No. 19–5430

IN THE

Supreme Court of the United States

CHRISTOPHER DEVON JACKSON,
Petitioner,

v.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Convicted capital murderer Christopher Devon Jackson sought federal habeas relief in district court. Among other things, he asserted that he received ineffective assistance of trial counsel (IATC) at punishment because his trial attorneys failed to investigate and present mitigating evidence. But the district court denied habeas relief as well as any certificate of appealability (COA) on Jackson's IATC claim. The district court found that significant parts of Jackson's IATC claim were unexhausted and procedurally defaulted. Furthermore, the district court held that Jackson's IATC claim failed on the merits under the facts and controlling Circuit and Court precedent. On appeal, the Fifth Circuit held that reasonable jurists could not debate that the exhausted part of Jackson's claim, as presented to the state court, was meritless and not worthy of a COA. Jackson's petition for certiorari review now raises the following questions:

1. Whether the Fifth Circuit's past misapplications of the COA standard in other cases proves a misapplication in this case.

2. Whether the unexhausted part of Jackson's IATC claim should have any influence on the Court's analysis of the exhausted portion, given that the Fifth Circuit found that Jackson's challenge to his procedural default was waived for lack of adequate briefing.

3. Whether reasonable jurists could debate the lower courts' decision, made under the deferential AEDPA[1] standard, that the state court reasonably denied the exhausted portion of Jackson's IATC claim.

[1] The Antiterrorism and Effective Death Penalty Act of 1996.

LIST OF ALL PROCEEDINGS

The State of Texas v. Christopher Devon Jackson, No. 1056372 (230th District Court of Harris County Mar. 30, 2007)

Jackson v. State, No. AP–75,707 (Tex. Crim. App. Jan. 13, 2010)

Jackson v. Texas, No. 09–10477 (U.S. Oct. 4, 2010)

Ex parte Jackson, No. WR–78,121–01 (Tex. Crim. App. Aug. 20, 2014)

Jackson v. Davis, No. 4:15–CV–208 (S.D. Tex. Mar. 6, 2018)

Jackson v. Davis, No. 18–70014 (5th Cir. Dec. 10, 2018)

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INTRODUCTION

Jackson killed Eric Smith after carjacking the SUV that Smith was driving. Evidence presented at guilt-innocence showed that Jackson admitted to police that he shot Smith, and the shooting itself was recorded on Smith's 911 call. Jackson's girlfriend witnessed the shooting, testified against Jackson, and provided authorities with the SUV's keys. Jackson was arrested carrying a sawed-off shotgun that forensics showed was consistent with the murder weapon. Evidence adduced at punishment demonstrated that Jackson was a violent and noncompliant juvenile; he once shot a man in the head and robbed him; he mistreated his ex-girlfriend and kicked her in the stomach when she refused to get an abortion; he was a member of the Bloods street gang; he would carry his sawed-off shotgun with him; and he was armed when arrested. ROA.13580–88 (SHCR.221–29).[2] After hearing this and other evidence, a Texas jury convicted Jackson of capital murder and sentenced him to die.

Following unsuccessful direct appeal and state habeas proceedings, Jackson sought federal habeas relief in district court. There he asserted that

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[2] The Director uses the following citation conventions: "ROA" refers to the record on appeal. "ECF" refers to entries to the district court's electronic docket sheet. "CR" refers to the clerk's record of pleadings and documents filed during Jackson's trial proceedings. "RR" refers to the court reporter's transcript of the trial proceedings. "DX" refers to the trial exhibits offered by the defense. "SHCR" refers to the clerk's record of pleadings and documents filed during Jackson's state habeas proceeding. "SHRR" refers to the court reporter's transcript of the evidentiary hearing held during Jackson's state habeas proceeding. Where applicable, references are preceded by volume number and followed by page number.

he received IATC at punishment because his trial attorneys failed to investigate and present mitigating evidence. But the district court denied habeas relief as well as any COA on Jackson's IATC claim. The district court found that significant parts of Jackson's IATC claim were unexhausted and procedurally defaulted.[3] Nevertheless, the district court held that Jackson's IATC claim failed on the merits, finding that Jackson failed to demonstrate either deficiency or prejudice under *Strickland*.[4] *See* Appendix (App.) B at 26–43; ROA.2847–64. Indeed, the record shows that trial counsel did investigate and present mitigating evidence, including much of the substance of what Jackson now claims was omitted. Jackson maintains that counsel's investigation should have delved deeper into his personal history and provided more details to the jury; yet, trial counsel was not ineffective for failing to present cumulative mitigation evidence. *See*, *e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (per curiam) ("Additional evidence on these points would have offered an insignificant benefit, if any at all."). Like the district court, the Fifth

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[3] The Director previously argued that these aspects of Jackson's claim are more appropriately barred by *Cullen v. Pinholster*, 563 U.S. 170 (2011). Nevertheless, the result is the same under either *Pinholster* or default doctrine—Jackson's arguments are procedurally flawed and fail to offer any basis for relief.

[4] *Strickland v. Washington*, 466 U.S. 668 (1984). This standard is "doubly deferential" with respect to the exhausted portions of Jackson's IATC claim since they are viewed through the AEDPA prism. *Pinholster*, 563 U.S. at 190.

Circuit denied a COA. *See generally* App. A; *Jackson v. Davis*, 756 F. App'x 418 (5th Cir. 2018) (per curiam).

In his petition (Pet.) for certiorari review, Jackson asserts that the Fifth Circuit has a history of misapplying the COA standard and did so here. Pet.10–11 (citing *Buck v. Davis*, 137 S. Ct. 759 (2017); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). In particular, Jackson notes the district court's observation that his federal petition raised "issues worthy of judicial review"—a statement that he believes should have translated to a COA grant. Pet.11. But the Fifth Circuit properly stated the COA standard in its opinion, *see* App. A at 2, and that standard does not ask whether a claim is "worthy of judicial review." Under Supreme Court Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of [. . .] the misapplication of a properly stated rule of law." This case further bears little resemblance to the unusual circumstances in *Buck*, *Tennard*, or *Miller-El*. In fact, Jackson appears to have the *Buck* case backwards. If anything, *Buck* castigated the Fifth Circuit for being too thorough with its COA threshold analysis, whereas Jackson effectively accuses the Fifth Circuit of not being thorough enough. 137 S. Ct. at 774 ("The State defends the Fifth Circuit's approach by arguing that the court's consideration of an application for a COA is often quite thorough.[. . .] But this hurts rather than helps the State's case.").

Moreover, Jackson's attack on the district court's disposition of his IATC claim is largely fact-based and largely fails in the face of the district court's "painstaking[ ]" and "cogent[ ]" analysis. App. A at 4–5; App. B at 26–43; ROA.2847–64. Jackson also seems to suggest the district court's decision on the unexhausted and defaulted part of his IATC claim should inform the Court's analysis of the exhausted part. Pet.16–18. However, Jackson's certiorari petition, like his COA application below, completely fails to address his default. App. A at 4. In fact, the Fifth Circuit found that Jackson had waived a challenge to this default by inadequately briefing the issue and failing to raise it in his opening brief. *Id*. This Court should "decline to decide in the first instance" issues "neither presented nor passed on below." *See*, *e.g*., *Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018).

In sum, reasonable jurists could not debate that Jackson's IATC claim is both procedurally defective and meritless, and Jackson fails to demonstrate that he deserves any encouragement to proceed further. Jackson's petition does not demonstrate any special or important reason for this Court to review the court of appeals' decision, and this Court typically does not engage in routine error correction. Judicial restraint is further warranted in this case because Jackson does not show that a split exists among the circuit courts regarding any relevant issue. Accordingly, no writ of certiorari should issue.

STATEMENT OF THE CASE

I. Facts of the Crime

The district court provided the following summary of the crime:

> After Hurricane Katrina hit New Orleans in 2005, Eric Smith and his girlfriend moved to Houston, Texas. In the early morning of December 5, 2005, Smith left their apartment in a rented vehicle to buy cigarettes at a nearby convenience store. Smith carried a large amount of cash with him. Smith entered the store, purchased some cigarettes, and gave the attendant money for gas. A few minutes later, Smith approached the attendant again, saying that he had been robbed. The attendant looked out the window and saw that Smith's rented vehicle was gone. Smith told the attendant that he would call 9–1–1 on his cell phone.
>
> A 9–1–1 call taker received a phone call minutes later from a man who said he had been robbed. The call taker did not obtain the man's name, but as they were talking she heard footsteps on the other end, incomprehensible voices, and then a gunshot. The man never returned to the phone.
>
> A short time later a passerby stopped his car to help a man he had seen lying on the ground. The man, later identified as Smith, was bleeding from a single shotgun wound in the back of his head. He soon died.
>
> The police subsequently found Smith's vehicle at an apartment complex not far from the convenience store. Still, the investigation was at a standstill until the police received information that Wenshariba Gage, Jackson's girlfriend, had been present when Smith was killed. When police met with Gage, she turned over incriminating evidence that implicated Jackson in Smith's murder. Gage described the crime to police officers. The police soon thereafter spoke with Jackson who had previously been arrested for another crime. Jackson's subsequent confession and Gage's testimony would serve as the centerpieces of the prosecution against him.

The State of Texas charged Jackson with intentionally shooting Smith while in the course of a robbery. The trial court appointed R.P. "Skip" Cornelius and Hattie Sewel Mason Shannon to represent Jackson at trial. Trial counsel unsuccessfully moved to suppress Jackson's confession.

At trial, Jackson's confession and Gage's testimony filled in the events that led to Smith's murder. Both Jackson and Gage told the police that they were walking down the street when Jackson approached Smith and stole his vehicle. Jackson drove away, but returned a few minutes later to pick up Gage. As Jackson returned, he saw Smith walking down the road. Jackson jumped out of the car and shot Smith in the head with his shotgun. Jackson told the police that he only shot after Smith lunged at him. Circumstantial evidence confirmed Jackson's identity as the murderer. On his arrest, the police found shotgun shells consistent with the one that killed Smith. Jackson gave Gage the keys to Smith's vehicle, which she in turn gave to the police. Jackson possessed a large amount of cash after the murder, presumably taken from Smith. All told, the State presented a strong case for Jackson's guilt.

ROA.2822–24 (citations and footnotes omitted).

II. Evidence Relating to Punishment

The district court described the punishment evidence as follows:

[. . .] The State based its case for a death sentence on testimony and evidence showing Jackson's long and extensive history of lawlessness. As a youth, Jackson committed various bad acts while in the custody of Child Protective Services [("CPS")], including repeated bullying, threatening, and assaulting fellow residents. Jackson also assaulted staff members at the facility. After prosecution for two assault cases, Jackson was put on probation, but further assaults lead to commitment in the Texas Youth Commission ("TYC"). Jackson committed over one hundred violations of TYC rules, including being a danger to others, disrupting the program, failing to follow rules or comply with staff requests, assaults on other youth, assaults on staff members, sexual contact with others, and vandalism.

Jackson's violence escalated after reaching adulthood. The State presented evidence that Jackson was a member of the Bloods gang, committed assaults, fled from police, possessed weapons, stole weapons, threatened others, robbed, and pointed guns at people. Jackson abused his girlfriend, to the extreme of repeatedly kicking her in the stomach when she was pregnant with, but refused to abort, his baby. Shortly before the murder for which he was convicted, Jackson shot another man in the head during a robbery, but he survived. Jackson also told his girlfriend that he had killed before. While incarcerated before trial, Jackson committed jail infractions including possessing a weapon. Jackson told another inmate that he planned to escape by killing a jail guard. Jurors knew that violence was a constant, and escalating, theme in Jackson's life.

The State presented evidence that, while Jackson had previously been diagnosed with bipolar disorder and schizophrenia, a psychiatrist, [Dr. Willard Gold] observed no sign of those disorders after his arrest. The psychiatrist opined that Jackson was malingering[5] symptoms of mental illness, largely to secure favorable benefits for himself.

The defense tried to secure a life sentence for Jackson by presenting significant mitigating evidence and testimony. Jackson had an unstable and chaotic home life. Jackson's grandmother testified that his mother was a poor parent. Lacking parenting skills, Jackson's mother allowed him to shuffle through the households of other family members. When Jackson lived with his aunt as a child, his mother only visited occasionally. Family members remembered Jackson as respectful and helpful. Jackson's mother gave up her parental rights after Jackson's aunt died when he was thirteen. He never saw his mother afterwards and never met his father. As Jackson's behavior worsened, he entered CPS custody.

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[5] The expert defined "'malingering' as a person who for his own purposes wants to appear psychotic and out of touch with reality, but who really is not" and "said that it takes a person who is quite intelligent and clever to try to do that." [*Jackson v. State*, No. AP–75,707, slip op., 2010 WL 114409 at *6 n.33 (Tex. Crim. App. Jan. 13, 2010) (not designated for publication), *cert. denied*, 562 U.S. 844 (2010)]. [footnote in original]

> Jackson's family suffered from mental illness. A clinical social worker, Bettina Wright, testified that Jackson's CPS records indicated that he had been admitted to the Twelve Oaks Medical Center because of suicidal ideation. Jackson admitted to feeling depressed, not being able to sleep, and feeling suicidal. The records indicated that Jackson was "on a record breaking number of psychiatric medications."

ROA.2824–26 (citations omitted).

III. Conviction and Postconviction Proceedings

Indicted on charges of capital murder, a Texas jury convicted and sentenced Jackson to death for killing Smith while committing or attempting to commit robbery. ROA.9821 (1.CR.2); ROA.10708–709 (3.CR.885–86); Tex. Penal Code § 19.03(a); Tex. Code Crim. Pro. Art. 37.071. The Texas Court of Criminal Appeals (CCA) upheld Jackson's conviction and sentence on automatic direct appeal. *Jackson*, 2010 WL 114409. The Court denied certiorari review. *Jackson v. Texas*, 562 U.S. 844 (2010).

Jackson filed a state application for a writ of habeas corpus. ROA.13361 (SHCR.2). After briefing and a hearing, the trial court recommended that the CCA deny relief and submitted proposed findings of fact and conclusions of law. ROA.13580–632 (SHCR.221–73). Following its own review, the CCA adopted the trial court's findings of fact and conclusions of law and denied Jackson's application. *Ex parte Jackson*, No. WR–78,121–01, slip op., 2014 WL 5372347 (Tex. Crim. App. Aug. 20, 2014) (per curiam) (not designated for publication).

Jackson filed his federal petition for a writ of habeas corpus on August 20, 2015. ROA.269 (ECF No. 24). The Director answered. ROA.917 (ECF No. 34). The district court then allowed limited discovery. ROA.1044 (ECF No. 36). Jackson filed an amended petition on May 12, 2017. ROA.2164 (ECF No. 75). The Director filed an amended answer and motion for summary judgment, and Jackson replied. ROA.2484, 2730 (ECF Nos. 77, 87). After briefing was complete, the district court denied habeas relief and a COA in a memorandum opinion and order. App. B; ROA.2822, 2866 (ECF Nos. 89, 90). The Fifth Circuit likewise denied any COA. App. A. The instant petition followed.

REASONS FOR DENYING THE WRIT

The questions that Jackson presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." An example of such a compelling reason would be if the court of appeals below entered a decision on an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Pursuant to Supreme Court Rule 10, Jackson provides no basis to grant his petition for a writ of certiorari.

Additionally, there is no automatic entitlement to appeal in federal habeas corpus. *Miller-El*, 537 U.S. at 335. As a jurisdictional prerequisite to obtaining appellate review, a petitioner is required to first obtain a COA. 28

U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack*, 529 U.S. at 483. In determining whether to issue a COA, a court must consider whether the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). Importantly, the COA standard:

> . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Buck, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 327); *see also Slack*, 529 U.S. at 484. "Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336).

However, the district court's determinations must still be reviewed in light of § 2254(d), which "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam) (internal quotation marks omitted); *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *see also Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."). Under § 2254(d), a

federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100–01 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)).

The Court has emphasized § 2254(d)'s demanding standard, stating:

> [u]nder § 2254(d), a habeas court must determine what arguments or theories supported, or . . . could have supported, the state court's decision; and then it must ask *whether it is possible fairminded jurists could disagree* that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

Richter, 562 U.S. at 102 (emphasis added).

The Court has noted that "[i]f this standard is difficult to meet, that is because it was meant to be." *Id.* "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

I. The Fifth Circuit Correctly Explained and Applied the COA Standard.

Jackson's complaint that the Fifth Circuit misapplied the COA standard is unworthy of this Court's review. There is no conflict among circuits, nor important issue proposed, nor similar case pending after the grant of certiorari. Rather, Jackson asserts that the Fifth Circuit correctly identified the COA standard but misapplied it. His complaint is a textbook example of a purported "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Such complaints are not compelling, and Jackson's is particularly not so.

In support, Jackson directs the Court to the Fifth Circuit's misapplication of the COA standard in 2001, 2003, and 2015. Pet.10–11. But this case is not *Buck* or *Tennard* or *Miller-El*. Nor is it a case in which the Fifth Circuit requested extra briefing or granted oral argument before denying COA. This is a case in which the Fifth Circuit correctly identified the COA standard and then correctly applied it to the district court's determinations. The treatment below fully adhered to *Buck*'s admonition that "procedures are employed at the COA stage should be consonant with the limited nature of the inquiry." *Buck*, 137 S. Ct. at 774. In *Buck*,[6] the Court found that the Fifth Circuit denied COA "only after essentially deciding the case on the merits." *Id.*

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[6] *Buck* also involved the unique circumstance of a defendant's own attorney presenting expert testimony that the defendant was statistically more likely to act violently in the future because he was black—a situation not alleged here.

at 773. Here, on the other hand, the Fifth Circuit issued a short opinion agreeing with and commending the district court's work. No one could look at the Fifth Circuit's five-page opinion and conclude it was anything but the threshold analysis approved by *Buck*.

Jackson states that he is adopting the arguments "in a certiorari petition filed on June 12, 2019, in *Halprin v. Davis*, No 18–9676." Pet.10 n.4. However, the *Halprin* petition suffers from the same defect identified above—asserting that the court of appeals's analysis was not detailed enough. *See* Cert. Pet., *Halprin v. Davis*, No 18–9676, at 15, 18 (complaining the lower court rejected his miscarriage of justice argument in "one conclusory sentence"), 20–21 (complaining about the lower court's "wholesale" rejection and "pretermission" of his assertion that AEDPA does not apply), 23 (complaining the lower court resolved claims "without ever analyzing the underlying merits").

Finally, there is no circuit conflict here—only different courts coming to different conclusions regarding different underlying facts. Indeed, the Director acknowledges that COA may be granted on *Wiggins*[7] claims premised on a failure to investigate mental-health evidence—just not on the facts of Jackson's case. Rather, the facts of Jackson's case show that reasonable jurists could not debate that Jackson's attorneys reasonably investigated and presented

[7] *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel in a capital case must investigate mitigating evidence).

evidence of Jackson's mental health under the standards set forth by the Court. Jackson argues that "[t]he Fifth Circuit's decision stands in sharp conflict with other Courts of Appeal" and cites various opinions from the courts of appeals wherein COA was granted on allegations that an attorney failed to adequately investigate mental health evidence. Pet.11 (citing *Saranchak v. Beard*, 802 F.3d 579, 582 (3d Cir. 2015); *Smith v. Grews*, 735 F. App'x 178 (6th Cir. 2018); *King v. Westbrooks*, 847 F.3d 788 (6th Cir. 2017); *Suggs v. McNeil*, 609 F.3d 1218 (11th Cir. 2010); *Walker v. Tru*, 401 F.3d 574 (4th Cir. 2005); *King v. Kemna*, 266 F.3d 816 (8th Cir. 2001)). But these are factually distinguishable cases and do not derive from a legal conflict. And Jackson does not appear to maintain that these cases stand for the proposition that a COA must always be granted when this type of claim is raised.

Moreover, Jackson's cited precedent appears to largely deal with counsel failing to secure, or failing to timely secure, appropriate mental-health experts. Such an allegation would appear to fall outside the scope of Jackson's exhausted IATC claim and was thus subsequently waived on appeal, as argued in the following section. App. B at 20 ("Jackson's state habeas claim, however, focused that claim on trial counsel's use of the mitigating investigator and presentation of testimony about medications he had taken."), 25 ("On state habeas review, Jackson faulted counsel for not presenting additional mitigating theories through investigator Bettina Wright. Jackson's federal

claim outlines a defense relying on additional lay and expert witnesses."), 26 ("To the extent that Jackson's federal claims challenge trial counsel's investigation, preparation, and presentation of mental-health defensive issues, the Court can only consider arguments and evidence that Jackson presented on state review."); ROA.2841–47.

II. Any Challenge to the Procedurally Defaulted Part of Jackson's IATC Claim Has Been Waived.

Jackson alleges that the unexhausted and procedurally defaulted portion of his IATC claim supports his request for certiorari. But the Fifth Circuit found that any challenge to the procedural default was waived because Jackson failed to include it in his opening brief and failed to adequately brief it. App. A at 4 ("any challenge to the procedural default is waived, and we will consider only the rejection of the claims characterized by the district court as properly exhausted"). This Court has long held that it will neither decide issues raised for the first time on petition for certiorari nor decide federal questions not raised and decided in the court below. *See*, *e.g.*, *Ayestas*, 138 S. Ct. at 1095; *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218–22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805–06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438–39 (1969). As the Court has explained:

> Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed

> upon below, *see*, *e.g.*, *U.S. v. Estate of Romani*, 523 U.S. 517, 526, n.11 (1998), it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.

U.S. v. United Foods, *Inc*., 533 U.S. 405, 417 (2001). Because Jackson did not raise a challenge to the default in his opening brief to the court of appeals when he had the chance and the Fifth Circuit subsequently declined to pass upon his issues, the Court should decline to allow Jackson to belatedly raise them here.

Given that Jackson had to show that both the district court's procedural determination as well as its substantive determination regarding his IATC claim are debatable to obtain a COA, and Jackson waived any challenge to the procedural ruling, the Fifth Circuit necessarily could not issue a COA on the defaulted parts of Jackson's IATC claim. Likewise, *Pinholster* precludes consideration of the new evidence adduced in support of the procedurally defaulted parts from being considered to undermine the reasonableness of the state court's determination of the exhausted parts. 462 U.S. at 218. Accordingly, Jackson's briefing on this part of his claim should not be considered.

In any event, the district court conducted an alternative merits evaluation and found that Jackson had failed to demonstrate either *Strickland* deficiency or prejudice with respect to the defaulted parts of his claim. App. B

at 42–43; ROA.2863–64. The familiar two-prong standard by which an IATC claim is weighed is set forth in *Strickland*. That is, to establish that counsel performed ineffectively, Jackson must show both that his attorneys' performance was deficient, and the deficient performance prejudiced his defense. 466 U.S. at 687. Furthermore, because a convicted defendant must satisfy both prongs of the *Strickland* test, a failure to establish either deficient performance or prejudice makes it unnecessary to examine the other prong. *Id*. at 697. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

A convicted defendant must overcome a strong presumption that trial counsel's conduct fell within a wide range of reasonable professional assistance, and every effort must be made to eliminate the "distorting effect of hindsight." *Strickland*, 466 U.S. at 689. When assessing effectiveness at the sentencing stage of a capital trial, counsel should attempt to "discover all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 524 (emphasis and quotation omitted). Nevertheless, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692. To establish prejudice, Jackson "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to

undermine the confidence in the outcome." *Id*. That requires a "substantial," not just "conceivable," likelihood of a different result. *Richter*, 562 U.S. at 112.

Here, Jackson's defaulted allegations included complaints that "counsel should have presented evidence of mental illness in Jackson's family, particularly that of his mother and sister; that Jackson was sexually abused by a teenager living in his home; that he was abandoned by his grandmother, who also abused him; the difficulty and turmoil he experienced while living in TYC custody; and the possibility that Jackson is actually the son of his biological uncle." App. B at 36; ROA.2857. The district court observed that "Jackson identifies some issues trial counsel did not put before jurors. Jackson supports this claim with affidavits and various documents. The Court, however, finds that many of those documents do not provide viable, admissible material which a trial attorney could have put before jurors." App. B at 38; ROA.2859. The district court noted that, with respect to Jackson's parentage and family history, "the affidavits are long on speculation and hearsay, but short on new and admissible facts." *Id*. For instance, the affidavits only showed that the affiants suspected that Jackson's uncle was actually his father. *Id*. ("No affidavit provides more than speculation and surmise on that ground"). Moreover, Jackson's new information also would have actually lessened the credibility of other records offered by Jackson. App. B at 39; ROA.2860 n.17.

Likewise, concerning Jackson's allegation (Pet.17) that he was sexually abused as a child by a teenager at his aunt's house, the district court held that the federal records offered by Jackson contained roughly the same level of detail as the records presented by counsel at trial. App. B at 39; ROA.2860. With respect to his grandmother's affidavit relating this molestation, the district court found that Jackson's grandmother admitted to not knowing this information at the time of trial and "[a]side from not describing how she knows that information, Jackson's grandmother could not have testified at trial about information she did not know." *Id.* Similarly, Jackson alleged that his grandmother herself molested him but again only offered "affidavits containing speculation and surmise" on this point. *Id.* at n.18.

Regarding Jackson's allegation that counsel should have presented more evidence about his family history, the district court held that "[w]hile some of the evidence was arguably relevant, much of the intergenerational mitigating evidence did not have strong relevance to the special issues." App. B at 40; ROA.2861; *see Bobby v. Van Hook*, 558 U.S. 4, 11–12 (2009) ("there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties"). This was because "[t]he focus of the mitigation special issue was on Jackson, as opposed to his ancestors or relatives." *Id.*

With respect to Jackson's TYC experiences, a "reasonable trial attorney could decide to deemphasize that period of [Jackson]'s life." *Id.* While Jackson's attorneys could have presented evidence of his difficulties there, it would have been contrasted by his numerous disciplinary infractions and his "extensive improper, and even violent, behavior." *Id.* "Drawing additional attention to his time at TYC by painting a bleak picture of the circumstances would be double-edged; jurors could understand somewhat Jackson's behavior, but at the expense of allowing the prosecution to detail his disciplinary infractions and assaults, and then further connect that pattern of violence throughout his life." App. B at 40–41; ROA.2861–62. Accordingly, a reasonable attorney "could decide to shift the focus away from areas which would open the door to even greater discussions of Jackson's own bad behavior." App. B at 41; ROA.2862.

Thus, the district court held that Jackson failed to prove that his trial attorneys provided ineffective representation. *Id.* This was, in large part, because "Jackson has not adduced strong evidence, or in some cases even admissible evidence," in support of his assertions. *Id.*

Jackson faults trial counsel for not exploring and presenting mitigating mental-health evidence through experts such as Victor R. Scarano, Bettina Wright, and James Ray Hays. Pet.13–14, 20–21, ROA.2390–412; (ECF No. 75–

3 – ECF No. 75–5). However, as noted above, Wright testified at trial.[8] And Scarano and Hays appear to have at least partially based their current opinions on a selective and limited number of records provided to them by Jackson. ROA.2391–93 (ECF No. 75–3 at 2–3; 1–3); ROA.2408–10 (ECF No. 75–5 at 1–3). The doctors do not acknowledge having read the entire trial record or even just the relevant testimony. Besides, the same strategic considerations that precluded counsel from calling Wright to rebut Dr. Gold's testimony would also apply to the introduction of testimony from experts like Drs. Scarano or Hays.[9] ROA.13600, 13698. The district correctly observed that "[t]he state habeas court [ ] endorsed counsel's choice to describe Jackson's background through lay witnesses, rather than through an expert witness." App. B at 35; ROA.2856. The district court found that an "expert veneer" would

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[8] Drs. Hays and Scarano did not testify. To the extent that Jackson is alleging that Hays and Scarano should have been called, "complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what a witness would have testified are largely speculative." *Sayre v. Anderson*, 238 F.3d 631, 635–36 (5th Cir. 2001) (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986)). Moreover, in the Fifth Circuit, the claim that counsel's failure to call a witness violated the Sixth Amendment requires that the petitioner "name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). The Scarano and Hays affidavits presented in district court do not meet the requirements of *Day* since the authors do not aver that they were available to testify and would have done so.

[9] "[T]hat an expert who would give favorable testimony for [the defendant] was discovered [] years after sentencing proceeding is not sufficient to prove that a reasonable investigation at the time of sentencing would have produced same expert or another expert willing to give the same testimony." *Daugherty v. Dugger*, 839 F.2d 1426, 1432 (11th Cir. 1988).

not have changed the jury's evaluation because it already "had before it a basic understanding of the neglect, deprivation, turmoil, and pain in Jackson's childhood." *Id*. And "[t]he jurors knew that he had been previously medicated for mental illness." *Id*. Counsel's investigation and presentation thus adequately gave the jury "the building blocks to show mercy to Jackson." *Id*.

Jackson alleges that counsel did not adequately investigate his personal and family history—especially various accusations of abuse and incest. Pet.17–19. However, if true, many of the facts concerning these matters should have been known to Jackson through his own personal knowledge of his family. *Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."). Jackson himself would thus bear the blame for counsel not knowing these facts, if counsel actually did not know them.

That said, Jackson submitted a document in district court apparently produced by the defense team prior to trial, and this document shows that counsel were aware of many aspects of Jackson's turbulent childhood, mental health issues, alleged sexual abuse, personal relationships, and educational/institutional history. ROA.2384–88 (ECF No. 75–2). This

document notes that Jackson stated that when he lived with his great aunt she was raising another child who was "6 or 7 years older than him" and "sexually abused him." *Id.* This document also states that "[a]ccording to [Jackson], the next couple of years were difficult, as his aunt developed cancer and died when he was 12 years old." *Id.* The document relates that after Jackson's great aunt died and he was sent to live with his grandmother, "his grandmother would hit him with a TV cable when she was angry with him." *Id.* "[Jackson] stated that he had been doing well in school until his great aunt developed cancer and died." *Id.* The document notes Jackson had been treated for depression, bipolar disorder, and suicidal tendencies (and noted that he had attempted suicide by drinking bleach). *Id.* The document also notes his medications. *Id.* Given that counsel was aware of many of the issues raised in Jackson's petitions, their investigation could not have been deficient. Moreover, as shown in the Statement of the Facts, much of this information was presented at trial, although perhaps not in the manner that Jackson now would have liked.

But even though counsel was aware of this history, the district court correctly noted that "Jackson has not shown how the trial defense could present the document itself nor does he verify much of its contents with admissible evidence." App. B at 38; ROA.2859. For instance, Jackson's grandmother, Tommie Walter, submitted an affidavit on federal habeas review. ROA.2456–63 (ECF No. 75–6). Walter testified at trial. 18.RR.200–26.

Walter explains in her affidavit that she met with one of Jackson's trial attorneys prior to giving testimony. ROA.2456–57; ECF No. 75–6 at 1–2. Walter complains that Jackson's attorneys should have better prepared her to testify, but it is her belief that counsel should have supplied her with facts about Jackson, not within her personal knowledge, to influence and alter her trial testimony. ROA.2456–57, 2460–61 (ECF No. 75–6 at 1–2 ("[Co-counsel] did not show me any medical or other records, and did not tell me that [Jackson] was on similar medications when he was in [CPS] years earlier"), 5–6 ("I did not know at the time that I testified, but have since learned that Leroy was sexually abusing [Jackson]. . . I deeply regret not knowing this information before I testified, and wish that [Jackson]'s attorneys would have shared this type of information with me;" "I also wish that [Jackson]'s attorneys at trial would have helped me understand that [Jackson] was mentally ill;" "Had I known that [Jackson] was sexually abused by Leroy, and was suffering from mental illness as a teenager, my testimony at trial would have [been] very, very different.")). Consequently, the district court correctly concluded that Walter could not have testified at trial about information she did not know. App. B at 39; ROA.2860.

Likewise, the district court correctly rejected Jackson's suggestion that Walter herself may have sexually abused Jackson as unsubstantiated. Pet.18; ROA.2860 n.18. Walter does not admit to sexually abusing Jackson in her

affidavit. The main support for this assertion seems to be hearsay statements of Jackson's sister, who Jackson himself has contended is "severely mentally ill." ROA.2215, 2269–70 (ECF No. 75 at 52, 106–07). Moreover, Jackson's cousin Lenore Fitch stated at trial that she believed Walter was a decent woman, and she did not believe any allegation that Walter was molesting Jackson. ROA.12267; 18.RR.235–37. Thus, defense counsel may have been aware of the prosecution's ability to rebut this allegation and strategically chose to minimize testimony that could suggest that Jackson was a liar.

Concerning the CPS records relied upon in federal habeas—it is worth noting that counsel had access to Jackson's CPS records through the district attorney's file. Pet.5, 7, 17–21; ROA.2832–33. Jackson asserts that this was not sufficient since the district attorney records were incomplete. However, Jackson raised a prosecutorial misconduct claim concerning these records, and the district court, in denying the claim, noted that the "factual premise of much allegedly suppressed information was known to, and used by, trial counsel."[10] App. B at 11–12; ROA.2832–33. Additionally, the district court held that "Jackson has not shown a reasonable probability exists that the jury would have answered the special issues differently if trial counsel possessed and used the full CPS records he has obtained on federal review"—meaning that there

[10] The court also noted that most CPS information would have been known to Jackson himself through his personal knowledge and could have been related to counsel by him.

was no prejudice even if counsel had performed deficiently by relying on the prosecution's CPS records instead of Jackson's current version. *Id.*

As for additional information about Jackson's mother, the district court explained that "while Jackson provides extensive evidence about the criminal and mental-health problems experienced by Jackson's mother, the jury already knew that she did not want Jackson and had hardly any positive influence in his life. Additional negative information would not have meaningfully changed the jury's perception[.]" Indeed, as shown above in the Statement of Facts and the state court findings (ROA.13598, 13602), the jury was aware that Jackson's mother was a poor parent and largely abandoned him. Further information would have been cumulative. *Busby v. Davis*, 925 F.3d 699, 726 (5th Cir. 2019).

Lastly, it is worth noting that Jackson did not provide the district court with affidavits from trial counsel concerning any newly presented evidence, making it difficult to ascertain what information that they were or were not aware of, as well as the strategic considerations that guided their presentation of evidence at trial.

The district court found that Jackson failed to adduce compelling evidence in support of his IATC claim that was both verifiably true and theoretically admissible in trial. Instead, he supplied mostly rumor, speculation, and hearsay. But even if the district court's no-deficiency finding was debatable, its no-prejudice finding is not. The district court explained that

"[a]lbeit in outline form, the jury had before it much similar information to that contained in the federal habeas record. Much of the new information is not in a vehicle that could come before jurors." App. B at 42; ROA.2863. In contrast, "[t]he jury heard extensive evidence about Jackson's lawlessness, violence, and remorselessness. Jackson had committed many crimes, and even had attempted to murder before." *Id*. Jackson's cumulative mitigating evidence (to the limited extent that it was admissible) would not have surmounted the overwhelming punishment evidence against him. Reasonable jurists could not debate the district court's determination that a court "plugging the new information into the trial record would not reasonably grant relief." *Id*. Reasonable jurists thus could not debate the district court's conclusions that these parts of Jackson's claims are procedurally defaulted as well as meritless.

III. Reasonable Jurists Could Not Debate the District Court's Decision That the State Court Reasonably Denied the Exhausted Part of Jackson's IATC Claim.

Concerning the exhausted part of Jackson's IATC claim, the district court found that Jackson failed to show that counsel did not adequately investigate, develop, or present the relevant aspects of Jackson's mental health or that Jackson was prejudiced by the alleged failure. App. B at 26–36; ROA.2847–57. The district court applied AEDPA deference in reviewing the state court's decision and—pursuant to *Pinholster*—only considered the state court record. App. B at 26, 33; ROA.2847, 2854. The Fifth Circuit found that

"[t]he district court's opinion is thorough and well-reasoned with respect to all of the preserved issues." App. A at 5. Consequently, it likewise found that Jackson failed to show both deficiency and prejudice. *Id.* at 4–5. As shown below, reasonable jurists could not debate these conclusions.

A. Review of the exhausted part of Jackson's IATC claim is "doubly deferential."

As noted, the deferential *Strickland* standard applies to Jackson's IATC claim. However, a federal court's review of a state court's resolution of an IATC claim under AEDPA is "doubly deferential," *Pinholster*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111 (2009)), because the question is "whether the state courts application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101. Importantly, "[t]his is different from asking whether defense counsel's performance fell below *Strickland*'s standard," because the "state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.* Consequently, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. Rather, to obtain habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 102–03.

B. Reasonable jurists could not debate the district court's finding of no deficiency.

In his state habeas application, Jackson contended that counsel neglected to present, or could have better presented, evidence of his mental illness. On federal review, the district court correctly identified the governing standard for IATC claims and found that Jackson's claim failed to meet either *Strickland* prong. App. B at 26–36; ROA.2847–57. The district court explained that, when he was young, Jackson had seen a psychiatrist, been hospitalized, and received medications for mental illness. App. B at 26; ROA.2847. At the TYC, he was diagnosed with a depressive disorder with psychotic features and received counseling but was not administered drugs. App. B at 27; ROA.2848. Jackson attempted suicide before trial and displayed erratic behaviors. *Id*. He was diagnosed with bipolar disorder with psychotic features and prescribed medication; however, Dr. Gold labeled him a malingerer and discontinued his medication, although another psychiatrist later renewed it. *Id*. At trial, counsel elicited evidence of Jackson's mental state through mitigation investigator Bettina Wright. *Id*. The State cross-examined Wright by pointing out aggravating factors present in Jackson's records and rebutted her testimony with Dr. Gold. Jackson's counsel "effectively tried to call into question Dr. Gold's testimony by chronicling Jackson's mental health history and medication." App. B at 27–28; ROA.2848–49.

The district court noted that "[o]n state habeas review, Jackson argued that trial counsel failed to follow testimony about his 'record-breaking number of medications' with testimony about '(1) the clinical diagnoses which would call for each of those drugs either singly or in combination and (2) the long-term effects of such a drug cocktail.'" App. B at 28; ROA.2849 (citing SHCR.42). Wright also submitted an affidavit stating that she thought that Jackson was severely mentally ill and she should have testified as a rebuttal witness to Dr. Gold. App. B at 29; ROA.2850 (citing SHCR.147–48). But lead trial counsel submitted two affidavits explaining the defense's strategic decisions regarding the admission of mental-health evidence. App. B at 28–29; ROA.2849–50 (citing SHCR.133). Counsel explained that, while he respected Wright, it was his strategy to use her to point out records that documented Jackson's issues and then make reasonable assumptions about them in jury argument where those assumptions could not be rebutted by a State's expert. App. B at 3; ROA.2851 (citing SHCR.151). Counsel explained that, while he believed Jackson had a difficult childhood, Jackson did not have a mental illness. *Id.* Counsel agreed that Jackson was likely malingering and did not want to lose his credibility with the jury by debating the point. *Id.* Counsel was also concerned that if he called his own expert, that expert would be forced to concede that Jackson was sociopath, psychopath, or suffered from an antisocial personality. App. B at 30–32; ROA.2851–53. Counsel repeated these concerns

at the state evidentiary hearing and emphasized the double-edged nature of the evidence. App. B at 31; ROA.2852. He also observed that presenting mental health evidence short of actual insanity could make the defendant look more dangerous to the jury.[11] App. B at 30; ROA.2851.

The district court noted that the state court issued explicit findings and conclusions that found counsel credible and acknowledged his strategic decisions and reasoning. App. B at 32–33; ROA.2853–54 (citing SHCR.241–45). The state court found that counsel did not perform ineffectively by presenting evidence through Wright or in their treatment of Jackson's medications and underlying conditions. *Id.*

Jackson claims that the state court and the district court erred by using counsel's strategic decisions regarding the presentation of certain mental-health evidence to excuse the alleged failure of counsel's underlying investigation. Pet.14–16. In particular, Jackson believes that counsel prematurely cut short the mental-health investigation because of lead counsel's belief that Jackson was a malingerer. *Id.* at 14–15. However, the district court plainly found that counsel first conducted an adequate

[11] "Let me illustrate briefly, if you prove that the defendant needs medicine to overcome his mental health challenges, and even if you prove the medicine is available, the State will argue that even if this were true the jury will never be assured the defendant will take his medicine and if he doesn't then society is in danger." ROA.13628 (SHCR.269).

investigation and then made reasonable strategic decisions concerning the presentation of Jackson's mitigation case. As the court explained,

> [T]rial counsel did not abdicate the responsibility to prepare for the punishment phase. Counsel hired an investigator, a dedicated mitigation investigator, and a forensic psychiatrist. Trial counsel called family members and a mitigation investigator to tell witnesses about Jackson's background. Family members addressed many of the same themes, such as abandonment, possible sexual abuse, and chaotic upbringing, as Jackson raises on federal review, even if the details differ. The record indicates that trial counsel had sufficient familiarity with Jackson's mental-health history and family background to make decisions about the evidence to put before jurors, and the vehicle by which to put it.

App. B at 33–35; ROA.2854–56.

The district court's conclusions are not debatable among reasonable jurists, as the state court's decision is fully supported by the appellate record, lead counsel's two affidavits (ROA.13622, 13627 (SHCR.263, 268)), and the testimony at the writ hearing. The record shows that—in addition to presenting evidence from Jackson's grandmother, uncle, and three cousins—Jackson's attorneys retained Dr. Scarano (a forensic psychiatrist), Wright (a mitigation specialist), and Gradoni & Associates (professional investigators). ROA.10731–39 (3.CR.908–16).

Counsel knew that Dr. Stephen McCary found Jackson legally sane and competent to stand trial, and Dr. Ramon Laval also attempted to evaluate Jackson. ROA.9833–34, 9840–45 (1.CR.14–15, 21–26). Counsel moreover had full access to the State's file and the voluminous records that were subpoenaed

before trial. These thousands of pages included TYC records, records from Memorial Hermann Hospital, and Harris County Sheriff's Office Disciplinary Section jail records. ROA.9923–10536 (3.CR.104–713); ROA.8101–9806 (1–5.Supp.CR.2–1704). Counsel admitted into evidence CPS records, hospital records, and Harris County Probation Department records. ROA.13080–301 (DX.5–7). Jackson contends that counsel improperly limited the scope of the investigation, but simply because trial counsel did not offer every shred of possible evidence it does not mean that counsel's assistance was deficient under *Strickland*. *Cf. Richter*, 562 U.S. at 110 ("*Strickland* does not guarantee perfect representation, only a reasonably competent attorney.") (citation and internal quotation marks omitted). "The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources." *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992).

Jackson complains about the fashion in which trial counsel presented evidence in his case and suggests that the purportedly poor presentation was the result of poor investigation. Pet.6, 12. However, the record makes clear that trial counsel had good strategic reasons informing the presentation of their case. Lead trial counsel explained that he considered Jackson to be malingering his mental illness. ROA.13628 (SHCR.269) ("[I]n my experience, [Jackson] was at the bottom of the scale, one of the least mentally ill defendants

I have encountered. He had a horrible childhood and it made him mean and angry and he took it out on whoever was in his path[.]"). Counsel noted that "There was a ton of evidence, of records. And in the records, there was a lot of talk about him malingering." ROA.13314 (SHRR.12). Counsel "sought to keep those records out of evidence," and was able to keep certain records that showed malingering out of evidence through agreement with the State. ROA.13315 (SHRR.13). As observed by the district court, lead counsel thought that the mental-health evidence in this case was double-edged and may have actually convinced the jury that Jackson was dangerous. ROA.13600 (SHCR.241 (Finding No. 113)). Lead counsel was concerned that if he attempted to rebut Dr. Gold's testimony with other expert testimony (like Wright's), the prosecution could have elicited damaging testimony about Jackson being a psychopath, sociopath, or antisocial. ROA.13600–01 (SHCR.241 (Finding No. 114)); *Wong*, 558 U.S. at 20, 22–24, 26 (a court must not only consider favorable omitted evidence, but prejudicial evidence that would also "come in with" it). Moreover, counsel was concerned that attempting to rebut the State's evidence of malingering would simply emphasize the issue to the jury. ROA.13628 ("Additionally, in my opinion, no jury has ever given someone the death penalty for malingering. It might be a minor consideration, but I believe very minor, unless I challenge it, in which case it becomes a

serious issue."). Counsel further worried that "if I [ ] challenged Dr. Gold's opinion of malingering I would have lost all credibility with the jury." *Id.*

Instead, counsel attempted to point out "the most important records concerning the atrocious events that Mr. Jackson had lived through as a child" and then offered assumptions based on them in jury argument when the State could no longer rebut them. ROA.13697 (SHCR.268). This is a legitimate, strategic decision premised on valid concerns. This Court presumes that the "challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. While counsel's strategy in this case was ultimately unavailing, "[r]eliance on 'the harsh light of hindsight' to cast doubt on a trial that took place . . . years ago is precisely what *Strickland* and AEDPA seek to prevent." *Richter*, 562 U.S. at 107; *Bell v. Cone*, 535 U.S. 685, 702 (2002); *see also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

In short, counsel adequately investigated the matters in Jackson's state habeas application and made reasonable, strategic decisions based on that investigation. "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752–53 (5th Cir. 2003) (citations omitted). Reasonable jurists could not debate that the state court reasonably found that counsel was not deficient with respect to Jackson's exhausted allegations.

C. Reasonable jurists could not debate the district court's finding of no prejudice.

Even if Jackson could show the lower courts erred in finding no deficiency, he certainly cannot show error in the finding that there was no prejudice. With respect to errors at the sentencing phase of a death penalty trial, the relevant inquiry 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." *Strickland*, 466 U.S. at 695; *see also Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir. 2008) ("If the petitioner brings a claim of ineffective assistance with regard to the sentencing phase, he has the difficult burden of showing a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel." (internal quotation marks and citation omitted)).

As mentioned above, counsel presented evidence from Jackson's grandmother, three cousins, an uncle, and Wright. ROA.13588 (SHCR.229 (Finding No. 45 (citing 18.RR.201–11, 227–31, 240–48, 261–75; 19.RR.20–56))). These witnesses explained that Jackson did not really know his father (an incarcerated murderer); his mother did not want him, care for him properly as an infant or have a good relationship with him; his mother relinquished her parental rights; Jackson was raised by a great aunt and was strongly affected by her death; he eventually went into CPS custody; and there were mental

health issues in his family. *Id.*; *see also* ROA.13599 (SHCR.240 (Finding No. 107 (citing 18.RR.201–06); Finding No. 108 (citing 18.RR.227–31); Finding No. 109 (citing 18.RR.240–45))). Wright testified about Jackson's CPS records, his prior medical records, and his Harris County Probation records, all of which were admitted into evidence. ROA.13599–60 (SHCR.240 (Finding No. 110)); ROA.13080–301 (DX.5–7). This included information about Jackson's mother relinquishing her parental rights, Jackson's suicidal ideations, his feelings of depression and hopelessness, his medical diagnosis of a peptic ulcer at age fourteen, his medication, his inability to sleep, his unhappiness, and an allegation of sexual abuse. ROA.13599–60 (SHCR.240–41 (Finding No. 110 (citing 19.RR.20–26, 56)); ROA.11946; 19.RR.23. The record thus clearly shows that the trial witnesses related the important facts concerning Jackson's mental-health history and background. *See Pinholster*, 563 U.S. at 200 (finding no reasonable probability that the additional evidence presented in state habeas proceeding would have changed jury's verdict because the "'new' evidence largely duplicated the mitigation evidence at trial"). Jackson cannot contend that his jury "heard almost nothing that would humanize [Jackson] or allow [it] to accurately gauge his moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009). And Jackson's case clearly bears little resemblance to cases where the Court found evidence was prejudicially omitted in other cases. *See*, *e.g.*, *Wiggins*, 539 U.S. at 516–17, 525–26, 534–35 ("Wiggins experienced

severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care."); *Sears v. Upton*, 561 U.S. 945, 947–49 (2010) (Sears's counsel "presented evidence describing his childhood as stable, loving, and essentially without incident;" however, postconviction evidence showed "Sears'[s] home life, while filled with material comfort, was anything but tranquil: His parents had a physically abusive relationship, and divorced when Sears was young; he suffered sexual abuse at the hands of an adolescent male cousin; his mother's favorite word for referring to her sons was 'little mother fuckers'; and his father was verbally abusive, and disciplined Sears with age-inappropriate military-style drills" and Sears had "significant frontal lobe abnormalities," suffered severe head injuries, and was "'among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli.'"); *Rompilla v. Beard*, 545 U.S. 374, 378, 390–95 (2005) (evidence established that Rompilla was reared in a slum, quit school at sixteen, had a series of incarcerations, his mother drank during pregnancy, his father had a "vicious temper," Rompilla and his siblings "lived in terror," he and a brother were locked "in a small wire mesh dog pen that was filthy and excrement filled," their home had no indoor plumbing, and they slept in an attic with no heat); *Williams*, 529 U.S. at 395 (counsel "failed to conduct an

investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.").

On the other hand, the State presented an overwhelming case at punishment. As noted by the CCA concerning a different claim, there was ample evidence of Jackson's "violent nature and his inability to follow rules." *Jackson v. State*, No. AP–75,707, slip op. at 13–15. The district court therefore correctly held that, although "the jury had before it a basic understanding of the neglect, deprivation, turmoil, and pain in Jackson's childhood" and "the jury still had the building blocks to show mercy to Jackson," the "jury would still have to consider his long-standing, and intensifying, violent behavior." ROA.2856–57. Consequently, the "evidence of mental illness and familial turmoil would not have significantly changed the way jurors answered the special issues and, in fact, much aggravating evidence would accompany the mitigating features of his psychological history." *Id.*

Jackson argues that the importance of his mental health is displayed by the jury's request for certain records. Pet.23. However, the jury's reason for requesting these particular documents is not explained in the note. ROA.8101 (ECF No. 95 at 2). Attempting to divine the jury's mindset based on this note

is a speculative endeavor. And some documents are relevant to future dangerousness as well as Jackson's mental health.

Federal courts cannot grant habeas relief unless the state court's decision conflicts with clearly-established federal law as determined by this Court or "[is] based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). There is no such conflict here. Based on the evidence actually adduced during the state habeas proceedings, Jackson has shown neither deficiency nor prejudice by counsel, and therefore the state court's application of *Strickland* was reasonable. *See*, *e.g.*, *Bell*, 535 U.S. at 699 (holding that the burden is on the petitioner to do more than just "convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly," but instead the petitioner "must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner"). Accordingly, Jackson's exhausted IATC claim—the one based on the evidence actually presented to the state court—was correctly denied by the district court. No COA could or should issue on this claim, and certiorari review is not appropriate.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court refuse certiorari review.

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