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,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute the essential ingredients for this Court's review. There is a "circuit split" over the meaning of 28 U.S.C. § 2254(d)'s "adjudicated on the merits" requirement. *Wilson v. Workman*, 577 F.3d 1284, 1316 (10th Cir. 2009) (*en banc*) (Gorsuch, J., dissenting). Three circuits hold that a claim has not been "adjudicated on the merits" if the defendant did not receive a full and fair opportunity to litigate in state court; three others disagree. This issue is certworthy—indeed, this Court has already granted certiorari to resolve the split. *Bell v. Kelly*, 553 U.S. 1031 (2008). And this case squarely implicates the split. In the decision below, the Fifth Circuit expressly rejected the Fourth Circuit's rule that Section 2254(d) applies only when the defendant was afforded a "full and fair hearing." It thus applied Section 2254(d)'s exacting standard even though the state courts decided petitioner Moises Mendoza's claims "without the benefit of … material evidence" because they denied him crucial discovery.

Respondent nonetheless opposes certiorari primarily on the ground that Mendoza might eventually lose on remand. Respondent is wrong on that score. But regardless, downstream arguments about a petitioner's ultimate ability to secure relief are no basis to deny review of an important and recurring question that has divided the circuits.

The Court should separately grant review to consider Mendoza's claim that counsel unreasonably presented an expert who proved the State's case for death.

I. THE COURT SHOULD RESOLVE THE MEANING OF SECTION 2254(d)

The Court should grant certiorari because the circuits are in open conflict over the meaning of an "important federal statute," *Wilson*, 577 F.3d at 1323 (Gorsuch, J., dissenting); *see* Pet. 12-17, and the decision below squarely implicates that conflict, *see* App.15a-18a.

A. *Vehicle*. Unable to dispute the split or its importance, respondent argues that this case is an unsuitable vehicle for settling the meaning of Section 2254(d) because (in his view) Mendoza is likely to lose on remand. But that is not a vehicle problem at all—and even if it potentially were, respondent's arguments lack merit.

Even if Mendoza were likely to lose on remand, that would be no basis to deny certiorari. As case after case demonstrates, alternative grounds for affirmance never reached by the court below are not vehicle problems. *See, e.g.*, *Smith v. Arizona*, 2024 WL 3074423, at *10 (U.S. June 21, 2024) (leaving forfeiture for remand); *Chiaverini v. City of Napoleon*, 2024 WL 3056034, at *5 (U.S. June 20, 2024) (leaving additional merits issues for remand); *Cantero v. Bank of America, N.A.*, 144 S. Ct. 1290, 1301 (2024) (leaving application of clarified legal standard for remand); *Dubin v. United States*, 599 U.S. 110, 116 n.3 (2023) (leaving forfeiture and potential application of plain error for remand). Vehicle problems arise only when there is some impediment to this Court reaching or resolving the question presented—where, for example, some threshold issue precludes the Court from reaching the question presented, or where a

decision resolving a circuit conflict in the petitioner's favor would not require vacating the decision below.

There is no such problem here. There is no barrier to this Court reaching the first question presented. And if the Court agrees with Mendoza that Section 2254(d) does not apply when the defendant lacked a full and fair opportunity to litigate, the decision below would need to be vacated. The Fifth Circuit never considered the arguments that respondent now raises in its opposition because it misinterpreted Section 2254(d). Those issues can be saved for another day, after this Court resolves the threshold question about the statute's meaning.

1. Respondent asserts (BIO 15-20) that Section 2254(d)'s deferential standard will apply even if the Court agrees with Mendoza's interpretation because (respondent claims) Mendoza was afforded a full and fair opportunity to litigate in state court. But the Fifth Circuit never decided whether Mendoza was afforded a full and fair hearing because it "held that a full and fair hearing is not a precondition … to applying § 2254(d)." App.16a (quotations omitted). Where a lower court misinterprets a federal statute, this Court regularly "leave[s] the context-specific application of [the] clarified standard to the lower court[] in the first instance." *Groff v. DeJoy*, 600 U.S. 447, 473 (2023); *see, e.g.*, *Cantero*, 144 S. Ct. at 1301; *Ayestas v. Davis*, 584 U.S. 28, 48 (2018). The Court should follow that practice here. It can settle the meaning of Section 2254(d), and then send the case back to the Fifth Circuit to apply the clarified standard if needed.

Respondent is also wrong that Mendoza had a full and fair opportunity in state court. Respondent first contends (BIO 16-17) that Mendoza cannot show that the evidence he ultimately discovered in federal district court was material. But the question is about what happened in *state* court, and the Fifth Circuit expressly held that the Texas courts adjudicated Mendoza's claims "without the benefit of additional material evidence." App.17a.

Respondent's separate assertion that the state courts "followed proper procedures," BIO 17, likewise finds no purchase in the record. Mendoza sought discovery to determine the extent of his trial team's mitigation investigation. *See* Pet. 9. After his trial lawyers submitted self-serving affidavits attesting to their effectiveness, the state habeas court denied Mendoza's motion (and relied heavily on those affidavits in denying Mendoza relief). *See id.* That decision deprived Mendoza of a basic right in our adversarial system: The right to test the evidence against him.

Respondent responds that Mendoza is at fault because he "largely failed to comply with state discovery rules." BIO 18. But no court—state or federal—has accepted that argument. And it amounts to nothing. Respondent does not dispute that, for the critical witnesses, Mendoza satisfied procedural requirements. *Compare* 1:SCHR:205-14, 356-401, *with* BIO 18-19. Instead, his argument again boils down to the assertion that Mendoza did not seek "material" evidence, BIO 19-20, an assertion foreclosed by the decision below, App.17a. And it is illogical. Obviously, information about the "extent" of

counsel's mitigation investigation, 1:SCHR:205-14, is material to Mendoza's claims that counsel conducted an inadequate mitigation investigation.

b. Respondent also contends (BIO 8-9) that Mendoza has "forfeited" his argument that he would prevail under de novo review. But the Fifth Circuit never considered that contention. Accordingly, this Court can interpret Section 2254(d) and remand for the Fifth Circuit to apply that interpretation "subject to ordinary principles of waiver and forfeiture." *McDonough v. Smith*, 588 U.S. 109, 117 n.3 (2019); *see, e.g.*, *Smith*, 2024 WL 3074423, at *10; *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 977 (2024).

That said, respondent's forfeiture arguments are meritless. He contends (BIO 8) that Mendoza forfeited his argument for de novo review in his objections to the magistrate judge's R&R. But in the Fifth Circuit, "[a] party cannot waive, concede, or abandon the applicable standard of review." *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015). And respondent forfeited *his* argument by failing to raise Mendoza's alleged forfeiture below. *See, e.g.*, *Calzone v. Summers*, 942 F.3d 415, 422 (8th Cir. 2019) (en banc) (collecting forfeiture-of-forfeiture cases).

Respondent next contends that Mendoza "forfeited his argument that he would win under de novo review in the Fifth Circuit through inadequate briefing." BIO 8-9. Respondent never made this argument either, *see* Respondent's CA5 Br., Dkt. 47, and the Fifth Circuit understood that Mendoza "challenge[d] the application of … Section 2254(d) to the Court of Criminal Appeals' decision," App.17a. Mendoza's argument that the state courts

unreasonably applied federal law necessarily encompassed his claim that he would prevail under a lesser standard. *See* Petitioner's CA5 Br., Dkt. 28 at 44-59. And Mendoza also argued that Section 2254(d) did not bar evidence that created a dispute of fact precluding judgment, *id*. at 30-43; *see also* App.14a-17a, no different than a litigant arguing that error at summary judgment prevented a case from going to trial. Winning the case outright is not the only reason legal standards matter on appeal; reversals and remands for further proceedings are also significant.[1]

Last, respondent faults Mendoza for not challenging in his petition the "district court's conclusion" that his claims fail under de novo review. BIO 9. But the Fifth Circuit did not adopt the district court's conclusion, so there was no basis for Mendoza to include the argument in his petition. Alternative grounds for affirmance, not reached by the court of appeals, are appropriately left for remand. *See, e.g.*, *Chiaverini*, 2024 WL 3056034, at *5.

c. Respondent finally asserts (BIO 10-15) that Mendoza is likely to lose under de novo review. Again, a respondent's position on the ultimate merits is no barrier to this Court resolving a threshold question. *Supra* at 2. Consider *Chiaverini*. There, the Court granted certiorari notwithstanding

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[1] *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), does not support respondent's argument. There, the Court reached the question presented, notwithstanding possible forfeiture, because the court of appeals "passed on the issue presented." *Id*. at 1099 n.8. Respondent does not dispute that Mendoza raised, and the Fifth Circuit resolved, the question presented.

respondent's argument that resolving the question presented in petitioner's favor would not "affect the outcome" because the district court granted summary judgment on alternative grounds. *Chiaverini* BIO 24. And after resolving the question presented, the Court remanded so the court of appeals could consider that alternative ground in the first instance, 2024 WL 3056034, at *5, as it should do here.

If anything, respondent's merits arguments only underscore the importance of this Court's review. Respondent relies on the district court's conclusion that Mendoza's claims fail under de novo review. But even the district court recognized that its conclusion was debatable. In granting a certificate of appealability, the district court found that Mendoza had made a "substantial showing of the denial of a constitutional right." ROA.1866-67. A major point of this petition, in turn, is that the Fifth Circuit never reviewed the district court's debatable conclusion because it misinterpreted Section 2254(d).

And Mendoza's claims have merit. The record shows that trial counsel conducted a deficient investigation. Members of Mendoza's defense team were confused about their roles, and as a consequence did not collect critical evidence or follow up on leads, *see* 1:SCHR:360-75—for example, trial counsel's state court affidavit asserted that "mitigation expert," Vince Gonzalez, investigated "all possible mitigation issues," ROA.638, 642, but Gonzalez's responses in federal court show otherwise, ROA.1286-89. And the deficient investigation resulted in a woefully unprepared expert who offered testimony devastating to the defense. *See* Pet. 6-8.

Respondent recites (BIO 15) the state habeas court's conclusion that trial counsel's investigation was adequate. But that decision was made on an incomplete record, App.17a, and relied on self-serving affidavits Mendoza was unable to contest, *see* Pet. 9. Again citing those affidavits (BIO 10), respondent attempts to blame Mendoza for counsel's truncated investigation, but respondent's cited evidence does not excuse counsel's failure to probe Mendoza's background thoroughly, *see* 1:SCHR:359; *see also Rompilla v. Beard*, 545 U.S. 374, 381, 383 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003). For example, trial counsel was aware of Mendoza's drug and alcohol abuse, ROA.641, but never investigated its potential impact on his mental functioning, *compare* ROA.1315-16, 570, *with* 1:SCHR:268-71, notwithstanding trial counsel's own supposed theory that Mendoza was mentally "underdeveloped," BIO 31.

Respondent asserts that no jury could have credited Mendoza's alternative theories, but any explanation would have been better than the incoherent theory offered through Vigen. *See infra* Part II. As respondent has acknowledged, Mendoza's fact witnesses laid the foundation for a "very compelling case in mitigation." *See* Pet. 6. A well-developed mitigation theory could have swayed a reasonable juror's vote.

B. *Merits*. Respondent offers precious little on the meaning of Section 2254(d). He does not respond to Mendoza's arguments that text, structure, and history confirm that Section 2254(d) is an "old soil" statute that draws its meaning from the law of res

judicata, including the requirement that a litigant be afforded a full and fair opportunity to litigate before preclusion applies. *See* Pet. 19-23.

Instead, respondent doubles down (BIO 20-22) on the mistaken view that Congress's deletion of a "full and fair" hearing requirement from Section 2254(e)(1) shows that Congress intended to exclude such a requirement from Section 2254(d). As Mendoza explained, that reasoning is flawed. *See* Pet. 24-25. The two provisions use different language and serve different purposes. And the drafting history shows that Congress recognized the close relationship between "full and fair" procedures and an "on the merits" requirement. *Id*. When Congress enacted Section 2254(d), it would have understood that expressly adding a "full and fair opportunity" requirement "was unnecessary," *Cullen v. Pinholster*, 563 U.S. 170, 185 n.7 (2011), because that requirement was already incorporated through the phrase "adjudicated on the merits."

Finding no support in the traditional tools of statutory interpretation, respondent resorts to mischaracterization. He claims that Mendoza "would turn AEDPA on its head" because de novo review would apply "any time a petitioner can subsequently take issue with the state habeas court's mere evidentiary or discovery ruling." BIO 22. But mere disagreement is not enough. To fall outside Section 2254(d), a petitioner would need to prove that he was denied a full and fair opportunity to litigate as that requirement historically has been understood. That is no small feat.

The Court should grant review and resolve the circuit conflict over the meaning of Section 2254(d).

II. THE COURT SHOULD REVERSE ON MENDOZA'S EXPERT-PRESENTATION CLAIM

The defense's star witness at sentencing testified that traditional mitigating factors were absent, that Mendoza was dangerous, and that he lacked a moral compass. *See* Pet. 6-8. "No competent defense attorney would introduce such evidence about his own client." *Buck v. Davis*, 580 U.S. 100, 119 (2017). Respondent offers no coherent defense of the Fifth Circuit's contrary conclusion.

A. *Deficient performance*. Respondent's thesis in defense of trial counsel's performance is that Vigen "provide[d] the jury with the missing explanation for Mendoza's actions." BIO 29-30. That explanation: Mendoza's immaturity "rendered him susceptible to negative influences from his peer group," which "led" him to commit murder. BIO 25-30. Respondent's theory has several problems.

First, Vigen offered no explanation. His testimony was devastating in part because he offered a string of unrelated "opinions" that destroyed Mendoza's defense but explained nothing. As the prosecution summarized: "Vigen … 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. Second, impressionability plus "bad" friends (BIO 32) is not a coherent explanation for murder. Mendoza's high-school friends did not kill anyone or encourage Mendoza to. Third, respondent's theory naturally

would have led the jury to *impose* a death sentence since the alternative was life in prison surrounded by even more dangerous people.

Most important, respondent's theory does not actually explain Vigen's damning testimony. There is no strategic justification for a defense expert telling a jury charged with weighing a man's life that the factors they should be looking for are "missing," App.294a, that the defendant lacks a moral compass, App.232a, and that he is dangerous, *see* Pet. 28-30.

Respondent suggests (BIO 30) that Vigen testified to the absence of traditional mitigation to gain credibility for his "bad influences" theory of murder. Not true. And there *was* traditional mitigating evidence. *See* Petitioner's CA5 Br., Dkt. 296 at 8-10. As respondent has previously recognized, Mendoza had "a very compelling case for mitigation," Pet. 6, that Vigen effectively told the jury to ignore. Respondent's theory also cannot explain why Vigen testified that Mendoza lacked a moral compass—which Vigen described as the "ability" to feel empathy—and had "superficial" remorse. Pet. 28-31.

Vigen's testimony that Mendoza was dangerous could not have served a "bad influences" theory of defense either. *Contra* BIO 32. If that was counsel's theory, they would not have introduced Mendoza's jail record through Vigen. *See* Pet. 28-29. Indeed, Vigen testified, the "the best predictor" of Mendoza's future violence in prison was his jail record, App.283a, a point the prosecution hammered in closing, RR25:21-22. Counsel did not need to "quarrel," BIO 33, with the jury's verdict to abstain from telling them that both special issues required for death were satisfied.

B. *Prejudice*. The prejudice Mendoza suffered is plain. The jury looked to Vigen, an expert psychologist with vast experience in capital cases, for a reason to spare Mendoza's life. He gave them worse than nothing. Small wonder the prosecution used Vigen's testimony to answer both special issues. Pet. 32-33. Respondent urges the Court (BIO 28) to ignore the prosecution's closing because, in his view, references to Vigen comprised "only" 5%. But prejudice "cannot be measured simply by how much air time [testimony] received at trial or how many pages it occupies in the record." *Buck*, 580 U.S. at 121-22. What matters is the *qualitative* significance of Vigen's testimony, and on this score, there is little doubt.

The remainder of respondent's argument is that the jury "heard enough evidence" from other witnesses. BIO 26-27. But "that is not the test." *Rompilla*, 545 U.S. at 393. Prejudice in a death-penalty case does not test the sufficiency of the prosecution's case; it focuses on the error's impact. The prosecution may have put on a strong case in aggravation.[2] But Mendoza also had a "very compelling" story to tell. Pet. 6. Vigen ensured the jury would not listen.

The Fifth Circuit's decision upholding the denial of habeas relief on Mendoza's expert-presentation

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[2] Respondent emphasizes (BIO 26-27) Mendoza's conduct leading up to and including the murder. But we know that was not the jury's focus—they asked about Mendoza's "criminal acts while in jail," RR25:51, which counsel introduced through Vigen.

claim is extraordinary and warrants this Court's review.[3]

CONCLUSION

The petition should be granted.

Respectfully submitted,

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[3] Respondent separately asserts (BIO 24-25) that this case is a poor vehicle because of state habeas counsel's default. As with other issues the Fifth Circuit never considered, App.37a, Mendoza's argument that counsel's default should be excused is properly reserved for remand.