No. 18-674

IN THE

Supreme Court of the United States

JEDIDIAH ISAAC MURPHY,
Petitioner,

vs.

LORIE DAVIS, Director
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Murphy presents the following questions in his petition for writ of certiorari:

1. Did the Fifth Circuit err in rejecting Murphy's claim that his trial counsel were ineffective for failing to use their redirect examination of defense expert Dr. Mary Connell to correct any misapprehension that the doctors who created the multiple-choice psychological tests given to Murphy personally evaluated his answers?

2. Did the Fifth Circuit err by presuming the state habeas court's alternative merits findings related to Murphy's *Brady* claim correct under 28 U.S.C. § 2254(e)(2)?

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BRIEF IN OPPOSITION

Petitioner Jedidiah Isaac Murphy was convicted of capital murder and sentenced to death for killing an elderly woman, Bertie Cunningham, in the course of a kidnapping and robbery. His conviction and sentence were affirmed on appeal. He now files the instant petition for writ of certiorari. But the questions Murphy presents for review are unworthy of the Court's attention. He has failed to provide a single compelling reason to grant review. No circuit conflict has been supplied; no important issue proposed; nor has a similar pending case been identified to justify this Court's discretionary review.

First, the Fifth Circuit properly rejected Murphy's claim that his attorneys were ineffective during the punishment phase of his trial because they failed to correct a false impression created during the State's cross-examination of his own expert. Counsel were not deficient for declining to use their redirect examination of their expert to illuminate a meaningless distinction between an interpretation of multiple-choice tests by computer programs created by doctors and a personal evaluation of the tests by the doctors themselves. Instead, counsel reasonably relied on their expert to explain the reports and exhibited a well-developed strategy to concentrate on the cautionary instructions printed on the reports and on the expert's mitigating conclusions. Moreover, the proposed clarification would not have influenced the jury; thus, Murphy fails to demonstrate prejudice. In this Court, Murphy cherry-picks discrete pieces of reasoning in an effort to isolate them from the context of the Fifth Circuit's extensive,

well-reasoned rejection of his arguments. He has identified no split of authority or misapplication of this Court's precedent.

Second, Murphy contends that the lower federal courts improperly applied 28 U.S.C. § 2254(e)(1)'s presumption of correctness to the state habeas court's alternative merits findings; but, again, he has failed to identify conflicting precedent from this Court or any other. Indeed, application of the presumption in these circumstances is consistent with the direction from this Court, cases from other federal circuit courts, and the policy underlying federal habeas review of state court judgments. In addition, success in this Court on this issue would not entitle Murphy to relief as the Fifth Circuit did not directly rely on any state-court fact finding in its reasoning, and Murphy's *Brady*[1] claim is plainly meritless.

Here, Murphy's petition, at best, simply requests error correction, and this Court's limited resources would be better spent elsewhere. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Thus, the petition for writ of certiorari should be denied.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963) (finding a constitutional violation where evidence is suppressed by the State, favorable to the defense, and material)

STATEMENT OF THE CASE

I. THE FACTS OF MURPHY'S CAPITAL MURDER

The convicting court described the facts of the offense as follows:

> During the afternoon hours of Wednesday, October 4, 2000, Murphy kidnapped, robbed, and murdered 80-year-old Bertie Cunningham while Ms. Cunningham was on her way home from shopping at the Collin Creek Mall in Plano. Murphy forced Ms. Cunningham into the trunk of her car and shot her in the head. The medical examiner testified that although Ms. Cunningham's wound was fatal, her death was not instantaneous; she may have lived for several minutes or longer in a comatose state.
>
> Immediately after the shooting, Murphy repeatedly attempted to withdraw money from Ms. Cunningham's bank account using her ATM card. These attempts failed, but over the next two days, Murphy successfully used Ms. Cunningham's credit cards at various retail and restaurant locations.
>
> Shortly after shooting Ms. Cunningham and while she was still in the trunk, Murphy picked up his niece and two of her teenage friends and drove them around in Ms. Cunningham's car. He purchased beer for himself, then he

> purchased the two teenage boys motorized scooters from a Richardson sporting goods shop using Ms. Cunningham's credit card. The next day, Murphy drove to Van Zandt County to visit his friend Treshod Tarrant, and bought dinner, beer, and liquor. The police discovered Murphy at Tarrant's grandmother's house early the next morning and arrested him. Ms. Cunningham's vehicle was parked near the house.
>
> Upon his arrest, Murphy admitted he had dumped Ms. Cunningham's body in a creek. He led police to the location of the body and subsequently executed a written statement in which he claimed he accidentally shot Ms. Cunningham while forcing her into the trunk.

ROA.497–498 (citations omitted).

II. THE STATE'S PUNISHMENT CASE

At punishment, the State presented evidence of several extraneous offenses, adjudicated and unadjudicated. Sheryl Wilhelm testified that on August 26, 1997, a man kidnapped her from the parking lot of Arlington Memorial Hospital, where she worked. ROA.10954–10955. Wilhelm said her kidnapper choked her and, in a "mean," "hateful" voice, he told her to get down on the floor. ROA.10960–10961. Wilhelm said the man repeatedly told her he was not going to hurt her, but she felt like he would kill her. ROA.10962–10964. As they drove away from the hospital, Wilhelm leapt from the car and escaped. ROA.10966–10968.

Although she described her assailant to police, helped the police prepare a composite drawing, and viewed at least one photographic line-up, which did not include a photo of Murphy, no one was arrested in connection with her attack. ROA.10968–10969. Years later, after she heard a television report about Cunningham's abduction and saw a televised picture of Murphy, she recognized Murphy as her assailant and contacted police. ROA.10974. When shown a photographic lineup, she identified Murphy as her attacker. ROA.11003.

The State also presented evidence of Murphy's multiple prior theft convictions, for which he failed to pay full restitution, and possession of marijuana. ROA.10832–10835; ROA.10863; ROA.10880–10897. Further, officer James Lee testified that on August 17, 1997, he responded to a domestic-disturbance call at a mobile home park. When he entered the mobile home, he found a "white male [later identified as Murphy] standing there with a knife in his right hand." ROA.10905–10909. Also in the home was Chelsea Willis, who had a bloody nose. Lee disabled Murphy with pepper spray. ROA.10905–10909. Although Murphy was charged with assault resulting in bodily injury, he was never convicted. ROA.10910–10911. Mandy Kirl testified that, when they were in high school, Murphy had pulled a gun on her, put it to her head, and asked if she was afraid to die. ROA.11053–11062. Shirley Bard, a coworker of Murphy, testified that Murphy talked about having access to guns, bragged about shooting at people, threatened to blow her away and "knock her fucking head off," and told her he could kill her and she would not see it coming. ROA.8127–8134. Bard was

frightened enough by Murphy's threats that she tried to quit her job, and she called the sheriff's department. ROA.8134–8138.

III. THE DEFENSE'S CASE IN MITIGATION

Much of the defense's case involved testimony about Murphy's difficult childhood. Murphy's father was a violent alcoholic, who beat his wife and children. ROA.7626, ROA.7620, ROA.7659–7686. After his parents separated, Murphy and his brother, Donnie, lived with their grandparents, who provided a loving home. ROA.7627–7628. But after they became ill, the children spent some time in an orphanage. ROA.7496.

When Murphy was about nine or ten, he and Donnie were adopted by Terry and Celeste Tolar. ROA.7629, ROA.7632. At around the age of twelve, Murphy was again adopted by Bob and Samantha Murphy, while Donnie, who exhibited behavioral difficulties, was returned to state custody. ROA.7501. Although the couple later divorced, the evidence showed that before the divorce, Murphy got along well with his adoptive family. ROA.7547–7548.

Chelsea Willis, the mother of Murphy's daughter, described Murphy as a caring, good father. ROA.7569–7579. She acknowledged he was different after he had been drinking. ROA7569–7579. The defense also offered expert testimony to rebut Wilhelm's identification of Murphy as her abductor. Dr. Leon Peek, a psychologist, explained that Wilhelm identified Murphy because she had seen his face on television in connection with the Cunningham abduction. ROA.11092–11106.

Dr. Mary Connell testified that Murphy "perceive[d] himself as unlovable," "reiterated his self-loathing," and spoke with reverence about victim Bertie Cunningham. ROA.7775–7776. Dr. Jaye Crowder, a psychiatrist, said that he "would diagnose [Murphy] as suffering from what we call major depression and dysthymic disorder," and "from a narcissistic and borderline personality disorder with some antisocial features." ROA.7859–7860. On cross-examination, Dr. Crowder testified that Murphy would likely not be a future danger in prison; however, he acknowledged that "[o]n the outside I would be concerned about him." ROA.7925. Dr. Gilda Kessner testified that based on several studies and Murphy himself, she did not believe Murphy posed a future danger. ROA.7938–7981. On cross-examination, however, she acknowledged that her definition of "society" was limited to prison. ROA.8017.

IV. MURPHY'S POSTCONVICTION PROCEEDINGS

On direct appeal, the Texas Court of Criminal Appeals (TCCA) affirmed Murphy's conviction and sentence. *Murphy v. State*, 112 S.W.3d 592 (Tex. Crim. App. 2003). Adopting the convicting court's findings and conclusions, the TCCA denied state habeas relief. *Ex parte Murphy*, No. WR-70,832-01, 2009 WL 766213, at *1 (Tex. Crim. App. Mar. 25, 2009).

Murphy filed his federal habeas petition on January 28, 2010, alleging ineffective-assistance-of-trial-counsel (IATC) and *Brady* claims, which were not raised in his initial state habeas application. The federal district court granted Murphy's motion to stay and hold his proceedings in abeyance to allow Murphy to return to state court. On July 13, 2010, Murphy filed his second

state habeas application. ROA.10310–10384. After determining that Murphy's IATC claims did not meet the requirements of Article 11.071, section 5, of the Code of Criminal Procedure, the TCCA dismissed them as abusive. *Ex parte Murphy,* No. WR-70,832-02, 2010 WL 3905152, at *1 (Tex. Crim. App. Oct. 6, 2010). As to the *Brady* claims, the court remanded to the convicting court for factual development to determine whether the claims met the requirements for review of a subsequent habeas petition, and if it did, whether the claim had merit. *Id.*

On remand, the convicting court held an evidentiary hearing and issued findings and conclusions recommending that the *Brady* claims be dismissed as abusive or, in the alternative, denied on the merits. ROA.10105–10142. The TCCA dismissed the claims as an abuse-of-the-writ based on the findings of the convicting court. *Ex Parte Murphy,* No. WR-70,832-02, 2012 WL 982945, at *1 (Tex. Crim. App. Mar. 21, 2012). After returning to federal court, the district court denied Murphy's petition. App. at 76a–152a, ROA.484–550. Murphy filed a motion for Certificate of Appealability (COA) raising eleven claims; the Fifth Circuit denied COA on nine claims and granted COA on two. App. at 40a–75a, *Murphy v. Davis*, 732 F. App'x 249, 256 (5th Cir. 2018). Subsequently, the Fifth Circuit rejected the two remaining claims and affirmed the denial of habeas relief. App. at 1a–39a, *Murphy v. Davis*, 901 F.3d 578, 586 (5th Cir. 2018). This petition follows.

REASONS TO DENY THE PETITION

I. THE FIFTH CIRCUIT PROPERLY REJECTED MURPHY'S IATC CLAIM.

A. THE *STRICKLAND* STANDARD

The Sixth Amendment, together with the Due Process Clause, guarantees a defendant both the right to a fair trial and the right to effective assistance of counsel at that trial. *Strickland v. Washington*, 466 U.S. 668, 684–86 (1984). A defendant's claim that he was denied constitutionally effective assistance requires him to affirmatively prove both that (1) counsel rendered deficient performance, and (2) his actions resulted in actual prejudice. *Id*. at 687–88, 690. Importantly, failure to prove either deficient performance or resultant prejudice will defeat an IATC claim, making it unnecessary to examine the other prong. *Id*. at 687.

To demonstrate deficient performance, Murphy must show that in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e., "prevailing professional norms." *Id*. at 689–90. This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight." *Strickland*, 466 U.S. 689–90. Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

This reasonableness standard applies also to counsel's investigation. Strategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Strickland*, 466 U.S. at 690–91.

Finally, even if deficient performance can be established, Murphy must still affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This requires him to show a reasonable probability that "but for counsel's deficiencies, the result of the proceeding would have been different." *Id*. at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Id*. The question in conducting *Strickland*'s prejudice analysis "is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citations omitted). Rather, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id*. at 112 (citation omitted).

B. RELEVANT FACTS

1. DR. CONNELL'S TRIAL TESTIMONY

Dr. Connell was retained to evaluate Murphy and deliver testimony related to the mitigation special issue. ROA.7738–7740. She testified that she interviewed Murphy three times, interviewed Murphy's family and other acquaintances, reviewed his records, and administered multiple tests. ROA.7737–7738, 7744. As

relevant here, she administered two tests "designed to sample personality attributes," the Minnesota Multiphasic Personality Inventory, II (MMPI-II) and the Millon Clinical Multiaxial Inventory 3 (MCMI-III). ROA.7738–7742.

Dr. Connell explained that the MMPI-II is a 567-item test consisting of true/false questions. ROA.7738–7739. She "gave this test to Mr. Murphy and scored the results with a computer system looking at the kind of clinical interpretation, how did he look compared to other people in clinical settings." ROA.7739. Dr. Connell explained that the results of these tests indicated that Murphy exhibited signs of multiple psychological issues, including depression, paranoid thoughts, and extreme emotional distress. ROA.7740–7741. While "the first interpretation is that this person may be exaggerating," she concluded that he was "fairly faithful in describing himself" and not malingering. ROA.7741–7743.

Dr. Connell described the MCMI-III as a test consisting of 175 questions "aimed at looking at character problems." ROA.7740. She testified that Murphy again "subscribed to a broad range of symptoms," and that he judged himself harshly and did not try and make himself look good. ROA.7741. She explained that the MCMI-III showed that he was "deeply depressed with an agitated edge," and that his thoughts were "shifting between self-deprecation and despair, thoughts of suicide and hopelessness, futility, to occasional outbursts of bitter discontent or irrational demands." ROA.7783. Dr. Connell used the tests and the information she obtained through interviews and a review of Murphy's records to paint a sympathetic

picture of a man whose "genetic predisposition" to alcoholism was "fueled" by his self-resentment. ROA.7784.

During cross-examination, the prosecutor elicited testimony that there were interpretive reports related to the tests performed by Dr. Connell, bearing the names of Dr. James Butcher and Dr. Theodore Millon. ROA.7828. The State introduced the reports into evidence. ROA.7831, ROA.7835, ROA.9251–9261, ROA.9263–9275.

Dr. Connell testified that Dr. Butcher is probably the leading expert in the country on the interpretation of the MMPI. ROA.7828. She agreed with the prosecutor's statement that, "[i]n fact, Dr. Butcher, interpreted the [MMPI-II] that was administered to [Murphy]." ROA.7828. The prosecutor read multiple statements from the report that could indicate that Murphy would be a future danger. He asked Dr. Connell, "[T]hose were the statements of Dr. Butcher, weren't they?" ROA.7830. She responded, "They were, yes." ROA.7830. Dr. Connell responded "yes" in multiple instances after the prosecutor referred to statements made by Dr. Butcher in the report. ROA.7831–7835. However, Dr. Connell also explained that the reports did not offer conclusions, but hypotheses. ROA.7829. Specifically, she pointed out that "on the beginning of the report, it says that the interpretation that is offered is not meant to be a final interpretation, that, interview, observation, and history should be taken into account and so forth. So he offers these as hypotheses." ROA.7829. Once again, she later described a statement

from the report as a "hypothesis about his personality." ROA.7830.

Regarding the MCMI-III, Dr. Connell agreed with the prosecutor that Dr. Theodore Millon is the creator of the actual test; thus, Dr. Connell considered him to be "authoritative." ROA.7835. She also agreed that the interpretive report provided was "produced by Dr. Millon." ROA.7835. The prosecutor directed Dr. Connell to a portion of the report indicating that Murphy may have been exaggerating some of his symptoms and that he used drugs as a statement of "resentful independence." ROA.7838–7840. Dr. Connell noted that the prosecutor was skipping over multiple paragraphs. ROA.7838. When asked if she looked at all of Murphy's individual responses to questions on the MCMI-III, Dr. Connell responded, "Again, not all 175 of them, but instead critical items that emerge as it's computer scored." ROA.7840. Dr. Connell also explained, "I don't know that these results should be considered definitive for diagnosis, for example. I find them useful in elucidating or illuminating some of his personality characteristics as he perceives them essentially." ROA.7837.

On redirect, Murphy's counsel asked Dr. Connell, "Now, the answers, the information that's been testified about the experts in these—according to these tests that you gave, are in part of your report; is that correct?" ROA.7850. Dr. Connell responded, "Yes." She also agreed that "those things were considered." ROA.7850. Counsel then directed Dr. Connell to information in the reports that the prosecutor "left out" during cross-examination. ROA.7851. She asked Dr. Connell to read

a portion of the report stating that Murphy's alcohol abuse is caused by his frustration and disappointment in his life, that he expresses genuine feelings of guilt and remorse, and that his inappropriate behavior manifests when he is drinking. ROA.7852–7853. Counsel also had Dr. Connell explain that Murphy does not continue to use drugs and alcohol. ROA.7853.

Finally, counsel asked, "And the purpose of these tests again, Dr. Connell, are what?" ROA.7853. She responded, "Well, I administered them in order to help myself gain an understanding of his view of his own functioning and an understanding of how he compares to other people in similar situations. I didn't administer them for the diagnosis or treatment of a disorder, but just to give myself a sort of objective and normative feel for who it was that I was attempting to understand." ROA.7853–7854. Dr. Connell then testified that her opinion of Murphy remained the same, that Murphy "was essentially truthful with me, quite self-deprecating, not attempting to blame anyone else for his behavior," and that "he was still suffering enormously over the guilt for what he had done . . . ." ROA.7854. Dr. Connell's report was then admitted into evidence. ROA.7855; ROA.9430–9450.

2. STATE HABEAS EVIDENCE

Dr. Connell provided an affidavit, which was attached to Murphy's state habeas application, explaining that she had ordered reports that were run through computer programs created by the two doctors. ROA.10466–10471. She explains that the reports compared Murphy's tests with group profiles of other

research subjects and generated hypotheses about him. ROA.10466–10471. Specifically, she explained,

> I scanned his answers and fed the information into a database. Once the data was scored, I had to decide whether to request a report in profile form or a more extensive report that might include the interpretation of Butcher (regarding the MMPI-2) and Millon (regarding the MCMI-III) to generate some hypotheses. I requested the interpretive reports.

ROA.10468. Dr. Connell's affidavit then recites the "cautionary statement on each report." ROA.10468. She concludes that the jury was left with a false impression that Dr. Butcher and Dr. Millon interpreted Murphy's test results. ROA.10470.

Murphy's trial counsel, Jane Little, also provided an affidavit attached to Murphy's state habeas application. When asked to respond to why she did not "correct the false impression that the prosecution created on cross-examination of Dr. Mary Connell," she explained that "regardless of the interpreter of the tests, the results were what they were. I decided after consultation with all three experts, but on my own to call Dr. Connell in order to show the jury what kind of life Jedidiah Murphy had been exposed to growing up." ROA.10464. She also stated that she was aware that the evidence would be "double-edged," but "concluded that combined with Dr. Jaye Crowder's testimony and the statistical testimony of Dr. [Kessner] about prisoner behavior, the jury might weigh in more heavily on the mitigation instead of aggravation." ROA.10464.

C. THE FIFTH CIRCUIT PROPERLY DETERMINED THAT COUNSEL WERE NOT DEFICIENT.[2]

Murphy argues that the Fifth Circuit "erred in requiring that an expert witness, instead of trial counsel, correct the false impression that the prosecutor created on cross-examination that the leading experts in the country on the interpretation of certain psychological tests had evaluated Murphy's results and concluded that he would be dangerous in prison . . ." Pet. at 7. In his federal petition, Murphy proposed that counsel should have asked Dr. Connell to explain, as she does in her postconviction affidavit, that she obtained the interpretive reports of the two doctors by running Murphy's multiple-choice tests through a computer

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[2] This claim was dismissed as abusive in state court; thus, the district court found the claim to be procedurally barred in federal court. ROA.515–516, 535–536. The Fifth Circuit acknowledged the procedural bar issue, but "instead of deciding if Murphy can overcome his procedural default via *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), [the court] cut straight to the merits to deny his claim." App. at 17a n. 4. The federal procedural default doctrine precludes federal habeas corpus review unless the petitioner establishes cause for the default and actual prejudice, or a miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 749–50 (1991). Under *Martinez*, "inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of [IATC]." 566 U.S. at 9. Indeed, as state habeas counsel could not have been ineffective for failing to raise this insubstantial claim, the district court properly found that Murphy cannot meet the *Martinez* standard to show cause. Nor can he show actual prejudice under *Coleman*. Thus, the district court properly considered the claim defaulted.

program created by the doctors.[3] He also argued that an evidentiary hearing was necessary to determine if counsel knew that the reports were computer generated.

Murphy does not fault counsel for failing to object to any questions, testimony, or argument. Instead, his claim is confined to his assertion that counsel "did not elicit testimony on redirect examination of Dr. Connell to correct the false impression. . . ."[4] Pet. at 11. However, as the district court held, that "would not appear to have been necessary or an effective trial strategy." ROA.521.

The Fifth Circuit agreed, determining that counsel were not deficient for failing to pursue a different strategy during their redirect examination regardless of whether they were aware that the reports were computer generated. Specifically, the lower court's reasoning included that: (1) counsel reasonably concluded that regardless of how they were created, the reports "were what they were" (App. at 22a–25a); (2)

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[3] Murphy does not claim that Dr. Connell testified falsely, but that her testimony allowed the prosecutor to create a false impression. In this regard, Dr. Connell's testimony was ambiguous as to the method by which these interpretive reports were created. At multiple points during the cross examination, Dr. Connell agreed that the statements made in the interpretive reports were provided by the two doctors who had analyzed the tests. ROA.7828–7835. But she also generally explained that the tests were computer scored and that she used a "computer interpretive program." ROA.7739, ROA.7827, ROA.7840.

[4] Notably, Murphy does not argue, nor is there any evidence in the record supporting, that the jury harbored a false impression that Murphy himself was personally evaluated by the doctors, only a false impression that the doctors evaluated his multiple-choice test results.

counsel made an informed decision to adopt a mitigation-focused strategy, *id.*); (3) counsel elicited an effective counter to the damaging information in the reports by having Dr. Connell explain that they only provided hypotheses for further analysis (*id.* at 23a); (4) it was not obvious that the State would rely on the interpretive reports to the extent that it did at closing arguments (*id.* at 24a); and (5) counsel's retained expert did not alert them to any important clarification that needed to be made regarding the involvement of the creators of the tests in interpreting Murphy's multiple-choice answers *id.*).

Contra Murphy's contentions, the Fifth Circuit did not create a blanket rule that would allow trial counsel to rely on their expert in all matters of strategy. Instead, as explained above, the court considered a variety of factors—including that there was an adequate rebuttal to the State's line of questioning and that the proposed clarification was not meaningful or necessary—to conclude that counsel's performance was reasonable. The Fifth Circuit even explicitly noted that "hiring an expert and having her testify does not give counsel license to completely abdicate responsibility." App. at 24a.

Here, counsel certainly did not abdicate their responsibility. As is clear from counsel's postconviction affidavit, they knew Dr. Connell's testing contained potentially damaging information and had a strategy to deal with it. ROA.10464. That strategy did not include an effort to draw a fine distinction between computer-generated interpretive reports and personal evaluations

of the multiple-choice tests—which likely would have made no difference to the jury.

Indeed, counsel's assessment that the reports "were what they were" regardless of their origin was reasonable. *Id.* As the Fifth Circuit appropriately explained, "[i]t strains credulity to believe that, had the jury given the reports weight, merely clearing up that the tests were graded by computer, not hand, would change its opinion." App. at 27a. In this regard, a doctor does not need to personally evaluate answers to a multiple-choice test after it has been taken to provide an interpretation. The doctors' names are on the reports because they created the computer programs that interpreted Murphy's answers—the interpretations are *their* work product even if produced by algorithm because it is *their* algorithm. Any clarification merely would have shown that the doctors' analyses were one step removed, and in fact, only would have further highlighted that the reports were the doctors' own work product.[5]

Further, as is evidenced from the record, Dr. Connell did not deem it necessary, at trial, to clarify that the interpretive reports were computer generated. Instead, she responded to the State's references to the damaging information in the reports by reading portions of the cautionary instructions printed on the reports and

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[5] The Fifth Circuit even noted that considering the proposed clarification, the reports "would retain an imprimatur of neutrality because Murphy's expert administered the tests and computer programs returned the results." App. at 27a. In other words, the jury easily could have considered the fact that the reports were produced by computer programs created by the two doctors to have enhanced their credibility.

explaining that they were not final interpretations but merely guides for follow-up inquiries. ROA.7832. Even in her *post-conviction* affidavit, other than generally opining that the distinction "would have been important," she fails to describe the significance of the reports being computer-generated instead of personally evaluated. ROA.10470. In fact, she continues to refer to the MMPI-II report as being "authored by" Dr. Butcher. Moreover, she describes the reports as "more extensive report[s] that might include *the interpretation of Butcher* (regarding the MMPI-2) *and Millon* (regarding the MCMI-III)." ROA.10468 (emphasis added). Thus, her affidavit reveals that, even after careful retrospective consideration of her testimony, she still would have testified that these analyses were the interpretations of the two renowned doctors albeit digitalized. She only suggests that she could have clarified that they did not actually analyze Murphy's answers after he took the test. Indeed, in her affidavit, Dr. Connell primarily concentrates on the importance of the "cautionary instructions" printed on the reports, ROA.10468—the *same* rebuttal she offered at trial. ROA.7830, ROA.10469.

Counsel's redirect thus appropriately centered on the most effective means of diminishing the impact of the damaging information from the reports and explaining that Dr. Connell's ultimate conclusions resulted from a more thorough examination—refocusing the jury's attention on their mitigation argument instead of belaboring a trivial distinction related to future dangerousness. In this regard, counsel elicited testimony from Dr. Connell (1) emphasizing the beneficial information in the interpretive reports,

including Murphy's feelings of self-resentment and guilt, which led to his alcoholism; (2) reiterating the limited purpose of the reports; and (3) explaining that in consideration of the reports and her own personal evaluation of Murphy and his acquaintances, Dr. Connell's sympathetic conclusions about him remained the same. ROA.7853–7855.

Counsel also used the redirect examination to set-up subsequent expert testimony and their closing argument. For example, the statements in the reports regarding Murphy's self-resentment, alcoholism, and depression matched Dr. Crowder's testimony and counsel's focus at closing argument. ROA.7859, ROA.7868, ROA.8195–8197. Counsel also elicited Dr. Connell's opinion that Murphy's drug and alcohol use would not continue in prison, ROA.7852–7853, which benefited Dr. Kessner's testimony that Murphy would not be a danger in prison. ROA.7983–7992. Even if Murphy believes additional clarification as to the method by which the reports were generated might have been helpful, it is clear that counsel's "overall performance indicates active and capable advocacy." *See Richter*, 562 U.S. at 111 (citation omitted).

In this Court, Murphy complains primarily that the Fifth Circuit improperly concluded that "counsel was entitled to rely on Dr. Connell to explain the testing process to her and challenge the prosecutor's framing of the questions" and that the court's "ultimate holding . . . is that reasonably competent counsel in a death penalty case has no duty to investigate and determine how psychological tests are scored. . . ." Pet. at 14. But Murphy's construction of the lower court's opinion is

incorrect—he conspicuously homes in on one discrete factor from a much broader opinion. Indeed, with or without its reasoning related to counsel's reliance on their expert, the Fifth Circuit's rejection of this claim based on its extensive analysis was correct. [6]

In any event, Murphy wholly fails to show that the specific reasoning he complains about was improper. The Fifth Circuit followed its own well-established case law for the proposition that counsel can rely on their experts to alert them to avenues of further investigation. *See e.g. Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016); *Turner v. Epps*, 412 F. App'x 696, 704 (5th Cir. 2011). These cases are consistent with *Strickland*'s presumption of competent performance, and Murphy fails to cite any contrary

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[6] Murphy also argues that the Fifth Circuit improperly reasoned that "it was not obvious beforehand that the State would go down this path—especially in light of Dr. Connell's repeated emphasis that the reports only gave hypotheses." App. at 24a. He seems to simply disagree with this reasoning. Pet. at 13–14. But as the Fifth Circuit explained, Murphy "was entitled to reasonable competence, not perfect advocacy." *Id*. at 24a (citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). Moreover, as explained further below, because the distinction Murphy believes should have been clarified is not meaningful, such clarification would not have prevented the prosecutor from making his primary points about the reports to the jury—that they were created by well-renowned doctors, that they were obtained by Murphy's own expert, and that they contained disturbing information about Murphy. *See infra* Section I(C). Again, as explained above, both Dr. Connell and Murphy's counsel focused on what they determined to be the most effective push-back against this line of argument.

Supreme Court or circuit court precedent.[7] *See e.g. Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) ("Berman's investigation into Hendricks'[s] mental health and his reliance on the conclusion of his experts shields Berman from ineffective assistance of counsel claims under existing caselaw.").

And, as explained above, the Fifth Circuit expressly disclaimed creating a rule that counsel can insulate their performance from review by relying on an expert. App. at 24a. Instead, its opinion focused on the reasonableness of counsel's reliance on Dr. Connell in

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[7] Murphy cites multiple state court cases standing for the proposition that counsel must adequately prepare witnesses for trial. Pet. at 14–15 (citing *Ex parte Guzmon*, 730 S.W.2d 724, 733 (Tex. Crim. App. 1987) (counsel ineffective for not even knowing what multiple punishment witnesses were going to testify about); *Perrero v. State*, 990 S.W.2d 896, 899 (Tex. App.—El Paso 1999, pet. ref'd) (counsel ineffective for failing to prepare defendant to avoid opening the door to extraneous offense evidence); *Nance v. Ozmint*, 626 S.E.2d 878, 881–82 (S.C. 2006) (finding trial counsel completely abandoned their client because they only called witnesses that were harmful to the defendant and by refusing to plead for the defendant's life during closing argument, instead referring to him as a "'sick man' who did 'sick things'")). These cases are entirely inapposite. As the Fifth Circuit explained, "Murphy cites no case even remotely analogous" to his. App. at 25a n. 9. Indeed, neither his allegation nor the record implicates any concern that Dr. Connell was not adequately prepared to testify, only that counsel, themselves, did not properly examine her about or investigate the method by which the interpretive reports were created. Moreover, the Fifth Circuit properly explained that it could not "conclude that counsel was deficient because they did not fully prepare an expert to testify on the intricacies of tests the expert administered." *Id.*

the case before it.[8] Given the circumstances explained above, counsel appropriately relied on their retained expert to identify any relevant limitations on her own testing.

Ultimately, the Fifth Circuit's analysis is a straightforward and thorough application of the *Strickland* standard with which Murphy simply disagrees. His question presented is thus not worthy of this Court's review.

D. THE FIFTH CIRCUIT PROPERLY APPLIED THE APPROPRIATE *STRICKLAND* PREJUDICE STANDARD.

Murphy's first question presented is also unworthy of review because, even if counsel were deficient, the Fifth Circuit properly held that he was not prejudiced. *See, e.g., Parker v. Matthews*, 567 U.S. 37, 42 (2012) (per curiam) ("That ground was sufficient to reject Matthews'[s] claim, so it is irrelevant that the court also invoked a ground of questionable validity."). Murphy's

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[8] In this regard, Murphy quibbles with the Fifth Circuit's determination that "[f]iguring out this detail from the reports might 'distract from more important duties', *see Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam), especially because, as counsel explained, the reports "were what they were." App. at 23a. He contends that "it would have taken little time to ask how the tests are scored. . . ." Pet. at 13. But this ignores the second part of the Fifth Circuit's sentence relating to counsel's determination that the method by which the reports were obtained was not meaningful. In addition, it fails to account for the Fifth Circuit's reasoning that there are multiple intricacies related to these tests, which counsel relied upon Dr. Connell to explain. App. at 25a. At the direction of their expert, counsel focused on the relevant limitations that might affect the jury's consideration of them..

complaints about the Fifth Circuit's prejudice analysis are unpersuasive.

First, Murphy argues that the Fifth Circuit placed an improper burden on him to prove prejudice. Pet. at 17–19. It did not. The lower court expressly articulated the appropriate reasonable probability standard, explaining, "'To satisfy Strickland's second prong, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome'" App. at 18a (quoting 466 U.S. at 694). Murphy also criticizes the Fifth Circuit's use of the word "substantial." Pet. at 18 (citing App. at 27a). But this Court itself has held that to demonstrate prejudice, a defendant must show that "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citation omitted). Ultimately, in consideration of all of the evidence, the lower court held that there was not a reasonable probability that the proposed change in strategy would have affected the outcome of Murphy's trial.[9] Again, this was a straightforward and proper application of the *Strickland* standard.

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[9] Murphy also curiously argues that the Fifth Circuit improperly required him to provide affidavits from jurors discussing the impact of any misunderstanding. Pet. at 15–16. Nowhere does the opinion discuss a need for juror affidavits. Instead, the lower court followed this Court's precedent by analyzing the proposed change in strategy in light of the evidence as a whole.

Initially, and as explained above, the Fifth Circuit properly determined that the proposed clarification would have been unimportant to the jury's assessment of the reports. App. at 26a–27a. To be sure, this is dispositive of the prejudice inquiry. Nonetheless, Murphy faults the Fifth Circuit for "ignoring the lead prosecutor's devastating closing argument." Pet. at 17. But, as the Fifth Circuit's opinion makes clear, Murphy's proposed clarification during redirect would not have prevented the most harmful portion of that argument.

In this regard, after reiterating some of the damaging information from the MPMI-II report, the prosecutor argued: "Those aren't my words, ladies and gentlemen. That's not some expert that we hired. That's Dr. James Butcher hired by the defense to look at the tests administered to this man over here . . . . I mean, their own expert says, . . . [t]his man is going to be a danger wherever he's going to be." ROA.8209–8210. Dr. Connell did not testify to some of these points; however, Murphy does not assert that counsel should have objected to the prosecutor's statement.[10] Instead, he appears to suggest that counsel could have prevented this argument by employing his proposed redirect strategy.

But counsel could not have done so. As explained above, while Dr. Butcher was not "hired" by the defense and did not personally evaluate Murphy's test, he did create the computer program and provide the damaging analysis. Even had Dr. Connell clarified that the reports

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[10] The Fifth Circuit noted that Murphy did not separately claim that counsel failed to object to the argument; thus, it held that any such argument was forfeited. App. at 16a n. 3.

were computer-generated, the jury still would have heard the disturbing hypotheses provided by Dr. Butcher's computer program, which was used by the defense's own expert.

Finally, the court appropriately found that given the nature of Murphy's crime and the other damaging extraneous offense evidence presented, the jury would have assessed a death sentence no matter how they viewed the reports and Dr. Connell's testimony. App. at 27a. First, the facts of the underlying murder of Bertie Cunningham are horrific. Murphy kidnapped the elderly woman, shot her at point blank range, drove away in her car, and used her credit card while she was still alive and dying in the trunk. ROA.497–498. Second, the State presented devastating extraneous-offense evidence. Murphy held a gun to a young woman's head and asked her if she was afraid to die (ROA.11053–11062); a police officer had to pepper spray him while he was wielding a knife after he had bloodied his girlfriend's nose (ROA.10905–10911); he repeatedly threatened to blow a co-worker away and knock her head off (ROA.8127–8134); and he kidnapped another woman (ROA.10954–11003). Moreover, his own experts, Dr. Crowder and Dr. Kessner, testified that he would be a future danger outside of prison. ROA.7925; ROA.8017. And, on top of this extensive conduct-based evidence, the jury undoubtedly still would have heard about the damaging portions of the interpretive reports generated by computer programs created by well-renowned doctors.

Accordingly, the Fifth Circuit properly determined that had counsel pursued a different line of questioning during redirect, there is not a reasonable

probability that the outcome of Murphy's trial would have been different.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S APPLICATION OF 28 U.S.C. § 2254(E)(1).

A. THE FIFTH CIRCUIT PROPERLY APPLIED THE PRESUMPTION OF CORRECTNESS TO THE STATE HABEAS COURT'S ALTERNATIVE MERITS FINDINGS.

Murphy contends that the Fifth Circuit erred by applying the presumption of correctness to the convicting court's alternative merits findings rejecting his *Brady* claim. Pet. at 19–27. Under § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" and the "applicant shall have the burden of rebutting" this presumption "by clear and convincing evidence."[11]

Murphy did not raise his *Brady* claim in his initial state habeas application. And when he raised it in a subsequent state writ, the TCCA remanded to the convicting court, explaining:

> Before determining whether the first allegation satisfies the requirements of Texas Code of Criminal Procedure Article 11.071, § 5, we order the trial court to make findings-of-fact and conclusions of

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[11] This standard is distinct from 28 U.S.C. § 2254(d), which provides a reasonableness standard for review of state court adjudications of constitutional claims. Here, the Fifth Circuit assumed that § 2254(d)'s strictures do not apply." App. at 30a n. 10.

> law regarding whether or not the factual basis of the claim was ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed. If the trial court determines that the factual basis of the claim was not ascertainable through the exercise of reasonable diligence on or before the date the initial application was filed, then it will proceed to determine the merits of the claim.

Ex parte Murphy, 2010 WL 3905152, at *1 (citations omitted).

On remand, the convicting court held an evidentiary hearing and delivered two sets of findings-of-fact and conclusions-of-law. First, it provided findings in support of its conclusion that the *Brady* claims were available to his initial state habeas counsel. ROA.10113–10116 (¶¶5–23). Second, it delivered alternative findings supporting its conclusion that Murphy's *Brady* claims failed on the merits. ROA.10117–10140 (¶¶32–163). The TCCA, after noting that "the trial court recommended that the claim be dismissed, or alternatively denied," held: "Based upon the trial court's findings and conclusions and our own review, we conclude that Applicant has failed to satisfy the requirements of Article 11.071, § 5 of the Texas Code of Criminal Procedure. Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claims." *Ex Parte Murphy*, 2012 WL 982945, at *1.

Citing its own well-established precedent, the Fifth Circuit determined that § 2254(e)(1) applied to both the convicting court's abuse-of-the-writ and alternative merits findings. App. at 30a–31a; *see e.g.*, *Williams v. Quarterman*, 551 F.3d 352, 358 (5th Cir. 2008) (explaining that state habeas trial court findings are entitled to the presumption of correctness unless they are "directly inconsistent with the appellate court's decision"). Murphy fails to provide any authority to counter the application of the presumption of correctness in this circumstance. He does not cite any contrary Supreme Court case or show that there is a circuit split regarding when to apply § 2254(e)(1). Instead, existing precedent is clear that state court fact-findings are entitled to deference "whether the court be a trial or appellate court." *See Sumner v. Mata*, 449 U.S. 539 (1981); *Kirkpatrick v. Chappell*, 872 F.3d 1047, 1061 (9th Cir. 2017); *Smulls v. Roper*, 535 F.3d 853, 864 (8th Cir. 2008).

Here, the TCCA explicitly held that its decision was "based on the findings of the trial court," and the trial court's merits findings significantly overlap with its abuse-of-the-writ findings as both analyses required an inquiry into the prior availability and existence of the alleged evidence. *See* App. at 31a ("Indeed, many of the factual findings on the merits bore on whether Murphy's *Brady* claim was previously available and thus was an abuse of the writ.").[12] Murphy's argument rests primarily on a false premise that there is no distinction

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[12] Murphy has effectively conceded this overlap by arguing in state and federal court that the State's suppression of evidence caused his default under *Banks v. Dretke*. ROA. 10338; Pet. at 22–23 (citing 540 U.S. 668 (2004)).

between the TCCA expressly rejecting findings and declining to reach the merits of a claim due to a procedural ruling.[13] App. at 25a.

Further, Murphy argues that the presumption was not warranted because the state habeas court did not have "a jurisdictional mandate" under the TCCA's remand order to issue the merits findings. Pet. at 25. But there is no indication that the remand order precluded the trial court from making alternative merits findings—nor would such a bar be prudent especially given that the trial court held an evidentiary hearing on the issue. Indeed, had the TCCA disagreed with the procedural recommendation of the trial court, it would have been extraordinarily inefficient to require the trial court to haul the same witnesses back into court and issue new findings on what would have been similar testimony. Ultimately, the federal court should not determine the jurisdiction of the state trial courts. *Cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (explaining that it is not "the province of a federal habeas court to reexamine state-court determinations on state-law

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[13] In this regard, as the lower court explained, there is a stark and important difference between this case and the Fifth Circuit's opinion in *Jones* v. *Davis*, which declined to presume correct the convicting court's state habeas findings when they were "expressly rejected" by the TCCA and thus "directly inconsistent" with its ultimate holding. 890 F.3d 559, 565 (5th Cir. 2018); App. at 32a–33a. Notably, the TCCA in other cases has expressly rejected merits findings when applying the abuse-of-the-writ bar. *See Ex parte Jones*, No. WR-62,589, 2005 WL 8154111, at *1 (Tex. Crim. App. Oct. 26, 2005); *Ex parte Soffar*, No. WR-29,980-03, 2012 WL 4713562, at *1 (Tex. Crim. App. Oct. 3, 2012). It declined to do so here.

questions"). The only case Murphy cites declined to reach the issue, but also reasoned, in dicta, that "when a valid state court judgment exists a federal habeas court should generally presume that the state court properly exercised its jurisdiction[,]" noting that this is "an area in which Congress spoke in AEDPA [(Antiterrorism and Effective Death Penalty Act)] by facially eliminating the requirement of a jurisdictional inquiry." *Lambert v. Blackwell*, 387 F.3d 210, 238, n. 23 (3d Cir. 2004), 238.

And even if this Court could make the jurisdictional inquiry, there is no authority standing for the proposition that a federal court should not apply the presumption of correctness to a state court's fact findings simply because it lacked jurisdiction to resolve the merits of a claim under state law. In this regard, the Fifth Circuit explained, and multiple circuits agree, that § 2254(e)(1) deference applies even when findings are not related to the adjudication of the merits of a claim. App. at 30a; *Austin v. Davis*, 876 F.3d 757, 779 (5th Cir. 2017); *Appel v. Horn*, 250 F.3d 203, 210 (3d. Cir. 2001) (concluding that even when § 2254(d) does not apply, § 2254(e) still applies such that a state court's factual determinations are presumed correct, *Sharpe v. Bell*, 593 F.3d 372, 379 (4th Cir. 2010) ("Where a state court looks at the same body of relevant evidence and applies essentially the same legal standard to that evidence that the federal court does . . . , Section 2254(e)(1) requires that the state court's findings of fact not be casually cast aside.").

It follows that jurisdiction to adjudicate a claim is not a prerequisite to a state court issuing fact findings

entitled to § 2254(e)(1)'s presumption of correctness. A federal court should not deprive a state court's fact-findings—especially those made after holding an evidentiary hearing—of deference simply because the claim was ultimately dismissed pursuant to a procedural rule. In the interest of comity, a federal court should not ignore the alternative merits findings if it determines that the procedural ruling was inadequate to bar relief. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 185, (2011) (referencing "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance." (quotation omitted)).

B. THIS COURT SHOULD NOT GRANT CERTIORARI REVIEW BECAUSE APPLICATION OF § 2254(E)(1) HAD NO IMPACT ON THE FIFTH CIRCUIT'S ANALYSIS AND ULTIMATE REJECTION OF MURPHY'S CLAIM.

The issue is also not worthy of review because Murphy's *Brady* claim fails regardless of whether the presumption of correctness is applied. In this regard, Murphy has already been provided the remedy he seeks, and a finding in his favor on this procedural issue would not entitle him to habeas relief—nor would it even require the Fifth Circuit to alter its *Brady* analysis.

First, Murphy's *Brady* claim entirely lacks merit.[14] He argues that the State failed to disclose that,

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[14] As the Fifth Circuit also held, because this claim was procedurally barred in state court, it is likewise barred from federal habeas review because Murphy fails to meet the *Banks* standard for

during a pretrial conversation, the prosecutor confirmed the accuracy of Sheryl Wilhelm's identification of Murphy as the person who committed an extraneous kidnapping.[15] Pet. at 26–27. But the substance of the pretrial conversation was not suppressed because it could have been discovered by trial counsel.[16] ROA.10998–10999 (prosecutor's statement during trial that he had a pretrial conversation with Wilhelm). Moreover, the conversation provides no material impeachment value. The prosecutor did not confirm that Wilhelm's identification was correct; at most, he simply explained what would have been patently obvious to Wilhelm—that he was calling her to testify because she had identified the defendant in his case, who was in custody. ROA.9979, 10022 (Wilhelm and prosecutor's state habeas hearing testimony).

Further, the conversation occurred *after* Wilhelm's initial identification—an identification which was described by the detective who administered it as "one of the best" he had ever seen (ROA.11020). There is no indication that Wilhelm's conversation with the

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cause and prejudice. App. at 28a, 34a–35a (citing 540 U.S. at 691 (holding that procedural bar is overcome if suppression of material evidence caused the default)).

[15] Murphy raised multiple *Brady* claims in state court, his federal habeas petition, and his COA application. However, in this Court, he only challenges and cites to the Fifth Circuit opinion applying the presumption of correctness to his claim related to Wilhelm's pretrial conversation with the prosecutor. In turn, the Director only addresses that claim.

[16] The Fifth Circuit opinion provides a thorough explanation of the facts related to the *Brady* claim. App. at 12a–15a.

prosecutor affected her testimony as she was consistently resolute about her belief in the accuracy of her identification from the time the photo spread was shown to her (ROA.11020), through trial (ROA.1096–1097, 11003), her phone interviews with habeas counsel (ROA.10063), and her state habeas hearing testimony (ROA.9979–9980). In any event, Wilhelm's testimony and in-court identification were cumulative of both her pretrial identification and the detective's testimony that such identification was strong. Finally, the defense presented other evidence to impeach Wilhelm, and, as detailed above, the State's future dangerousness evidence was overwhelming even absent the Wilhelm extraneous offense kidnapping. *See supra* Section I(C). Thus, Murphy's question presented, even if resolved in his favor, could not ultimately entitle him to relief on his claim.

Second, and perhaps more importantly, the Fifth Circuit did not indicate that its determination turned on deference provided to a state-court fact finding. In this regard, Murphy argues that the Fifth Circuit should review his claim "de novo." Pet. at 26. But, in fact, the court did employ a de novo legal standard. App. at 30a n. 10. It only presumed the convicting court's fact-findings correct. However, the Fifth Circuit's *Brady* analysis does not so much as reference *any* state court finding, concluding that, assuming without deciding that Murphy satisfied the suppression and favorability elements of *Brady*, "[t]he pretrial conversation was of marginal value to the defense and was cumulative with already presented impeachment evidence." App. at 34a–37a. Put simply, application of the § 2254(e)(1) presumption of correctness, while proper, plainly had no

impact on the Fifth Circuit's resolution of Murphy's *Brady* claim.

For the foregoing reasons, review of Murphy's second issue is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

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