 17, "he had driven by [Rachelle's] house," and the two allegedly left to get a pack of cigarettes. *Mendoza*, 2008 WL 4803471, at *2. After they "drove 'for a little,'" he "'for no reason' started to choke her." *Id.* In Mendoza's words, "[s]he passed out for a while when my [car's] lights went out. So I drove to my house[,] parked in the far back[,] and had sex with her and choked her again. I got her out in the field and choked her until I thought she was dead." 30RR.143-44.

But to "make sure," he "poked her throat" with a knife. 30.RR.144.

Mendoza left Rachelle's body for five days until the police first interviewed him. 30.RR.142-44; *accord Mendoza*, 2008 WL 4803471, at *2. Then, "[s]cared that [Rachelle's] body would be found and tied to him," Mendoza "moved the body to a remote area and burned it," *Mendoza*, 2008 WL 4803471, at *2. After Mendoza "let the fire go out," he "found a rope and tied it to her and dragged her to where the body was found." 30.RR.144; *accord Mendoza*, 2008 WL 4803471, at *2.

II. Trial, Direct Appeal, and State Habeas

A jury found Mendoza guilty of capital murder. Tex. Penal Code § 19.03(a)(2); 21.RR.195-96, and he was sentenced to death, 25.RR.57-59. Texas's Court of Criminal Appeals ("CCA") affirmed his conviction on direct appeal, *Mendoza*, 2008 WL 4803471, at *1, *28, and this Court denied review, *Mendoza v. Texas*, 556 U.S. 1272 (2009).

While his direct appeal was pending, Mendoza sought habeas relief in state court. *See* Pet.App.96a. There, for the first time, he asserted that he unintentionally strangled Rachelle and desecrated her corpse after experiencing a flashback to rejection at the hands of his former girlfriend. Pet.App.104a-106a. He further asserted that this "catathymic homicide," Pet.App.105a—as well as his binge drinking and supposed brain damage, Pet.App.128a-131a—could be traced to the fact that he had never attached well to parents, particularly his father, Pet.App.159a.

Mendoza alleged that trial counsel was constitutionally ineffective for failing to discover this "attachment disorder." Pet.App.159a. In particular, Mendoza faulted counsel for failing to obtain a "comprehensive

psycho-social history" and "formulate an effective defense theory," Pet.App.80a-81a; "to consider, investigate, and present condition-of-the-mind evidence to negate the *mens rea* element" of his crime, Pet.App.81a; and to investigate, develop, and "present crucial mitigating evidence," Pet.App.81a; *see also* ROA.1866-67 (listing the claims on which the district court granted a certificate of appealability). To support his IATC claims, Mendoza sought "an order" from the state habeas court to "take the depositions of, submit written interrogatories [to], and issue subpoenas duces tecum" on (1) "all of Mendoza's Former Attorneys, and any of their agents, including by way of example but not limitation, investigators and mitigation specialists;" and (2) "all persons who would have information concerning Mr. Mendoza's family, background, and upbringing, including extended family members, acquaintances, neighbors, friends, educators, mental health professionals, social workers, and other third party professionals." 1.SCHR.207. He also moved for an evidentiary hearing. 1.SCHR.211-14.

After the State responded, the state habeas trial court denied Mendoza's motion for an evidentiary hearing, Pet.App.213a, determining that "no controverted, previously unresolved factual issues material to the legality of [Mendoza's] confinement require resolution," 4.SCHR.1480 (citing Tex. Code Crim. Proc. art. 11.071, § 8). The court also issued thorough findings of fact, Pet.App.95a-214a, which are presumed correct, 28 U.S.C. § 2254(e)(1). Mendoza has not argued to this Court that those findings are unreasonable under § 2254(d)(2).

Relying on those facts, the state habeas court ultimately recommended that the CCA deny Mendoza's

habeas petition, Pet.App.213a-214a, and the CCA agreed, Pet.App.93a-94a.

III. Federal Habeas

A. Mendoza raised the same claims in this federal proceeding. Pet.App.4a. *Compare* ROA.1035-43, *with* Pet.App.80a-81a. The district court referred the matter to a magistrate judge, who accepted into evidence interrogatory responses from two of Mendoza's trial lawyers, investigator Vince Gonzales, and defense expert Dr. Mark Vigen, a psychologist. ROA.244-45, 320-21; *see also* ROA.569-84, 589-96, 597-613, 1286-1301. Although the magistrate judge "recommended" that the district court "grant Mendoza's motion to expand the record," she also recommended that the district court "deny [Mendoza's] motion for an evidentiary hearing, on the grounds that no issue of material fact remains," and that the district court deny his claims, too. ROA.1743. The district court adopted these recommendations in full. Pet.App.83a-84a.

Mendoza had argued to the district court that the magistrate judge "should not have applied the deferential standard of review in 28 U.S.C. § 2254(d) because the state court did not allow Mendoza to conduct discovery." Pet.App.84a. But the court found, "[a]fter conducting a de novo review," that "this issue [was] immaterial. The magistrate judge's recommendation is correct regardless of whether the § 2254(d) deferential standard of review is applied." Pet.App.83a-84a. That is, "[e]ven considering the new evidence" Mendoza proffered, the court concluded "the outcome remains unchanged." Pet.App.83a-84a. It did, however, grant certificates of appealability (COAs) on four IATC claims. ROA.1866-67.

B. This Court decided *Trevino v. Thaler*, 569 U.S. 413 (2013), while Mendoza's appeal was pending. The court of appeals remanded the case for the district court

"to consider in the first instance whether [Mendoza] can establish cause for the procedural default of any [IATC] claims pursuant" to *Trevino* and *Martinez v. Ryan*, 566 U.S. 1 (2012). *Mendoza v. Stephens*, 783 F.3d 203, 203 (5th Cir. 2015) (per curiam).

On remand, new habeas counsel raised new IATC claims, alleging, as relevant here, that defense counsel was ineffective at the sentencing phase by calling Vigen as an expert witness. Pet.App.5a-6a. Mendoza conceded that this claim was procedurally defaulted but argued that ineffective assistance of habeas counsel allowed him to overcome the default. Pet.App.6a. The district court denied relief on these claims, too. Pet.App.6a, 79a.

The Fifth Circuit affirmed, Pet.App.2a, 40a, rejecting Mendoza's argument that "because he sought discovery in state court, but it was denied," the state courts "failed to provide him with due process and his claims were not adjudicated on the merits," Pet.App.15a-17a. The Fifth Circuit further (1) held that "the district court did not abuse its discretion in denying Mendoza's motion for an evidentiary hearing"; (2) concluded that § 2254(d)'s "highly deferential standard" applied to Mendoza's claims; and (3) declined to consider "the interrogatories the federal district court ordered and considered." Pet.App.17a-18a. It went on to apply § 2254(d) in holding that the state habeas courts had not "unreasonabl[y] appli[ed]" *Strickland v. Washington*, 466 U.S. 668 (1984), when they denied habeas relief on Mendoza's guilt-phase IATC claims, Pet.App.20a; *see* Pet.App.18a-25a.

The court of appeals next concluded that Mendoza's claim that trial counsel was ineffective for calling Vigen as an expert witness was "unmeritorious, particularly when this testimony is read in its proper context." Pet.App.26a; *see* Pet.App.25a-37a. "Because Mendoza's

trial counsel was not ineffective," the Fifth Circuit did not need to "consider whether th[is] [sentencing-phase] claim[]" could survive procedural default. Pet.App.37a. The Fifth Circuit declined to rehear the case. Pet.App.215a-216a. Mendoza's petition followed.

REASONS TO DENY CERTIORARI

I. Mendoza's Complaints About the Adequacy of Trial Counsel's Preparation Do Not Merit Review.

This Court should not grant review to give Mendoza yet another chance to litigate whether trial counsel's level of preparation met the minimum level of competence the Constitution imposes. AEDPA's relitigation bar in § 2254(d) "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)). Mendoza effectively admits that he cannot meet § 2254(d)'s high bar, as he has not argued that the state court's decision that his counsel was not ineffective is (1) precluded by this Court's precedent or (2) "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Mendoza's efforts to avoid that bar by complaining about the state court's ordinary-course discovery rulings would not change the outcome of this case and do not implicate any putative split among the circuits. They are thus unworthy of this Court's time.

A. Because Mendoza's claim fails on de novo review, there is no need to resolve any split regarding AEDPA's deferential review.

To start, although the petition spills considerable ink about whether the district court should have applied 28 U.S.C. § 2254(d), it largely ignores a key fact. "Even considering the new evidence" Mendoza proffered, and "[a]fter conducting a de novo review," the district court unequivocally concluded that "the outcome [of Mendoza's case] remains unchanged": Mendoza is not entitled to habeas relief regarding his counsel's investigation. Pet.App.83a-84a. Under the Fifth Circuit's standards for preservation, Mendoza has forfeited any objection to that holding—which was, in any event, correct. This Court's review of the first question presented is therefore unjustified because it will gain Mendoza nothing.

1. Mendoza has forfeited any challenge to the district court's decision that he would lose this case on de novo review.

Mendoza has forfeited any argument that he wins on de novo review thrice over. *First*, in his objections to the magistrate judge's report and recommendation, he argued that de novo review should apply only for claims for which the district court did *not* grant a COA. *Compare* ROA.1781-1826, *with* ROA.1809.

Second, he forfeited his argument that he would win under de novo review in the Fifth Circuit through inadequate briefing. Specifically, Mendoza's only legal objection to the district court's "ruling that the Magistrate Judge's recommendation was correct whether the review was deferential or *de novo*," Br. for Petitioner-Appellant at 40, *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. May 22, 2013), was a single statement that because the state

court ruled "on a materially incomplete record," that ruling was not "an adjudication on the merits for purposes of § 2254(d)," *id.* at 43. The rest of Mendoza's legal arguments assumed § 2254(d)'s standard of review. *Id.* at 47, 53, 59. The only time that Mendoza remotely suggested that his counsel was ineffective under *Strickland* was in vague references in the facts section of his Fifth Circuit brief. *See id.* at 6, 12. Because that brief recited no legal standards and provided no authority regarding *Strickland*'s ineffective-performance prong on de novo review, however, Mendoza forfeited any such arguments under both the Federal Rules of Appellate Procedure, Fed. R. App. P. 28(a)(8)(A) (requiring argument in briefing to include "citations" to "authorities"), and Fifth Circuit precedent.[1] Accordingly, the Fifth Circuit did not "pass[] on the issue" of whether Mendoza could prevail on de novo review. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); Pet.App.18a-25a.

Third, though Mendoza's petition to this Court spends considerable space trying to establish that § 2254(d) does not apply, Mendoza does not here contest the district court's conclusion that he loses this case even under de novo review. He has thus forfeited that argument, and the question *whether* de novo review should have applied makes no difference to the outcome of his case. The Court should deny review on that ground alone.

[1] *E.g.*, *Pascual v. Holder*, 377 F. App'x 369, 370-71 (5th Cir. 2010) (per curiam) (finding an argument "waived" where made as a "passing reference . . . in the fact section"); *accord United States v. Tracts 31a, Lots 31 & 32, Lafitte's Landing Phase Two Port Arthur*, 852 F.3d 385, 390 (5th Cir. 2017) (per curiam) (same, regarding footnotes); *United States v. Thames*, 214 F.3d 608, 611 n.3 (5th Cir. 2000) (summary of argument).

2. The district court was correct that Mendoza's claims fail even on de novo review.

Even if the Court were to overlook Mendoza's repeated failure to argue why he would actually win under his preferred standard, the district court was right that the standard of review does not matter: Each of Mendoza's claims fails even on a de novo application of *Strickland*.

The standards for an IATC claim are well established (and thus don't require plenary review): Mendoza must "show both that his counsel provided deficient assistance and that there was prejudice as a result." *Harrington*, 562 U.S. at 104. To show deficient performance, Mendoza must demonstrate that his trial "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 at 688. Even under de novo review, this places a heavy burden on Mendoza: He must show that counsel's "representation amounted to incompetence under 'prevailing professional norms'"—not just that it "deviated from best practices or most common custom." *Harrington*, 562 U.S. at 104-05 (quoting *Strickland*, 466 U.S. at 689-90). Moreover, to establish prejudice, Mendoza must also show a probability "sufficient to undermine confidence in the outcome" that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 104 (quoting *Strickland*, 466 U.S. at 694). Mendoza has not and cannot meet that burden.

a. From the outset, "Mendoza had created a defense maze for [his] team." 4.SCHR.1598 (trial counsel's affidavit). Counsel were entitled to rely on the version of events Mendoza told them and the police—especially as that version of events makes sense. *See* Pet.App.113a.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. That is, "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information" the defendant supplies. *Id.*

Here, Mendoza's own statements were damning. He had told the police not just that he killed Rachelle but that he knew what he was doing was wrong when he did it. Pet.App.131a. For example, he acknowledged that "being intoxicated was no excuse for killing Rachelle" because "*drunk people know what they're doing*." Pet.App.131a. Further demonstrating his intent, *see* Pet.App.113-118a, he also admitted that he "knew [he] couldn't stop" strangling Rachelle because "if [he] stopped [he] would still get in trouble for it." Pet.App.116a. And if telling the police weren't enough, Mendoza also "conveyed to the defense team that he knew what he was doing" when he raped, killed, and mutilated Rachelle, Pet.App.103a (quoting 4.SCHR.1600)—raising tricky ethical questions regarding what defenses counsel *could* advance, *see Torres v. Donnelly*, 554 F.3d 322, 325 (2d Cir. 2009) (discussing the availability of habeas relief where an attorney's duty of zealous advocacy is in tension with his duty not to present false testimony); Pet.App.103a.

Given the facts on the ground, counsel decided to challenge the aggravating offenses that would elevate the charge against Mendoza from simple murder to capital murder. Pet.App.97a-103a; *see* Tex. Penal Code § 19.03(a). This strategy aligned with Mendoza's multiple confessions to "the police and the press," as well as the physical evidence and witness statements. Pet.App.98a. Mendoza may now wish they had done otherwise. But

"strategic choices made after thorough investigation of law and facts relevant to *plausible options* are virtually unchallengeable." *Strickland*, 466 U.S. at 690 (emphasis added); *see Harrington*, 562 U.S. at 104. Because there are "countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way," a court must presume the soundness of trial counsel's chosen strategy. *Strickland*, 466 U.S. at 689-90. Each of the ways that Mendoza seeks to overcome that presumption fails.

b. Mendoza has first asserted that trial counsel was "constitutionally ineffective for failing to obtain a comprehensive psycho-social history" and thus did not "formulate an effective defense theory." Pet.App.80a-81. But the state habeas court found that Mendoza's trial team *did* obtain a "psycho-social family history." Pet.App.146a-147a. The team "asked family members about any family history of mental illness" and "performed a comprehensive investigation of" Mendoza's immediate family. Pet.App.146a, 147a; *see* Pet.App.145a-146a (detailing the defense team's discoveries). They also obtained Mendoza's father's medical and mental-health records. Pet.App.152a-153a.

Moreover, Mendoza "has produced no evidence ... that trial counsel had no definite theory of the case at guilt." Pet.App.97a. Counsel decided to present a guilt-phase theory that Mendoza "had committed first-degree murder, not capital murder," because the physical evidence could support such a theory and Mendoza's various confessions would not refute it. Pet.App.98a, 103a. This theory carried through to the sentencing phase, where the jury learned that Mendoza "came from a strict family," that "his father was

frequently absent due to depression and his hospitalization for suicide attempts," and that Mendoza had "adopted [the] values" of a "group of friends who indulged in depraved behavior" but that "in prison he could be controlled and eventually redeemed." Pet.App.100a. "It is logically consistent to argue that [Mendoza] did not break into Rachelle's home, kidnap her, or sexually assault her, and then argue in punishment that [Mendoza] had been drawn to a destructive crowd and had adopted their depraved value system." Pet.App.101a.

Mendoza may now prefer his attachment-disorder-binge-drinking-brain-damage-induced theory of flashback murder. *See supra* p. 3. But it is hardly clear how he was prejudiced by counsel's choice *not* to present such a theory, which "is not logical, simple, easy to believe, [or] consistent with everyday experience." Pet.App.102a-103a. At minimum, it would have required a "parade of experts," which would have alienated this particular jury based on the "negative responses" to defense experts in the questionnaires collected from the jury pool. Pet.App.155a-157a. At worst, it would have entirely discredited the defense. After all, even with the benefit of hindsight, the state habeas court expressly found that this theory "completely lacks credibility" and "is not true." Pet.App.108a.

c. Mendoza's claim that counsel "fail[ed] to consider, investigate, and present condition-of-the-mind evidence to negate the *mens rea* element" likewise fails. Pet.App.81a. Counsel undoubtedly had "a duty to make reasonable investigations or to make a reasonable decision that ma[de] particular investigations unnecessary." *Strickland*, 466 U.S. at 691. But counsel is *not* required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to

assist the defendant." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). And, as particularly relevant here, counsel was entitled to rely on the version of events Mendoza told them and the police, *Strickland*, 466 U.S. at 691, which was entirely consistent with the physical evidence, Pet.App.97a-103a. They were also entitled to tailor their investigation to that evidence. *See Strickland*, 466 U.S. at 691.

Not once did Mendoza "mention[]" his now-preferred theory that his brutal murder of Rachelle "was in any way connected" to his ex-girlfriend. Pet.App.106a; *accord* Pet.App.108a. Nor did counsel have a duty to ask "whether he had a flashback to a prior conversation with an ex-girlfriend that may have motivated the murder"—"[t]his is not the type of event that counsel could foresee." Pet.App.106a. Indeed, given "counsel's duty of candor to the court," combined with Mendoza's multiple confessions, "counsel could not have ethically sponsored [Mendoza's] or an expert witness's testimony" that Mendoza "lacked the *mens rea* to" murder Rachelle. Pet.App.103a. Counsel moreover stated that they "would not have presented [a 'catathymic homicide' theory] because the facts as relayed to [them] by Mr. Mendoza did not support it." Pet.App.106a (quoting 4.SCHR.1600).

Making arguments regarding brain damage and involuntary intoxication would also have been problematic. Not even Mendoza's own habeas experts could produce evidence that Mendoza had brain damage. Pet.App.128a-129a. And entering evidence that Mendoza was too drunk to form the necessary mens rea would likely have been counterproductive, as the record reflects that the jury largely believed that "a defendant's alcohol use would not ameliorate his culpability." Pet.App.131a. Given these facts, "reasonable

professional judgments support [any] limitations on investigation" about which Mendoza now complains. *Strickland*, 466 U.S. at 690-91.

d. For all the reasons the state habeas court explained, Mendoza has "presented no probative evidence" to support his final two claims that his trial team's investigation "was deficient or unreasonable under the circumstances." Pet.App.134a. Both Gonzales (a qualified mitigation specialist, Pet.App.134a) and Vigen helped gather mitigation evidence, Pet.App.135-136a. The team investigated multiple avenues of potential evidence, including Mendoza's "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correction experience, and religious and cultural influences." *Wiggins*, 539 U.S at 524 (emphasis omitted); *see* Pet.App.135a-136a, 146a, 148a-153a. As the Fifth Circuit explained, the "extent of th[is] investigation" distinguishes Mendoza's case from other cases in which this Court has concluded that an investigation was inadequate. Pet.App.20a-21a.

Nor has Mendoza shown prejudice on these claims: As the state courts found, Mendoza has failed to present "evidence of any specific, *credible* fact or event in [his] background that counsel failed to uncover." Pet.App.152a (emphasis added). Thus, even reviewed de novo, these claims fail—along with all the others, obviating any need to review this case.

B. This case does not implicate any circuit split because Mendoza received a "full and fair hearing."

Even if the Court were inclined to require the district court to reconsider Mendoza's potential success under de novo review, this case would still be a poor vehicle to resolve any split regarding when a case has been

"adjudicated on the merits" because Mendoza would still lose under the standard he has requested. Specifically, a "full and fair opportunity to litigate" is not "a license to do as a party pleases. The adjudicative process operates pursuant to rules, and an opportunity to litigate is no less 'full' or 'fair' simply because the forum court enforces conventional limitations on pretrial discovery." *Mass. Sch. of L. at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 39 (1st Cir. 1998); *cf. Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-81 & n.22, 483 (1982) ("[N]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause" and, by extension, the "full and fair opportunity to litigate.").

The cases Mendoza cites as favorable to him state that a habeas petitioner did not get a "full and fair hearing"—and, thus, that the petitioner's claims were not "adjudicated on the merits" for § 2254(d)'s purposes—because the state habeas court refused to allow discovery of or admit "material" evidence, *Winston v. Kelly* (*Winston I*), 592 F.3d 535, 555 (4th Cir. 2010); *Winston v. Pearson* (*Winston II*), 683 F.3d 489, 501-02 (4th Cir. 2012); *Wilson v. Workman*, 577 F.3d 1284, 1291 (10th Cir. 2009) (en banc), *overruled on other grounds as recognized by Harris v. Sharp*, 941 F.3d 962 (10th Cir. 2019), or did not follow proper procedures, *Winston II*, 683 F.3d at 502. Neither is true here.

1. The state habeas court did not preclude Mendoza from discovering material evidence.

Notwithstanding that AEDPA barred the district court from expanding the state-court record or admitting new evidence, *see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), the record shows what Mendoza wanted the state court to consider because the district court

permitted Mendoza to propound interrogatories to two of his trial attorneys, mitigation specialist Gonzales, and Vigen, ROA.244-45, 320-21; *see* 1.SCHR.207 (requesting such discovery from the state court). The district court expressly concluded that the new evidence was not material. Pet.App.83a-84a. For good reason: the only thing this new evidence showed was that "members of the defense team had some confusion over each other's roles." Pet.App.83a. As the Fifth Circuit put it, "[t]here is no evidence of a substantial quantity of" information that the defense team's investigation missed and "that would have swayed the jury's mind," Pet.App.20a. And tellingly, even Mendoza has pointed to no material evidence that counsel failed to discover or that the district court overlooked. *See* Pet.App.152a; *supra* Part I.A.2.

2. The denial of Mendoza's motion for discovery accorded with state procedural rules.

The state habeas court also followed proper procedures. *See Winston II*, 683 F.3d at 501-02. In Texas, a "party desir[ing] to take the deposition of a witness" in a habeas case "shall file . . . an affidavit stating the facts necessary to constitute a good reason for taking the witness's deposition," as well as "an application to take the deposition." Tex. Code Crim. Proc. art. 39.02. Such a deposition will not be deemed non-hearsay if it is "taken" and "offered in accordance with" Code of Criminal Procedure Chapter 39. Tex. R. Evid. 804(b)(1)(B)(iii); *see also* Tex. Code Crim. Proc. art. 11.071, § 10 (explaining that the Texas Rules of Evidence apply to capital habeas proceedings in state court); *Ex parte Mares*, No. AP-76,219, 2010 WL 2006771, at *3 & n.5 (Tex. Crim. App. May 19, 2010) (not designated for publication) (quoting an older version of Texas Rule of Evidence 804

and indicating that depositions under Code of Criminal Procedure Chapter 39 are available in state habeas proceedings).

Once that application and affidavit have been filed, "the court shall . . . determine if good reason exists for taking the deposition." Tex. Code Crim. Proc. art. 39.02. "'Good reason' has been defined to include circumstances such as 'the refusal of a witness who possesses information critical to a significant factor at trial, or who has information exclusively within that witness's knowledge, to talk to the defendant's counsel.'" *In re State*, 599 S.W.3d 577, 596 n.10 (Tex. App.—El Paso 2020, orig. proceeding) (quoting *Garcia v. State*, Nos. 11-12-00091-CR, 11-12-00092-CR, 2014 WL 1778252, at *6 (Tex. App.—Eastland Apr. 30, 2014, no pet.) (mem. op., not designated for publication); *Frangias v. State*, 450 S.W.3d 125, 139 (Tex. Crim. App. 2013).

Mendoza largely failed to comply with state discovery rules. To start, Mendoza did not heed the warning that "the office of habeas corpus should not be turned into a discovery device or 'fishing expedition.'" *Ex parte Williams*, 587 S.W.2d 391, 392 (Tex. Crim. App. 1979) (Douglas, J., dissenting from denial of rehearing); *see also Simmons v. State*, No. B14-92-01127-CR, 1994 WL 149626, at *4 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (not designated for publication) (noting that denial of a discovery request will be upheld in criminal cases "where the motion" for discovery "is nothing more than a fishing expedition"). Mendoza's field of potential deponents included most people involved in his trial, but, with two exceptions, he never says what information he hopes any of them can give him, 1.SCHR.205-07. Indeed, for many, he never even submitted affidavits in state court "stating the facts necessary to constitute a good reason for

taking" depositions, nor did his motion set them out. Tex. Code Crim. Proc. art. 39.02; *see* 1.SCHR.205-07.

Moreover, when the state habeas court denied Mendoza's motion, the record already included affidavits from Mendoza's trial counsel, mitigation specialist Gonzales, and trial-team investigators; Vigen's assistant's extensive notes on the investigation; Mendoza's school records; and the trial-court record. Pet.App.95a-96a, 134a, 145a, 149a. Indeed, Mendoza's motion identified only two specific pieces of information that he sought: (1) documentation showing the extent of Gonzales's mitigation investigation, 1.SCHR.205; *see also* 1.SCHR.360 (affidavit of Mendoza's habeas expert, Toni Knox); and (2) a "thorough psycho-social history," 1.SCHR.205. But Mendoza did not explain—and has never explained—exactly what information Gonzales is supposed to have missed or why Mendoza could not himself have provided it. *Cf. Frangias*, 450 S.W.3d at 139. And the state habeas court expressly found the defense team *did* obtain a comprehensive social history. Pet.App.145a-147a, 152a-153a; *supra* Part I.A.2.

Because Mendoza did not articulate any other facts of which a potential deponent was in "exclusive possession," or "critical" facts of which a potential witness might be in possession, he has not established that any of those facts is "material to the legality of [his] confinement." Tex. Code Crim. Proc. art. 11.071, § 8(a); *see supra* Part I.B.1. The state habeas court thus correctly concluded that "no controverted, previously unresolved factual issues material to the legality of [Mendoza's] confinement require resolution." 4.SCHR.1480 (citing Tex. Code Crim. Proc. art. 11.071, § 8); Pet.App.213a.

Because Mendoza *still* has not identified either material evidence that he lacked or any state procedural rule

that was violated, Mendoza received a "full and fair" hearing, making this case a poor vehicle to decide whether such a hearing is required for a claim to have been "decided on the merits" within the meaning of § 2254(d).

C. The state habeas court adjudicated Mendoza's claims on the merits.

And even if the Court were inclined to reach the issue of what § 2254(d) requires, this Court's intervention would still be unnecessary here because the Fifth Circuit has taken the correct side of any putative split. The contrary view that Mendoza advocates is "inconsistent with AEDPA's plain terms and structure" and "frustrates AEDPA's central purpose." *Wilson*, 577 F.3d at 1315 (Gorsuch, J., dissenting) (explaining why the view that a claim is not "adjudicated on the merits" if the state court did not accord with the habeas petitioner's ideas of a "full and fair hearing" is incorrect).

a. AEDPA's text, particularly when read in light of its statutory history, shows that a state court resolves a claim "on the merits" when it resolves it on substantive grounds—notwithstanding any subsequent gripes about the procedures it used. As the Second Circuit has explained, "'[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) (emphasis added). That is precisely the rule that the Fifth Circuit has adopted, *see Valdez v. Cockrell*, 274 F.3d 941, 948-51 (5th Cir. 2001); Pet.App.16a, and that § 2254(d)'s context demands.

In pre-AEDPA habeas proceedings, former § 2254(d) included a presumption of correctness. 28 U.S.C.

§ 2254(d) (1994). But that presumption was rebuttable if a habeas petitioner could establish, among other things, that the state habeas court's "factfinding procedure" was "not adequate to afford a full and fair hearing," "that the material facts were not adequately developed at the State court hearing," that "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding," or "that the applicant was otherwise denied due process of law in the State court proceeding." *Id.* § 2254(d), (d)(2), (d)(3), (d)(6), (d)(7) (1994). Under this regime, pure legal questions received de novo review. *Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995).

Deeming this presumption inadequate, Congress *rejected* Mendoza's view by excising the "full and fair hearing" language from § 2254. In its place, Congress provided that the presumption of correctness would give way only if a habeas petitioner could "rebut[]" it "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). And it allowed a federal court to grant habeas relief from state judgments in two—and only two—narrow circumstances, neither of which contemplates that a federal court will grant habeas relief where the state-court proceeding does not meet the petitioner's notions of a "full and fair hearing." *See id.* § 2254(d).

Congress's "change in [statutory] language" is "read, if possible, to have some effect," *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992), and it "forecloses the notion that material new evidence uncovered in federal habeas proceedings 'has any impact whatsoever on the standard of review governing habeas claims,'" *Wilson*, 577 F.3d at 1317 (Gorsuch, J., dissenting) (quoting *Wilson v. Mazzuca*, 570 F.3d 490, 500 (2d Cir. 2009)). In other words, "Congress expressly anticipated that federal courts sometimes will have material new evidence or

facts before them that the state court didn't have the chance to consider," but "Congress did not provide for de novo review" in those circumstances. *Id.* Quite the contrary: Congress "told [courts] to ask whether the *substantive decisions* made by state courts are reasonable, rather than critique the *processes* by which they reach those decisions." *Id.* at 1318; *see also Valdez*, 274 F.3d at 950.

b. Mendoza's proposed reading of "adjudicated on the merits" would turn AEDPA on its head because a state court's substantive decision would be deemed not "on the merits" any time a petitioner can subsequently take issue with the state habeas court's mere evidentiary or discovery ruling. That reading would "treat[] state courts less like instruments of sovereign governments and more like federal agencies whose decisions" are under review. *Wilson*, 577 F.3d at 1318 (Gorsuch, J., dissenting). It would also thwart what this Court has recognized as AEDPA's goals: to promote "comity, finality, and federalism" by narrowing the grounds on which habeas petitioners can obtain relief. *Williams v. Taylor* (*Michael Williams*), 529 U.S. 420, 436 (2000); *see also, e.g.*, *Brown v. Davenport*, 596 U.S. 118, 125 (2022) ("Under AEDPA, . . . a federal court may disturb a final state-court conviction only in narrow circumstances.").

* * *

In sum, the Fifth Circuit's reading of AEDPA fully complies with its language, serves its purposes, and ultimately does not impact the outcome of this case. Granting review in this case to resolve any lingering disagreement over the meaning of § 2254(d) would thus serve only to delay justice for Rachelle's family and particularly for her infant daughter, who has now grown to adulthood while Mendoza has sought to avoid responsibility for a

murder he has never denied committing. The Court should decline that invitation.

II. Mendoza's Sentencing-Phase Claim Does Not Merit Review—Let Alone Summary Reversal.

The Court should likewise decline to render summary disposition on the second question presented—that is, to summarily reverse the Fifth Circuit's rejection of Mendoza's claim that his trial counsel was ineffective for calling Vigen as a mitigation expert. "[S]ummary reversal is 'a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" *Andrus v. Texas*, 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., dissenting from denial of certiorari) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). Instead, Mendoza asks this Court to use it to engage in the type of fact-bound error correction that would not justify plenary review. Such a request is always improper, but it is particularly so here where there is no error to correct.

A. This claim is a request for fact-bound error correction.

It is hornbook law that this Court is a "court of law," not a "court for correction of errors in fact finding." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). Certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 4-8, 4-44 (11th ed. 2019). Summary reversal is even rarer, reserved for cases where the same court has repeatedly made the same error—notwithstanding prior plenary decisions from this Court.

Compare, e.g., *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam) (summary reversal); *Patrick v. Smith*, 550 U.S. 915 (2007) (vacating and remanding in light of *Carey v. Musladin*, 549 U.S. 70 (2006)); *Patrick v. Smith*, 558 U.S. 1143 (2010) (vacating and remanding in light of *McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam)).

This case's second question presented is the prototypical example of a fact-bound request for error correction that does not merit this Court's review—whether summary or plenary. Mendoza does not attempt to argue that the Fifth Circuit incorrectly stated the rule of law regarding whether trial counsel's decision to call Vigen satisfied the constitutional standards for effective counsel—because he can't. *See* Pet.App.28a, 31a-32a, 35a-36a. And although he certainly disagrees with the application of that standard, he tellingly does not discuss how, on this record, *see infra* pp. 26-34, the Fifth Circuit's decision conflicts with, let alone ignores, *any* prior case applying the general *Strickland* standard, *see* Pet.26-35.

B. Even if there were an error to correct, Mendoza does not dispute that he procedurally defaulted this claim.

Summary reversal would be particularly inappropriate here because Mendoza did not raise this claim before the state courts, rendering it procedurally defaulted. *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022). This means that this sentencing-phase claim is not subject to de novo review—indeed, the federal courts cannot even consider it unless Mendoza can demonstrate cause and prejudice to overcome that default. *Id.* Nowhere does his petition argue that he can. For good reason: even if his trial attorneys were constitutionally ineffective (and they were not), the same was not true of his state habeas counsel. She made an issue of Vigen's testimony in the guilt-phase

claims, citing and attacking many of "the same statements [by Vigen] that Mendoza complains of" in this claim. Pet.App.60a; *see* Br. for Respondent-Appellee at 34-37, *Mendoza v. Lumpkin*, No. 12-70035 (Apr. 10, 2023). And even if state habeas counsel's performance was deficient, it was not so deficient that it became constitutionally ineffective. Mendoza's underlying IATC claim lacks merit, *infra* Part II.C, so he cannot demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Williams v. Taylor* (*Terry Williams*), 529 U.S. 362, 391 (2000) (citing *Strickland*, 466 U.S. at 694).

C. There is no error to correct because Mendoza's trial counsel was not ineffective.

Mendoza's complaints about his trial counsel's presentation of his mitigation case suffer the same problems as his complaints about counsel's guilt-phase preparation. *Strickland* requires lower courts to assess counsel's representation based on the record as a whole. 466 U.S. at 695. This case's record displays a surfeit of evidence pointing to Mendoza's future dangerousness and a lack of mitigating circumstances, which put to rest any notion of prejudice. *See* Tex. Code Crim. Proc. art. 37.071, § 2(b)(1), (e)(1). Given those facts, counsel acted within the scope of professional discretion when they chose Vigen as an expert to explain that Mendoza demonstrated a history of violence as the product of emotional immaturity, which rendered him susceptible to negative influences from his peer group.

1. Mendoza cannot show prejudice from any deficiency in his lawyers' performance.

Assuming counsel performed ineffectively at the punishment phase, this IATC claim would fail because Mendoza demonstrably suffered no prejudice. "In assessing prejudice under *Strickland*," the Court asks "whether it is 'reasonably likely' the result would have been different" if counsel had acted differently. *Harrington*, 562 U.S. at 111 (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112 (citing *Strickland*, 466 U.S. at 693). No such likelihood exists here.

a. In an effort to downplay the strength of the State's case at punishment, Mendoza relies heavily (at 33) on the prosecution's statement in closing that the jury "kn[ew] the answer" to the future-dangerousness question because Vigen had told it to them. 25.RR.21. But an improper statement in a closing argument does not alone establish prejudice. *See Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993) (finding no prejudice in part because "[t]he State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript"). This is particularly true where a wealth of evidence from sources unconnected to that statement support the jury's conclusion that Mendoza would "constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1); *cf. Harrington*, 562 U.S. at 113. Here, the jurors did not need Vigen's testimony to tell them that Mendoza was dangerous: Mendoza demonstrated that all on his own.

For example, in addition to the brutal nature of this specific crime, the jury heard testimony about Mendoza's violent tendencies and disrespect for women, including an attack on his own younger sister. 22.RR.38-41.

The jury further heard how Mendoza tried to strangle a girl at one party, 22.RR.46-47, and then "pulled a knife" and "slammed [the host of another party] up against" a truck when that gentleman confronted Mendoza about putting a pill in a girl's drink, 22.RR.60-61. Perhaps most chillingly, the jury heard how an eighteen-year-old Mendoza twice raped a fourteen-year-old girl and forcibly penetrated her with a beer bottle and a pen—all of which he videoed and showed to others. 22.RR.210-14, 228-35.

In addition to acts of sexual violence, the jury also heard how Mendoza committed multiple robberies. 22.RR.132-43, 150-56, 176-77. The jury heard testimony about the evening that Mendoza approached a young woman in a parking lot, threatened her with a weapon, took her phone and keys, and ordered her to get into the trunk of her car. 22.RR.150-54. When she resisted—and passersby began to approach—Mendoza and his accomplices stole the car. 22.RR.156. And all this is in addition to the blood-curdling facts of the murder itself, *see Mendoza*, 2008 WL 4803471, at *1-2, which, under Texas law, are alone "sufficient to sustain the jury's finding of future dangerousness," *Martinez v. State*, 327 S.W.3d 727, 730 (Tex. Crim. App. 2010).

b. The jury also heard enough evidence of how nothing in Mendoza's background mitigated his crimes. *See* Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). For example, Mendoza's older sister described their parents as "strict" but "loving" people who "made sure that we got along as a family." 24.RR.90. She recounted how the family was "all Catholic" and attended mass every Sunday. 24.RR.90; *see also infra* pp. 28-29. This and other evidence of a loving home with supportive, religious parents showed the jury that Mendoza's background differs from that of many individuals who commit capital murder, *e.g.*,

24.RR.186-87; *infra* pp. 28-29, and could have easily led it to conclude that no mitigating circumstances "warrant[ed] that a sentence of life imprisonment without parole rather than a death sentence be imposed," Tex. Code Crim. Proc. art. 37.071, § 2(e)(1).

c. Next, Mendoza argues (at 34) that counsel was ineffective for calling Vigen because Vigen was, in Mendoza's view, "*the* critical witness at sentencing" for agreeing with the State that Mendoza was dangerous. But the wealth of evidence that Mendoza would be a future danger to society did not come from Vigen. And a read of the full trial record shows that Vigen recognized the *jury's* determination that Mendoza was a "very dangerous individual." 24.RR.178; *infra* pp. 33-34.

Nor did Vigen's testimony have the pride of place in the State's closing argument that Mendoza represents (at 31-33). That closing argument takes up approximately nineteen pages of transcript. 25.RR.20-28, 39-50. The scattered references to Vigen's testimony would consume less than a full page. 25.RR.21, 25, 44-45; *see Brecht*, 507 U.S. at 639. The State spent much more time describing brutal actions that Mendoza had committed or threatened. 25.RR.22-24, 41-42. Given these facts, that defense counsel's attempt to offer a mitigation theory was unsuccessful is unsurprising, and it does not show prejudice sufficient to overcome *Strickland*'s deferential standard. *See Harrington*, 562 U.S. at 104.

2. Trial counsel's representation was not deficient.

Finally, counsel's choice of Vigen as an expert was within the scope of professional competence.

a. As this Court is undoubtedly aware, individuals convicted of capital murder often try to justify their crimes (or at least mitigate their culpability) by offering

evidence that they had difficult upbringings—that they came from broken or violent homes beset by drug or alcohol abuse, or that good role models were hard to come by. *See, e.g.*, 24.RR.154-55, 186-87. Such circumstances might "contribute to aberrant behavior like killing another human being." 24.RR.187.

Mendoza suffered nothing like that. He grew up in a good home, surrounded by nonviolent family and supported by parents who "exhibited a good work ethic" and "good values for all of their children." 24.RR.154-55. Mendoza's family was "devoted" to their Catholic faith. 24.RR.130. His parents provided opportunities for religious training, 24.RR.156; for example, Mendoza attended confession, 24.RR.130. And while his father suffered from depression, 24.RR.122, Mendoza had two other positive male role models in his older brothers, 24.RR.156-58.

And Mendoza is intelligent. He graduated high school, where he was placed in advanced classes. 22.RR.27-28; 24.RR.130. After graduation, he completed vocational training and even received a scholarship to trade school. 24.RR.130. In other words, Mendoza had every advantage. His background was not one likely to lead a jury to conclude that difficult factors in his life led him to commit his heinous crime. *Compare* 24.RR.130, 154-58, *with* 24.RR.154-55, 186-87.

b. Nonetheless, defense counsel's unenviable task was to convince the jury that Mendoza did not present a future danger and that his character, background, and "personal moral culpability" provided "sufficient mitigating circumstances" to warrant a life sentence instead of death. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1), (e)(1). Because defense counsel could not deny the facts, counsel called Vigen to try to provide the jury with the

missing explanation for Mendoza's actions. Vigen explained that Mendoza's lack of maturity and "sense of self," as well as lack of attachment to his parents (however exemplary those parents were), made Mendoza susceptible to outside influences from a peer group that trafficked in drugs, alcohol, and "empty sexuality"—all of which led Mendoza to commit the crime of which he was convicted. 24.RR.126; *see* 24.RR.117-26, 187.

With the benefit of two decades of hindsight, Mendoza levels three attacks at his attorneys' strategy. But examining Vigen's testimony in light of the whole record demonstrates that trial counsel's strategy fell within the "wide range of reasonable professional assistance." *Harrington*, 562 U.S. at 104.

First, Mendoza complains (at 27-28) that Vigen expressly recognized that Mendoza's background lacks the usual mitigating circumstances. But competent defense counsel is expected to anticipate what prosecutors are likely to do. *See Rompilla v. Beard*, 545 U.S. 374, 385-86 (2005). And prosecutors were sure to point out that Mendoza came from a supportive home, 24.RR.130, 154-56, had good role models, 24.RR.156-58, and graduated high school, 24.RR.130. This is, after all, not the type of background usually offered to mitigate a defendant's crime. 24.RR.186-87. "[U]nder the difficult circumstances of this case," it was a "reasonable strategy" to "draw the sting out of the prosecution's argument and gain credibility with the jury by conceding the weaknesses of his own case." *Smith v. Spisak*, 558 U.S. 139, 161 (2010) (Stevens, J., concurring) (questioning whether the strategy was properly executed in that case). Mendoza may now wish that his trial counsel had tried to bury the facts, but that wish does not obviate the reasonable explanation for

counsel's decision at the time. *See Harrington*, 562 U.S. at 104.

Second, Mendoza complains about Vigen's efforts to establish that Mendoza was impressionable by testifying that Mendoza—who was twenty when he murdered Rachelle—was "immature" and lacked an "internal sense of himself" or a "clear inner identity." 24.RR.117. Specifically, Vigen explained that a man's adolescent phase does not end until he is eighteen to twenty-one, 24.RR.119, 132, and that his brain "isn't fully developed until . . . 24 [or] 25." 24.RR.132. Vigen also opined that Mendoza was "immature psychologically and underdeveloped," even for his chronological age, 24.RR.133, characterizing Mendoza throughout his testimony as "adolescent-like," 24.RR.117, 132, and focusing on the fact that Mendoza's brain was still developing, 24.RR.132. According to Vigen, because Mendoza was still maturing, he had "the potential to develop a sense of self and the potential for rehabilitation and some type of spiritual conversion," 24.RR.129-30; *see* 24.RR.131—notwithstanding his already-demonstrated predilections for sexual and other violence, *supra* pp. 26-27.

Vigen then provided an explanation why Mendoza committed his crime: Mendoza's lack of self-awareness or attachment to his father, *see* 24.RR.187, left him open to bad influences. Vigen testified that Mendoza, who otherwise had an advantaged background, "began associating with . . . [a] new set of friends," 24.RR.58, that lived a "sort of depraved and disrespectful, aggressive and drug and alcohol lifestyle" involving "empty sexuality," 24.RR.126. The jury had already heard other evidence corroborating that account—the State's witnesses had described parties, substance abuse, and the group's disrespectful treatment of women. 22.RR.45, 60-61, 209-14,

228-36. Vigen testified that an individual who does not have an inner compass telling him which direction to go, 24.RR.118, can be susceptible to bad influences from peer groups like these.

Vigen's testimony did not imply that Mendoza "lacked the very characteristics that make [a person] human," as Mendoza complains (at 30). To the contrary, Vigen attempted to *humanize* Mendoza in the face of a horrendous crime as well as a demonstrated history of treating women and girls as objects for his own sexual gratification, *supra* pp. 26-27. Mendoza's family history did not explain those actions, so, as defense counsel later recounted, Mendoza's defense team tried to mitigate Mendoza's culpability by showing that Mendoza was especially susceptible to influence *outside* the home. 4.SCHR.1599.

Third, Mendoza complains (at 28-30) about Vigen's statements regarding future dangerousness, including a reference to Mendoza's behavior in pretrial detention. But Vigen mentioned Mendoza's negative jail behavior as an *example* of Mendoza's immaturity. 24.RR.120-21; *see also* 24.RR.151 (responding to cross-examination questions about Mendoza's lack of sense of self), 175 (same). This was part of defense counsel's strategy of showing that Mendoza—then still just twenty-one years old—remained susceptible to bad influences. Although one wouldn't necessarily know it given the cherry-picked pieces of the record that the petition highlights, Vigen also opined that as Mendoza matured in custody, he would be "a low or minimum risk for future violence in the prison system." 24.RR.127; *see* 24.RR.131.

Even if this exposed Vigen to cross-examination about Mendoza's jail record, under the deferential *Strickland* standard, counsel reasonably allowed Vigen

to testify about Mendoza's behavior in jail to further their strategy. *See Harrington*, 562 U.S. at 104. If the State was able to capitalize on references to Mendoza's behavior in jail, that "shows merely that the defense strategy did not work out as well as counsel had hoped, not that counsel was incompetent." *Id.* at 109.

Mendoza similarly complains (at 29) that Vigen opined that Mendoza was a "very dangerous individual" in a "free society." 24.RR.178. Again, Mendoza takes those snippets out of context. When the State asked Vigen on cross-examination if Mendoza was "a very dangerous individual" in a "free society," Vigen responded, "I think that's—the jury has decided that, and I certainly agree with that." 24.RR.178. Indeed, Vigen emphasized multiple times that his assessment of Mendoza's future dangerousness accounted for the facts of the crime for which the jury had already convicted Mendoza. 24.RR.111, 178. For example, he explained that "when I'm doing a capital evaluation," including assessments of mitigating factors, "I'm assuming that the individual who's been accused of a particular killing of an individual is guilty of murder, so I come with that assumption." 24.RR.111.

To obtain habeas relief—let alone justify this Court's review of the *denial* of such extraordinary relief—Mendoza "must overcome the presumption that, under the circumstances, [counsel's] action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. It was hardly unreasonable for trial counsel to present *at the punishment phase* an expert witness who would not quarrel with the jury's determination of guilt but would instead try to explain why that guilty verdict should not result in a death sentence. And Mendoza's wish (at 29) that his trial counsel had differently rehabilitated Vigen after

cross-examination does not transform counsel's decision to offer this witness into an unreasonable one. *See Harrington*, 562 U.S. at 104. It certainly does not justify this Court's intervention in a fact-bound dispute over a procedurally defaulted claim about *whether* counsel's decision was unreasonable.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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JUNE 2024