No. 09-900

In The
Supreme Court of the United States

LINDA ANITA CARTY, PETITIONER

v.

RICK THALER, 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 FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner Linda Anita Carty's five questions presented (Pet. i-ii) do not yield a certworthy case.

STATEMENT

1. The crime is detailed in the opinions below. Pet. App. 2a-9a, 72a-95a. In May 2001, petitioner set out to abduct the infant son of Joana Rodriguez, a neighbor she suspected of having an affair with Jose Corona, her husband. With help from her colleagues in the drug trade, petitioner orchestrated an armed invasion of Rodriguez's apartment, during which mother and child were kidnapped. Petitioner then killed Rodriguez by suffocating her with a plastic bag, and claimed the dead woman's baby as her own.

Following a jury trial in a Texas court, during which she was represented by appointed lawyers Jerry Guerinot and Windi Akins, petitioner was convicted of capital murder on February 19, 2002.

Pet. App. 9a. During the trial's punishment phase, the prosecution used petitioner's criminal history to demonstrate her future dangerousness, while petitioner's counsel introduced mitigation testimony from members of her family and testimony from a clinical psychologist concerning the danger she posed. *Id.* at 9a-11a. The jury ultimately answered Texas's three "special issues" in favor of capital punishment and, on February 21, 2002, petitioner was sentenced to death. *Id.* at 11a. The Texas Court of Criminal Appeals affirmed the conviction and sentence on direct appeal. *Id.*

2. Petitioner timely applied for state habeas relief on August 6, 2003, raising thirty claims. SHCR 2-159. On February 2, 2004, months after the deadline to amend the habeas application had expired, the British government filed a motion in the state court requesting a 180-day extension in which "any amendment or supplement filed in that time should be accepted without the application" of the statutory deadline. SHCR 222. The state court denied the motion "for want of jurisdiction." SHCR 222. The British government arranged for Baker Botts L.L.P., a Houston law firm, to represent petitioner. SHCR 650. Through her new counsel, petitioner repeatedly attempted to raise new claims, SHCR 382, 403-472, 485-697, but the state court never authorized any amendments to her habeas application. Pet. App. 119a. The state habeas court adopted the State's proposed findings, SHCR 771-797, and the Texas Court of Criminal Appeals denied relief. *Ex parte Carty*, No. 61,055-01 (Tex. Crim. App. Mar. 2, 2005) (unpublished).

3. Petitioner timely applied for federal habeas relief in February 2006 and moved for a federal evidentiary hearing. Pet. App. 72a. In September 2008, the United States District Court for the Southern District of Texas denied habeas relief and a hearing, *id.* at 227a-230a, but granted a certificate of appealability on three issues, *id.* at 231a. Petitioner then moved the United States Court of Appeals for the Fifth Circuit to expand the certificate of appealability to eighteen additional issues, which the court denied. *Id.* at 45a-69a.

4. The Fifth Circuit affirmed the denial of habeas relief. Pet. App. 1a-44a (King, J.). In an exhaustive opinion, the Fifth Circuit observed that "the evidence of [petitioner's] guilt was overwhelming." *Id.* at 34a.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Does Not Warrant Review Because It Is Barred By An Independent And Adequate State Ground, Is Not Factually Presented, And Was Not Pressed Or Passed Upon Below

This case suffers from at least three substantial vehicle problems. Each raises serious prudential concerns that weigh against the Court's review of the first question presented.

A. Review of the first question presented is barred by an independent and adequate state ground. The Texas courts rejected the ineffective-assistance claim raised in the first question presented as untimely under state law, see Tex. Code Crim. Proc. art. 11.071, and it was therefore procedurally defaulted. Because petitioner cannot

show cause and prejudice for the default or offer any other legal justification, Pet. App. 67a-69a, the first question presented is not properly before this Court.

1. "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment." *Cone* v. *Bell*, 129 S. Ct. 1769, 1780 (2009) (internal quotation marks omitted). This doctrine "is not technically jurisdictional" in habeas cases, *Lambrix* v. *Singletary*, 520 U.S. 518, 523 (1997), but unless the petitioner can demonstrate "cause and prejudice" for the procedural default, *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977), the doctrine "applies to bar consideration" of federal claims that have been defaulted under state law, *Lambrix*, 520 U.S. at 523.

The state habeas court rejected the federal claims urged in petitioner's first question presented because they were raised too late. The Texas capital habeas statute expressly prohibits untimely amendment of claims. Article 11.071 of the Texas Code of Criminal Procedure provides that state habeas applications in death penalty cases must be filed by "the 180th day after the date the convicting court appoints counsel . . . or . . . the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later." Tex. Code Crim. Proc. art. 11.071, § 4(a). The statute allows only a single 90-day extension of the filing period upon a showing of good cause. *Id.* § 4(b). Failure to file a timely application "constitutes a waiver of all grounds for relief." *Id.* § 4(e). And Texas law prohibits supplementation or amendment

of claims outside this time period unless the applicant demonstrates either cause or actual innocence. *Id.* § 5(a). The Texas Court of Criminal Appeals has consistently applied this statutory scheme to disallow the insertion of new habeas claims outside the statutory time period. See, *e.g.*, *Ex parte Esparza*, No. WR-66111-01, 2007 WL 602812, at *1 (Tex. Crim. App. Feb. 28, 2007) (unpublished); *Ex parte Acker*, No. WR-56841-01, 2006 WL 3308712, at *1 (Tex. Crim. App. Nov. 15, 2006) (unpublished).

The 45-day period for filing petitioner's state habeas application began March 31, 2003, when the State filed its brief on direct appeal, and was extended 90 days to August 13, 2003. See Tex. Code Crim. Proc. art. 11.071, § 4(a)-(b). With seven days remaining in the filing period, petitioner applied for habeas relief on August 6, 2003, raising thirty claims supported by seventeen exhibits. SHCR 2-159.

Petitioner then attempted several untimely amendments of her habeas application, but they were rejected by the Texas court. On February 2, 2004 — 173 days after time to amend the application had expired — the British government filed a "Motion to Suspend Proceedings, and Application for a Reasonable Time for Consular Assistance to Supplement Post-Conviction Writ of Habeas Corpus." SHCR 183-222. The pleading recognized that the time had expired for petitioner to raise new claims, but asked the court to grant a 180-day extension in which "any amendment or supplement filed in that time should be accepted without the application of Art. 11.071 5(f)." SHCR 222. The District Attorney "took the position that it did not believe that there

was jurisdiction to suspend proceedings." SHCR 209. The Texas court agreed, and denied the motion "for want of jurisdiction." SHCR 222; see *Ex parte Golden*, 991 S.W.2d 859, 861 (Tex. Crim. App. 1999) (holding that Article 11.071 "explicitly limits" court's subject matter jurisdiction over subsequent applications in death penalty cases); *Ex parte Smith*, 977 S.W.2d 610, 611 (Tex. Crim. App. 1998) (noting that Article 11.071 provides "the exclusive procedures for the exercise of this Court's original habeas corpus jurisdiction in death penalty cases").

Over the next fifteen months, petitioner repeatedly attempted to raise new claims despite Article 11.071's time limitations, SHCR 382, 403-472, 485-697, and despite the Texas court's jurisdictional holding, SHCR 222. But the state court never authorized any amendments, presumably for want of jurisdiction. See *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804 (1991) (holding that when one reasoned state-court decision rejects a federal claim, subsequent unexplained rejections of the same claim are considered to rest on the same ground as did the reasoned state judgment).

One of petitioner's untimely claims was the ineffective-assistance claim now raised in the first question presented. The exhaustive opinions of the district court and the Fifth Circuit both confirm that petitioner procedurally defaulted that claim. See Pet. App. 21a; see also *id.* at 120a ("[T]he trial court rejected efforts to file an out-of-time amendment."). Petitioner unsuccessfully urged the courts below to excuse her procedural default because, she claimed, the District Attorney had agreed to waive Article 11.071's timeliness requirement and the state habeas

court had blessed the agreement. *Id.* The federal district court found otherwise, holding that "nothing in the record . . . suggests that the parties and state habeas court agreed to suspend Tex. Code Crim. Proc. art. 11.071 § 5's limitation on tardy amendments." Pet. App. 120a. The Fifth Circuit affirmed the district court's finding "that there was no agreement to permit tardy claims." *Id.* at 21a; see also *id.* at 67a-69a (holding that "jurists of reason could not debate that the state did not waive its procedural default defense" and that petitioner could not show "cause and prejudice" or a "fundamental miscarriage of justice"). The district court's factual finding stands between the petitioner and review by this Court, yet it is not addressed in the petition.

2. To be sure, the Fifth Circuit reached the merits of the federal claim petitioner now urges in her first question presented, despite the court's acknowledgement that the claim was procedurally defaulted. Pet. App. 20a-21a, 25a. But the Fifth Circuit's oversight in petitioner's favor does not dislodge a procedural bar to this Court's review.

The Fifth Circuit held that the State waived its exhaustion defense under AEDPA, Pet. App. 22a-25a (citing 28 U.S.C. 2254(b)(3)), but petitioner's procedural default poses an independent bar to federal court review. *Coleman* v. *Thompson*, 501 U.S. 722, 729-732 (1991); see also 17B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4266 (3d ed. 2009) ("It may be that a state prisoner will exhaust his state remedies without obtaining any decision on the merits of his federal constitutional claim because he has failed to

comply with state procedural rules on how the claim must be raised.").[1]

From the beginning, petitioner recognized that her procedural default would be an obstacle to federal habeas review, independent of the exhaustion issue. After the district court granted a certificate of appealability "on the question of whether Petitioner sufficiently exhausted state court remedies," Pet. App. 233a, petitioner asked the Fifth Circuit to grant an additional certificate of appealability on "the district court's application of a federal procedural bar to [her] additional claims," C.A. Appellant's Mot. for Add'l COA Issues with Br. in Supp. 21. Petitioner's motion made clear that she correctly regarded procedural default as a distinct hurdle. See *id.* at 24 ("[A]lthough the district court concluded that the state did not expressly waive exhaustion, it did not address [petitioner's] argument that the court should choose not to apply a procedural bar because the State waived any procedural default defense."). The motion also argued that the procedural default

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[1] The Fifth Circuit recognized that procedural default and exhaustion were "distinct concepts" but relied on *Bledsue* v. *Johnson*, 188 F.3d 250, 254 (5th Cir. 1999), which held that when a procedural default is based on a failure to exhaust, *i.e.*, when the petitioner fails to exhaust all available state remedies and the state court to which he would be required to petition would now find the claims procedurally barred, a waiver of exhaustion waives both exhaustion and procedural default. See Pet. App. 67a. The Fifth Circuit misunderstood the district court's underlying procedural default ruling to be "entirely dependent" on its failure-to-exhaust ruling, see Pet. App. 66a, even though the procedural default doctrine is an independent bar to federal review in this case.

should be excused because petitioner had demonstrated "cause and prejudice" as well as "a fundamental miscarriage of justice." *Id.* at 26-28.

In denying petitioner's motion, the Fifth Circuit rejected these arguments, observing that "the state did not waive its procedural default defense." Pet. App. 67a-68a. Petitioner has not renewed these arguments in her petition. At bottom, the first question presented turns on a factual dispute over whether an express agreement waived a state procedural default, along with the subsidiary question whether such waiver is even possible under Texas law. This factual dispute alone poses a substantial vehicle problem that weighs against the Court's review. See *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973) ("Since this is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted."); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) ("[F]acts are subject to the 'clearly erroneous' rule . . . and their review would be of no importance save to the litigants themselves. The appropriate disposition in such a situation is to dismiss the writ as improvidently granted.").

Because of these defects, this is not the case that Justice Souter was "worried about around the corner," as petitioner contends. Pet. 19 (quoting Transcript of Oral Argument at 47:1-2, *Bell* v. *Kelly*, 129 S. Ct. 393 (2008) (No. 07-1223)). Justice Souter was anticipating a case where the petitioner is not "at fault in any way" for failing to "get his entire presentation . . . into the state court," and therefore presents a claim that is "not defaulted." Transcript

of Oral Argument at 45:17-46:6, *Bell* v. *Kelly*, 129 S. Ct. 393 (2008) (No. 07-1223). By contrast, petitioner is at fault for missing her state-court deadline by several months, Pet. App. 119a, and cannot show cause or prejudice, *id.* at 68a. The state court's rejection of her federal claim on that ground results in a procedural default that bars this Court's review. See *Lambrix*, 520 U.S. at 521.

B. The first question is not fairly presented by the facts of this case. Petitioner's application for habeas relief raised two sets of ineffective-assistance claims. At petitioner's request, the Fifth Circuit reviewed these sets of claims under a well-established framework. The first claims were exhausted in state court and therefore reviewed with AEDPA deference. See 28 U.S.C. 2254(d). The second claims were unexhausted in state court, but the Fifth Circuit held that respondent waived his exhaustion defense, and so those claims were reviewed de novo because they had not been adjudicated in state court.

1. This dichotomy between adjudicated and unadjudicated claims of ineffective assistance has been adopted by every circuit to consider the question. See, *e.g.*, *Kater* v. *Maloney*, 459 F.3d 56, 58 (1st Cir. 2006); *Aparicio* v. *Artuz*, 269 F.3d 78, 93 (2d Cir. 2001); *Chadwick* v. *Janecka*, 312 F.3d 597, 606 (3d Cir. 2002) (Alito, J.); *Weeks* v. *Angelone*, 176 F.3d 249, 258 (4th Cir. 1999), *aff'd*, 528 U.S. 225, 237 (2000); *Riley* v. *Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003); *Danner* v. *Motley*, 448 F.3d 372, 376 (6th Cir. 2006); *Cheeks* v. *Gaetz*, 571 F.3d 680, 684 (7th Cir. 2009); *Gary* v. *Dormire*, 256 F.3d 753, 756 n.1 (8th Cir. 2001); *Pirtle* v. *Morgan*, 313 F.3d 1160, 1167

(9th Cir. 2002); *Boyle* v. *McKune*, 544 F.3d 1132, 1137 (10th Cir. 2008), cert. denied, 129 S. Ct. 1630 (2009). As a result, when a state court did not reach the merits of a claim that was nevertheless exhausted, or where exhaustion was waived, all of these circuits review the claim of ineffective assistance de novo. Cf. *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003) (giving AEDPA-deferential review as to performance prong of ineffective-assistance claim, which state court had considered, but giving de novo review as to prejudice prong of that claim, which state court had not reached).

Petitioner urged the Fifth Circuit to apply this exact standard of review to her mix of adjudicated and unadjudicated claims, C.A. Appellant's Br. 3, yet she now recants and attempts to squeeze her case into an entrenched disagreement among the circuits over whether to apply AEDPA deference to an individual claim when new evidence is adduced in support of that claim at a federal evidentiary hearing. See Pet. 19; *Bell* v. *Kelly*, 128 S. Ct. 2108 (2008) (granting review to resolve the question); *Bell* v. *Kelly*, 129 S. Ct. 393 (2008) (dismissing certiorari as improvidently granted). The Fifth Circuit is on the correct side of that well-developed split, along with every circuit to consider the question except the Ninth and Tenth, in holding that the plain terms of AEDPA mandate deference to the state-court adjudication itself, but that the new facts bear on whether the state court's decision was unreasonable

under AEDPA. See *Valdez* v. *Cockrell*, 274 F.3d 941, 953-954 (5th Cir. 2001).[2]

But that split is not implicated by the facts of petitioner's case. The Fifth Circuit was not faced with federal claims that were fully adjudicated in state court but then supplemented with new facts adduced in a federal evidentiary hearing. Instead, the Fifth Circuit reviewed a set of claims that were entirely unadjudiated in state court. Moreover, there was no new evidence to complicate the court's review of those claims because no federal hearing was ever held. Indeed, petitioner was denied an evidentiary hearing to develop new facts, despite her repeated requests, because, unlike the petitioners in the cases she relies on to illustrate a circuit split, she never demonstrated cause and prejudice. See Pet. App. 44a; 28 U.S.C. 2254(e)(2).

2. Nor does the Tenth Circuit's recent decision in *Wilson* v. *Workman*, 577 F.3d 1284, 1295 (10th Cir. 2009) (en banc) (McConnell, J.), hold that cases like petitioner's are governed by the well-established split. To be sure, *Workman* is similar to petitioner's case in some respects, and it does engage the Fifth Circuit's analysis in *Valdez*, which weighed in on the disagreement over federal evidentiary hearings. But, as the Tenth Circuit itself recognized, any conceptual link between the well-established split

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[2] Compare *Wilson* v. *Mazzuca*, 570 F.3d 490, 500 (2d Cir. 2009), *Johnson* v. *Luoma*, 425 F.3d 318, 324 (6th Cir. 2005), and *Pecoraro* v. *Walls*, 286 F.3d 439, 443 (7th Cir. 2002), with *Killian* v. *Poole*, 282 F.3d 1204, 1207-1208 (9th Cir. 2002), and *Miller* v. *Champion*, 161 F.3d 1249, 1253-1254 (10th Cir. 1998).

and cases such as petitioner's may prove illusory. *Workman*, 577 F.3d at 1295 ("[P]ause to note that the [Fifth Circuit's] *Valdez* decision is not necessarily in conflict with our holding today."); see also *id.* at 1296 ("It is . . . not clear that *Valdez* would be resolved differently based on our holding today."); Pet. 19 (acknowledging that petitioner's case is only "conceptually related" to the well-established split).

For this reason alone, the Court should deny review of the first question presented. There is uniform agreement among the circuits that de novo review applies when a state court does not reach the merits of a properly raised federal claim. The Fifth Circuit applied this rule at petitioner's request. Although the rule does bear a conceptual relationship to a developed disagreement about AEDPA deference after federal evidentiary hearings, there is little likelihood that the resolution of that disagreement will have any effect on the ultimate outcome of this case.

C. In any event, the question whether AEDPA deference should apply when new evidence is reviewed for the first time in federal court was not pressed or passed upon below. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) (quoting *Duignan* v. *United States*, 274 U.S. 195, 200 (1927)).

Petitioner never asked the Fifth Circuit to apply de novo review to all of her claims of ineffective assistance, as she now urges (Pet. 19-20) this Court to do. Instead, she divided her ineffective assistance claims into those that were exhausted before the

state court and those that were unexhausted and therefore unadjudicated on the merits. Petitioner's merits brief in the Fifth Circuit acknowledged that "to the extent the state court adjudicated [her] claims," AEPDA deference should apply. C.A. Appellant's Br. 3. On the other hand, petitioner's brief urged, "[w]here the state courts did not make findings related to or adjudicate [her] claims, AEPDA's deferential standards do not apply." See *id.* at 3 (citing *Riley* v. *Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003)).

Petitioner's Fifth Circuit merits briefing did not address *Valdez* or any other case implicating the circuit split that is now the centerpiece of the first question presented in her petition for a writ of certiorari. See generally C.A. Appellant's Br.; C.A. Reply Br. Accordingly, the Fifth Circuit did as petitioner requested, applying its *Riley* line of cases holding that an ineffective assistance "sub-claim" receives de novo review if "a petitioner has properly exhausted his claim by raising it in the state court" but the state court "misunderstood the nature of the claim, and therefore did not adjudicate that particular claim on the merits." *Riley*, 339 F.3d at 318; see C.A. Appellant's Br. 3 (citing *Riley*).

II. The Second And Third Questions Presented Do Not Warrant Review Because This Case Is A Poor Vehicle For Addressing Aggregation Of Errors In Determining *Strickland* Prejudice

To claim ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), a "defendant must show that counsel's performance was deficient [and] that the deficient performance

prejudiced the defense." Petitioner contends that if multiple errors mar counsel's performance, then a court must aggregate the effects of those errors before determining prejudice. Review is sought on the ground that the Fifth Circuit failed to perform such aggregation. Pet. 22-25 (claiming, with regard to Corona's testimony, that "spillover effects of culpability phase ineffectiveness must be considered when assessing sentencing prejudice"); Pet. 25-29 (decrying "separate prejudice assessments for the various instances of deficient performance involving counsel's failure to investigate and present mitigating evidence"). This case is a poor vehicle for addressing aggregation of errors in *Strickland* analysis. Review should therefore be denied as to the second and third questions presented.

A. Petitioner did not adequately press her claim concerning the "spillover effects" (Pet. 22) of Corona's testimony in the court below. The Fifth Circuit has held that deficient performance during the guilt phase of a capital trial can prejudice the defense at the punishment phase. *Moore* v. *Johnson*, 194 F.3d 586, 619 (5th Cir. 1999); accord cases cited at Pet. 22-23. Due to omissions in petitioner's briefing, however, the Fifth Circuit did not address such spillover effects in her case. This Court should deny review as to subpart (A) of the second question presented, in light of petitioner's decision not to raise the claim and the Fifth Circuit's consequent failure to consider it. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (Harlan, J.) ("Where issues are

neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.").

In the merits briefs below, petitioner limited her claim of prejudice arising from Corona's guilt-phase testimony to its effect on the jury's culpability determination. See C.A. Appellant's Br. 39-46; C.A. Reply Br. 12-14. Petitioner stated that subtracting Corona's testimony by informing him of the marital privilege would have created "a reasonable probability . . . that at least one juror would have found reasonable doubt and [petitioner] would not have been convicted." C.A. Appellant's Br. 46. Crucially, petitioner never claimed in her merits briefs that removal of Corona's testimony created a reasonable probability that she would not have been sentenced to death. On the subject of punishment-phase prejudice, petitioner focused solely on counsel's failure to develop additional mitigation evidence, to the exclusion of the error leading to Corona's guilt-phase testimony. See *id.* at 60-63.

Given that petitioner never expressed the belief that Corona's testimony prejudiced her during the punishment phase, there was no reason for the court to do so of its own accord. The Fifth Circuit was entitled to take petitioner's argument as she presented it in her merits briefing. See *Brown* v. *Dretke*, 419 F.3d 365, 374 (5th Cir. 2005) ("The Court in *Strickland* in no way instructed courts to sua sponte aggregate the prejudicial effect of all alleged deficiencies urged by the claimant.").

Petitioner might respond with two snippets of briefing — neither of which appeared in her merits submissions — in which she vaguely alluded to the spillover effects of Corona's testimony. These do not show her to have pressed the claim below.

Near the end of a brief concerning the certificate of appealability, petitioner included a bullet-point list of fourteen failures of counsel alleged to have prejudiced petitioner, by their cumulative effect, at the guilt and punishment phases. C.A. Appellant's Mot. for Add'l COA Issues with Br. in Supp. 57-58. One bullet-point recounted the failure to "interview [petitioner's] husband, Corona, and inform him about spousal privilege." *Id.* at 57. This mention of Corona's testimony was too fleeting, and required too many inferential steps, to have pressed the spillover-effects claim. "Judges are not like pigs, hunting for truffles buried in briefs." *United States* v. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam).

Petitioner did urge the Fifth Circuit to consider the punishment-phase effect of Corona's guilt-phase testimony in her petition for panel rehearing, which devoted a sentence and a footnote to that claim. C.A. Appellant's Pet. for Panel Reh'g 15 & n.13. But this attempt to inject a new claim came too late. Cf. *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (mem.) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below."). A petition for rehearing is addressed to the court's discretion, *Conboy* v. *First Nat'l Bank of Jersey City*, 203 U.S. 141, 145 (1906), and hardly affords an opportunity squarely to consider any new claims therein raised.

B. In the surviving portions of the second and third questions presented, petitioner contends that the decision below is at odds with this Court's precedent regarding aggregation of errors in *Strickland* analysis. Petitioner asserts (Pet. 21) that "[t]he Fifth Circuit's ruling in this case strayed far from what appears to be this Court's clear mandate," as expressed in *Strickland*, 466 U.S. 668, *Williams* v. *Taylor*, 529 U.S. 362 (2000), and *Wiggins* v. *Smith*, 539 U.S. 510 (2003). Petitioner is wrong. On the subject of aggregation, the Fifth Circuit identified the relevant signposts from this Court's opinions and followed them to the extent they pointed the way.

On petitioner's view (Pet. 20-21), two words from this Court's opinions — *errors* and *totality* — dictate aggregation in any *Strickland* prejudice inquiry. By using the plural *errors* in its formulation of the prejudice standard, *Strickland* supposedly calls for aggregation. See 466 U.S. at 695 ("[T]he question is whether there is a reasonable probability that, absent the *errors*, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.") (emphasis added). References to the *totality* of the evidence are also said to demand aggregation. See *id.* at 695 ("[A] court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury.") (emphasis added); *Williams*, 529 U.S. at 397-398 (finding state court's "prejudice determination . . . unreasonable insofar as it failed to evaluate the *totality* of the available mitigation evidence") (emphasis added); *Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence

in aggravation against the *totality* of available mitigating evidence.") (emphasis added).

The opinion below quotes the foregoing language from *Strickland*, *Williams*, and *Wiggins*. Pet. App. 37a. If the words *errors* and *totality* are shorthand commands of aggregation, as petitioner contends, then these quotations establish that the Fifth Circuit applied the correct standard. Perhaps more could have been said in the opinion below concerning the cumulative effect of counsel's errors. For example, the Fifth Circuit could have elaborated on its conclusion that, "[f]or the remainder of [petitioner's] claim of ineffective assistance of counsel based on failure to investigate and present mitigating evidence, which we review de novo, we conclude that [petitioner] has failed to show *Strickland* prejudice." *Id.* at 40a-41a. Even if an additional sentence or footnote on aggregation would have been helpful, petitioner has, at worst, identified a "misapplication of a properly stated rule of law," Sup. Ct. R. 10, for which review is unwarranted.

Alternatively, if this Court has not demanded aggregation by its use of the words *errors* and *totality*, then the Fifth Circuit cannot have "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Petitioner's description of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (per curiam), reveals that she may overstate the clarity with which this Court has spoken to the aggregation issue. On petitioner's own reading, *Porter* merely "suggested" (Pet. 28) and "intimated" (Pet. 29) that courts should aggregate errors before determining prejudice. If *Strickland*, *Williams*, and *Wiggins* established a "clear mandate"

on the subject of aggregation, as petitioner claims (Pet. 21), it is difficult to see why the recent decision in *Porter* was so equivocal on that point.

C. Petitioner also bemoans (Pet. 26-27 & n.11) a conflict among the circuits concerning aggregation of errors for purposes of *Strickland* analysis. In describing this division of authority, however, she fails to acknowledge that the Fifth Circuit is on her preferred side of the circuit split. Petitioner would not have enjoyed a different result in a different circuit, because Fifth Circuit precedent actually embraces aggregation.

A majority of the circuits will aggregate the effects of counsel's errors in determining prejudice. See, *e.g.*, *Dugas* v. *Coplan*, 428 F.3d 317, 334-335 (1st Cir. 2005); *Gersten* v. *Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005); *Frey* v. *Fulcomer*, 974 F.2d 348, 361 n.12 (3d Cir. 1992) (Becker, J.); *Richards* v. *Quarterman*, 566 F.3d 553, 564, 571-572 (5th Cir. 2009); *Lundgren* v. *Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006); *Williams* v. *Washington*, 59 F.3d 673, 682 (7th Cir. 1995); *Richter* v. *Hickman*, 578 F.3d 944, 947, 967-968 (9th Cir. 2009) (en banc) (Reinhardt, J.), cert. granted sub nom. *Harrington* v. *Richter*, 2010 WL 596530 (U.S. Feb. 22, 2010) (No. 09-587); *Gonzales* v. *Tafoya*, 515 F.3d 1097, 1126 (10th Cir. 2008); *United States* v. *Fennell*, 53 F.3d 1296, 1304 (D.C. Cir. 1995) (Tatel, J.) (dictum) (citing *United States* v. *Hammonds*, 425 F.2d 597, 604 (D.C. Cir. 1970)). One circuit explicitly rejects aggregation.

See, *e.g.*, *Middleton* v. *Roper*, 455 F.3d 838, 851 (8th Cir. 2006). The law is unclear in two other circuits.[3]

Notably, the Fifth Circuit is among the circuits that aggregate. See *Richards*, 566 F.3d at 564, 571-572 (holding defendant was prejudiced by "the cumulative effect" of counsel's errors); *Leal* v. *Dretke*, 428 F.3d 543, 552-553 (5th Cir. 2005) (holding district court was right to "consider the prejudice resulting from . . . counsel's alleged deficiencies globally rather than in isolation"); *Knox* v. *Johnson*, 224 F.3d 470, 479 (5th Cir. 2000) (holding defendant was not prejudiced by counsel's errors, "even when considered cumulatively"); *Moore* v. *Johnson*, 194 F.3d 586, 619-622 (5th Cir. 1999) (holding defendant was prejudiced by aggregate effect of counsel's "cumulative errors"). Petitioner therefore would not have encountered more favorable precedent or secured a different result had she taken an appeal in another circuit.

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[3] Citing cases that do not explicitly address aggregation, petitioner claims (Pet. 26-27) the Fourth and Eleventh Circuits "affirmatively . . . refus[e] to cumulate all instances of deficient punishment phase performance when assessing sentencing prejudice." Yet these circuits have at least entertained aggregation arguments, rather than dismissing them out of hand. See, *e.g.*, *Hedrick* v. *True*, 443 F.3d 342, 359 (4th Cir. 2006); *United States* v. *Roane*, 378 F.3d 382, 405 (4th Cir. 2004); *Johnson* v. *Alabama*, 256 F.3d 1156, 1187 n.17 (11th Cir. 2001). See also *United States* v. *Russell*, 34 F. App'x 927, 927-928 (4th Cir. 2002) (per curiam) (discounting earlier statement, in *Fisher* v. *Angelone*, 163 F.3d 835, 852-853 (4th Cir. 1998), that "ineffective assistance of counsel claims . . . must be reviewed individually, rather than collectively").

D. Were the Court to grant review, it would find that aggregating the effects of trial counsel's errors does not show petitioner to have been prejudiced at the punishment phase. If the Court wishes to deliver a clear statement concerning aggregation of errors in *Strickland* analysis, there will be better vehicles than this case. The wiser course is to await a case in which the outcome of the prejudice analysis depends on the resolution of the aggregation question. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("[This Court's] function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.").

Petitioner invites this Court to repeat the Fifth Circuit's prejudice analysis, "cumulat[ing] all the instances of deficient punishment phase performance related to Mathis and the 17 St. Kitts witnesses, together with the mitigating evidence adduced from her family at trial." Pet. 27. This exercise, she says, will reveal "a much richer, positive depiction of [petitioner] drawn from the various aspects of her life" — so much richer and more positive, in fact, that petitioner would not have been sentenced to death for murdering Joana Rodriguez while kidnapping her baby. *Id.* For the reasons set forth in the Fifth Circuit's opinion, petitioner's argument overstates the cumulative value of her mitigation evidence. There is no reason to rehash petitioner's prejudice analysis, either in this Court or in the Fifth Circuit on remand.

Each omitted piece of mitigation testimony was individually weak. Mathis would have "provided some favorable if mixed testimony about [petitioner's] performance as an informant for the

DEA," Pet. App. 41a, and would have testified that " '[t]he [petitioner] I know is not a violent person, let alone a cold-blooded murderer,' " *id.* Besides finding this information "relatively unpersuasive," *id.*, the Fifth Circuit explained that Mathis's proffered punishment-phase testimony was duplicative of his guilt-phase testimony that " 'I've known [petitioner] for a long time and I did not believe that she could do something like this,' " *id.* at 41a n.15. The latter statement was considered by the jury at sentencing, as petitioner elsewhere explains (Pet. 24 n.8).

Petitioner's seventeen friends and acquaintances from St. Kitts would have "provided a much more nuanced and detailed vision of [petitioner's] life and contributions to the St. Kitts community," by testifying to her involvement in her school, church, and political party. Pet. App. 41a-42a. The Fifth Circuit found that this "proffered testimony of her good character," coming as it did from people far removed from petitioner's life in Texas, was " 'weak and stale' when compared to the person she had become — a person who stole cars; organized drug deals, burglaries, and kidnapings; and committed murder." *Id.* at 42a. Moreover, the Fifth Circuit found that although testimony from the St. Kitts seventeen would have given "more detail and more focus to the mitigating evidence," it was duplicative of what was actually presented during the trial's sentencing phase. See *id.* ("[T]he testimonies of Enid, Isalyn, and Jovelle . . . presented at least some of the proffered information to the jury.").

Corona "would have testified to the jury that [petitioner] 'did not deserve the death penalty' and that he did not 'believe she is an aggressive person or

a threat to society.' " Pet. App. 41a. The Fifth Circuit found this testimony, which was partially duplicative of other mitigation evidence, to be "relatively unpersuasive." *Id.* In addition, putting Corona on the stand during the punishment phase would have allowed for impeachment concerning petitioner's feigned pregnancies, which would weaken the mitigating effect of his testimony by exposing petitioner's mendacity.

The whole of petitioner's mitigation evidence does not exceed the sum of its parts. As described above, the evidence trial counsel could have introduced merely reiterated the message conveyed by the evidence trial counsel did introduce. Petitioner's family testified that she was kind, nonviolent, and beloved on St. Kitts, while Mathis testified that murder was not in petitioner's nature, but the jury found this mitigation evidence did not outweigh the aggravating factors. Pet. App. 11a. Mathis could have repeated his guilt-phase testimony that petitioner was not the murdering type; the St. Kitts friends could have elaborated on the testimony from petitioner's family concerning her good character and her life on the island; and Corona could have echoed that petitioner was peaceful, if dishonest. There is no reason to believe, however, that more of the same evidence would have yielded a different result.

Taken together, petitioner's aggregation of weak, duplicative, and possibly counterproductive mitigation testimony does not establish a reasonable probability that a jury presented with that evidence would have chosen a life sentence. The proffered testimony would not have tipped the balance against the prosecution's aggravating circumstances, which

centered on petitioner's future dangerousness in light of her criminal history. See Pet. App. 9a-10a (recounting punishment-phase evidence showing that petitioner had stolen a car while impersonating an FBI agent, and had been arrested in possession of pistols, $3900 in cash, and fifty pounds of marijuana following a high-speed car chase during which she attempted to run over a police officer). Accordingly, resolving the aggregation question would be a purely academic exercise in this case.

III. A Stray Citation Of *Lockhart* v. *Fretwell* In The Opinion Below Does Not Warrant Review Of The Fourth Question Presented

Petitioner contends (Pet. 29-33) the Fifth Circuit applied an overly demanding prejudice standard from *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993), when it rejected the ineffective-assistance claim involving Corona's marital privilege. That argument misrepresents the proceedings below. In accord with this Court's precedent and its own, the Fifth Circuit unremarkably applied the prejudice standard set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Review is therefore unwarranted as to the fourth question presented.

To establish prejudice, a defendant ordinarily must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. As seen in exceptional cases like *Lockhart*, an inquiry into "mere outcome determination," 506 U.S. at 369, will not always suffice. See *id.* at 368-372 (holding counsel's failure to assert a right to which defendant is not entitled cannot establish prejudice); *Nix* v. *Whiteside*, 475

U.S. 157, 175-176 (1986) (holding counsel's refusal to allow defendant to perjure himself cannot establish prejudice). Such cases, however, are quite rare. See *Lockhart*, 506 U.S. at 373 (O'Connor, J., concurring) ("[T]oday's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under [*Strickland*]."). As this Court explained in *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000), "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims."

The Fifth Circuit is well aware of the limited circumstances in which *Lockhart*'s heightened prejudice standard applies.[4] And that court correctly applied the ordinary *Strickland* standard in petitioner's case. The relevant portion of the opinion below opened with a recitation of settled law. Pet. App. 26a (quoting the "reasonable probability" prejudice standard from *Strickland*, 466 U.S. at 694); Pet. App. 33a ("[Petitioner] bears the burden of showing a reasonable probability of a different result had Corona not testified."). Having identified the appropriate standard, the Fifth Circuit concluded its prejudice analysis with a sound pronouncement that trial counsel's error was not outcome-determinative. *Id.* at 35a ("Although Corona's testimony was

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[4] See, *e.g.*, *Young* v. *Dretke*, 356 F.3d 616, 627 (5th Cir. 2004) ("*Williams* thus leaves no doubt that where deficient performance denies the petitioner a substantive or procedural right to which he is lawfully entitled, prejudice is to be determined, routinely, under the second prong of *Strickland*."). There is no merit to petitioner's suggestion (Pet. 32-33) that "the Fifth Circuit needs to be instructed again on the correct course of applying *Strickland*'s prejudice standard."

obviously damaging to [petitioner's] defense, we conclude, based on the totality of the evidence, that [petitioner] has not shown that but for trial counsel's deficient failure to advise Corona of his marital privilege there was a reasonable probability that she would not have been convicted of capital murder.").

Petitioner seizes upon the fact that the opinion below quoted *Ransom* v. *Johnson*, 126 F.3d 716, 721 (5th Cir. 1997), which in turn quoted *Lockhart*, 506 U.S. at 369. See Pet. App. 33a ("Although this is a close case, [petitioner] has not made the requisite showing that [Corona's] testimony rendered her conviction 'fundamentally unfair or unreliable.' "). Contrary to petitioner's suggestion (Pet. 31), this stray citation of *Lockhart* reveals no departure from the proper *Strickland* standard. Indeed, the quoted language invokes principles developed in *Strickland* itself. Compare Pet. App. 33a (noting that conviction was not " 'fundamentally unfair or unreliable' " (quoting *Ransom*, 126 F.3d at 721 (quoting *Lockhart*, 506 U.S. at 369))), with *Strickland*, 466 U.S. at 687 ("[T]he defendant [establishes prejudice by] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."), and *id.* at 696 ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.").

To be sure, it would have been error to require that petitioner show something more than a reasonable probability of a different outcome. See *Williams*, 529 U.S. at 391-398 (holding state court erred in reading *Lockhart* to require additional inquiry into fundamental fairness, where counsel's error was probably outcome-determinative). But the

Fifth Circuit eschewed the "erroneous view that a 'mere' difference in outcome is not sufficient," *id.* at 397, reasoning instead "that [petitioner] has not shown that but for trial counsel's deficient failure . . . there was a reasonable probability that she would not have been convicted of capital murder," Pet. App. 35a. The decision below thus embraced the standard that was erroneously cast aside by the state court in *Williams*, 529 U.S. at 394, 397.

The Fifth Circuit applied the correct standard in concluding petitioner was not prejudiced by counsel's failure to inform Corona of the marital privilege. Granting certiorari as to the fourth question presented would provide an opportunity to edit the opinion below by deleting the innocuous *Lockhart* citation, but no occasion to alter the judgment. As such, review is unwarranted. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

IV. The Off-The-Rack Argument In The Fifth Question Presented Is Not Fairly Presented By The Facts Of This Case

Less than a month ago, the Court declined to review a near-perfect copy of petitioner's fifth question presented. See *Skinner* v. *Thaler*, No. 09-7784 (U.S. Mar. 1, 2010) (order denying certiorari). Having just denied review of an argument that tracks petitioner's almost word for word, the decision to deny review of her fifth question presented should follow as a matter of course. Compare Petition for Writ of Certiorari at 17-26, *Skinner* v. *Thaler* (U.S. Nov. 23, 2009) (No. 09-7784), with Pet. 33-37.

This case is an even worse vehicle than *Skinner* because the question is not fairly presented. Petitioner argues (Pet. 36) that "[i]f a reasonable probability of prejudice exists with respect to any aspect of a petitioner's IAC claim, logic demands that the court should grant COA as to the entire IAC claim." But logic also dictates that if the court denies a certificate of appealability on an ineffective-assistance subclaim because counsel's performance was not ineffective, then there is no reason to cumulate prejudice resulting from that subclaim. Cf. *Miller* v. *Johnson*, 200 F.3d 274, 286 n.6 (5th Cir. 2000) ("[Petitioner] has not demonstrated error by trial counsel; thus, by definition, [he] has not demonstrated that cumulative error of counsel deprived him of a fair trial."). In petitioner's case, all of the ineffective-assistance subclaims on which the Fifth Circuit denied a certificate of appealability were rejected on the ground that trial counsel's performance did not fall below an objective standard of reasonableness. See Pet. App. 51a-59a.

In any event, the argument petitioner copied from the *Skinner* petition is unsound. Petitioner argues (Pet. 34-35) that because a certificate of appealability issues upon showing denial of "a constitutional right," 28 U.S.C. 2253(c)(2), a court must consider "the entirety" of the constitutional claim. This argument ignores the statute's next sentence: "The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing [of denial of a constitutional right]." 28 U.S.C. 2253(c)(3). Petitioner's off-the-rack question presented has no basis in the statutory text and does not fit the facts of her case. The Court should decline to review it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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