No. 20-7480

In the Supreme Court of the United States

MICKEY THOMAS,
Petitioner,

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision below should have extended the holdings of *Wood v. Milyard*, 566 U.S. 463 (2012), and *Day v. McDonough*, 547 U.S. 198 (2006), to apply to cases like this one, where Arkansas indisputably pleaded an affirmative defense (here, procedural default) and never deliberately waived that defense.

2. Whether the decision below correctly held that Petitioner fairly presented his penalty-phase ineffective-assistance-of-counsel claim to the state courts.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement 1

Reasons for Denying the Petition 14

I. Because the Eighth Circuit did not raise *sua sponte* an affirmative defense Arkansas had chosen not to raise, the decision below does not implicate *Wood* and *Day*. 14

II. Citing a putative split this Court has twice refused to review in recent years, Thomas overstates the conflict among the lower courts. 18

III. The decision below is not manifestly erroneous. 26

Conclusion 28

TABLE OF AUTHORITIES

Cases

Abdullah v. Groose,
75 F.3d 408 (8th Cir. 1996) 21

Anderson v. Kelley,
938 F.3d 949 (8th Cir. 2019) 21

Arcadia, Ohio v. Ohio Power Co.,
498 U.S. 73 (1990) 17

Daniels v. Kelley,
881 F.3d 607 (8th Cir. 2018) 21, 22

Dansby v. Hobbs,
766 F.3d 809 (8th Cir. 2014) 21

Day v. McDonough,
547 U.S. 198 (2006) 15

Dickens v. Ryan,
740 F.3d 1302 (9th Cir. 2014) (en banc) 19, 24, 25

Escamilla v. Stephens,
749 F.3d 380 (5th Cir. 2014) 20

Flieger v. Delo,
16 F.3d 878, 884 (8th Cir.1994) 21, 23

Fink v. State,
658 S.W.2d 359 (Ark. 1983) 11

House v. Bell,
547 U.S. 518 (2006) 26

Krimmel v. Hopkins,
56 F.3d 873 (8th Cir. 1995) 21

Martinez v. Ryan,
566 U.S. 1 (2011) 11

Picard v. Connor,
404 U.S. 270 (1971) 20

Runnels v. Davis,
746 F. App’x 308 (5th Cir. 2018) 26

Sasser v. Payne,
No. 18-1678, 2021 WL 2212590 (8th Cir. June 2, 2021) 22, 23

Thomas v. State,
257 S.W.3d 92 (Ark. 2007) 7

Thomas v. State,
431 S. W.3d 923 (Ark. 2014) 11

Trevino v. Thaler,
569 U.S. 413 (2013) 11, 16

Tyler v. Gunter,
819 F.2d 869 (8th Cir. 1987) 21

Vandross v. Stirling,
986 F.3d 442 (4th Cir. 2021) 20

Vasquez v. Hillery,
474 U.S. 254 (1986) 18, 20, 21

Ward v. Stephens,
777 F.3d 250 (5th Cir. 2015) 25

Wong v. Belmontes,
558 U.S. 15 (2009) 13

Wood v. Milyard,
566 U.S. 463 (2012) 13, 15, 16

Rules

28 U.S.C. 2254 Rule 5 17

Other Authorities

Wright & Miller, *Federal Practice and Procedure*
(3d ed. Apr. 2021 update) 17

STATEMENT

1. On the morning of June 14, 2004, Mickey Thomas drove his Ford Mustang with a distinctive, metallic paintjob from his hometown of Broken Bow, Oklahoma, across the border to DeQueen, Arkansas. As the jury heard, Thomas confessed to his mother that, a few hours later, he murdered two women in the Cornerstone Monument Company: Mona Shelton, the proprietor, and Donna Cary, a customer. Thomas took their purses and calmly left, when he was seen by a delivery driver. On the driver's tip, law enforcement pursued Thomas, who led them on a high-speed chase back to his mother's house in Oklahoma. Later, they would find at that house clothing covered with Ms. Shelton's blood, and in Thomas's pocket the murder weapon.

One of Thomas's victims, Ms. Shelton, was a mother of two who owned the Cornerstone Monument Company with her husband. Thomas severely beat Ms. Shelton, then shot her once in her right temple. C.A. App. 2234-36.[1] Based on her defensive wounds, it was clear that Thomas struggled with her before he shot her. C.A. App. 2233-2239, 4243-69. His other victim, Ms. Cary, a wife and grandmother of two, was apparently attempting to comply with Thomas's instructions when he killed her. She was found face-down in a pool of blood near the front door. C.A. App. 4257. In her left hand were the gravestone inscriptions she intended to deliver that day. *Id.* Next to her sat a soft drink from Sonic, suggesting she set it down to lower herself to the ground just before Thomas murdered her. C.A. App. 4257, 4259. She died from a contact gunshot wound to the back of her head. C.A. App. 2620-22, 4270.

[1] Citations designated "C.A. App." are to Arkansas's appendix filed in the court of appeals.

The trial evidence overwhelmingly proved Thomas's guilt. A security camera recorded him buying gloves at the DeQueen Wal-Mart minutes before the murders. C.A. App. 1975-79. Several witnesses on lunch breaks saw Thomas and his distinctive Mustang with Oklahoma license tags at the Cornerstone Monument Company late in the morning on the day of the double murder. C.A. App. 1990-2022. And a FedEx delivery man saw Thomas come out the door of the business, walk to his car "at a leisurely pace," and drive away. C.A. App. 2031-34. The delivery man then entered and discovered Ms. Shelton's and Ms. Cary's bodies. C.A. App. 2035.

Acting on the delivery man's report, police came upon Thomas's Mustang shortly before it crossed the border into Oklahoma, at which point Thomas led them on a high-speed chase to Broken Bow at speeds exceeding 128 miles an hour. C.A. App. 2055-57. Police eventually disabled Thomas's Mustang with spike strips, but Thomas was still able to drive to his mother's house on its destroyed wheels. *See* C.A. App. 2079-80, 2083-89. Before fleeing into the woods, Thomas told his mother that he had killed two women. C.A. App. 2108-09.

Thomas next appeared at the nearby home of Claudette Stevens, where he stole her car at gunpoint. C.A. App. 2098-99. The stolen-vehicle report led police to set up a roadblock, where they finally stopped Thomas by shooting out the tires of his vehicle. C.A. App. 2122-27. In Thomas's pockets they found a loaded .38-caliber, two-shot Derringer pistol, two spent shell casings, money, an unused condom, a brochure from Cornerstone Monument Company, and orange twine. C.A. App. 2135, 2140-41.

The physical evidence collected at the monument store also linked Thomas to the double murder. Investigators found one .38-caliber bullet at the crime scene that they were able to determine had been fired from Thomas's Derringer. C.A. App. 2199-2220, 2287-88, 2290. Additionally, they recovered a bullet from Ms. Cary's head which, although too damaged to be linked to a particular firearm, was also .38 caliber. C.A. App. 2287-88. They found one of Thomas's gloves in the parking lot. C.A. App. 2175. And they found Ms. Shelton's pink press-on fingernails scattered around the floor, including in an adjacent work room, which contained a mixture of DNA profiles that were consistent with Thomas and Ms. Shelton. C.A. App. 2192, 2276-77.

At Thomas's mother's house, police found still more evidence that he committed the murders. In her laundry room, they found Ms. Shelton's and Ms. Cary's purses, a pullover shirt and pair of jeans stained with Ms. Shelton's blood, and the other glove that Thomas bought at Wal-Mart that morning. C.A. App. 1977-78, 2153, 2214-20, 2273-74. The blood on Thomas's shirt and jeans belonged "with all scientific certainty" to Ms. Shelton. C.A. App. 2274.

2. After hearing this evidence, the jury deliberated for just over two hours before finding Thomas guilty of two counts of capital murder for killing Ms. Shelton and Ms. Cary. *See* C.A. App. 2395-2402. Following the guilty verdict, Thomas's counsel called ten witnesses in the penalty phase. These witnesses told the jury of Thomas's childhood and adolescence, an early life filled with abuse.

Thomas's mother testified about his birth and infancy. Not even 17 when she became pregnant, Thomas's mother then lived in Texas in a series of rat-infested

houses that "didn't have windows, doors, no water, no electric, nothing." C.A. App. 2471; *see* C.A. App. 2474-75. She saw no doctor during pregnancy and engaged in extensive substance abuse, which continued once Thomas was born. *See* C.A. App. 2472 (testifying that she "did acid, smoked weed . . . sniffed gas and stuff like that . . . every day"). Thomas—only about three pounds—was immediately hospitalized upon birth. C.A. App. 2473. And once he came home, the situation was so dire that Thomas's mother "didn't even have milk, diapers, or nothing." C.A. App. 2473-74.

The jury heard that, given the circumstances, Thomas's mother chose to leave his father and relocate to her parents' house in Oklahoma. C.A. App. 2475, 2477. Thomas spent "a lot" of time around her parents, who "fought all the time themselves and [were] drunk." C.A. App. 2477-78, 2484. Thomas's father never provided any child support for Thomas and his younger brother. Consequently, his mother "had to work two jobs by [herself] to try to keep feeding them." C.A. App. 2476. And at some point during his childhood, Thomas began to struggle with substance abuse. According to his mother, once—when "he was little"—she found him unconscious from "sucking gas." C.A. App. 2488.

Sometime after Thomas's mother moved back to Oklahoma, she told the jury how she began living with a new boyfriend, who regularly beat her. C.A. App. 2479-80. She testified: He "would beat me when I was pregnant, kicked me in my stomach when I was pregnant with my two girls," and "made our life hell." C.A. App. 2480. The abuse was also directed at Thomas. At least once, his mother's boyfriend beat him with an automotive fan belt. C.A. App. 2480-82, 2518. She would go on to leave

this boyfriend, at which point Thomas became "the man of the house," doing "things so we could have food and the lights would stay on or we could have—my other kids could have shoes to go to school in." C.A. App. 2482-83. Thomas eventually turned to theft to provide for his family, which led the State to place him in foster care. C.A. App. 2484.

As an adult, Thomas's criminal behavior intensified. In 1993 he robbed a motel clerk in Broken Bow. *See* C.A. App. 2432-39. After having the clerk hand him the cash from the register, C.A. App. 2434, Thomas took a shotgun that he found on a bookshelf in the office, loaded and unloaded it several times, and then loaded it once more and pointed it at the motel clerk, C.A. App. 2436-37. He instructed her to remove her clothes. C.A. App. 2437. She refused and soon escaped—"decid[ing] at that point [she] would rather take a bullet than go with him"—when she called the police who were able to arrest Thomas. C.A. App. 2437-38. For this, Thomas was convicted of "robbery with firearms" and sentenced to 15 years in prison. C.A. App. 4294.

After Thomas was released from prison, he got married, although he and his wife would eventually separate. At sentencing, Thomas's mother testified that this separation "hurt him because" his wife and stepchildren "were his world and his family." C.A. App. 2490. He began to change, drinking more and telling his mother "[s]omething is wrong . . . I need some help." C.A. App. 2491.

Other family members, including Thomas's four siblings, testified during the penalty phase and corroborated his mother's testimony. *See, e.g.*, C.A. App. 2502-05, 2506-11, 2510 (testimony of Thomas's two brothers that Thomas did what he could to

support the family); C.A. App. 2513-15, 2518-19 (testimony of his two sisters that he was the "backbone" of the family); C.A. App. 2534-35 (testimony of girlfriend of Thomas's father about father's substance abuse and lack of involvement with Thomas). One of his sisters recounted "the last fight" their mother had with her one-time boyfriend: "[H]e pretty much beat her and she had knots and blood pretty much everywhere, head butted her and had her down choking her and he tried to drown her." C.A. App. 2518. And Thomas's paternal aunt reiterated the abuse that he suffered from a young age—how his father once "whipped" him until he passed out, how relatives "gave [Thomas] whiskey . . . and blew cigar smoke all in his face . . . trying to get him to go to sleep." C.A. App. 2530-31.

Dr. Richard Livingston, a psychiatrist, also testified during the trial's penalty phase about Thomas's medical history. Livingston highlighted Thomas's low birth weight—indicative of drug exposure *in utero*—which placed him "at risk for almost everything developmentally," including "severe mental retardation" and "severe behavioral problems." C.A. App. 2553-54. Livingston also explained the wide-ranging damage that inhalation of gas fumes could cause a toddler's brain. *See* C.A. App. 2555 (testifying that exposure to "volatile inhalants" at an "early age" meant that the "lists of bad effects is broader and it is much harder to predict exactly what bad effects you'll see, but you can almost always count on there being some"). Indeed, Livingston explained to the jury that Thomas had a "specific learning disability in the area of language," which might have resulted from his exposure to toxins at a young age. C.A. App. 2558.

Livingston also testified about problems Thomas faced in adulthood. He described Thomas's paranoid tendencies. C.A. App. 2559. He also discussed how Thomas's separation from his wife and step-children caused him "anxiety and fretfulness and depression." C.A. App. 2559-60. He explained how the absence of a father figure in Thomas's life would be "associated with a high statistical risk of all kinds of behavior problems," and how because Thomas "gr[e]w up with adults who [were] in abusive and difficult relationships," he likely did not "learn how to relate to people right." *Id.*

Based on this extensive penalty-phase testimony, the jury unanimously found that 13 out of Thomas's 32 enumerated mitigating circumstances probably existed, and it nonunanimously found that 12 more probably existed. C.A. App. 1126-36, 1141-51. Yet the jury also unanimously found that three aggravating circumstances existed: (1) Thomas had "previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person"; (2) Thomas knowingly killed both Ms. Shelton and Ms. Cary "in the same criminal episode"; and (3) Thomas killed the women "for pecuniary gain." C.A. App. 1125, 1140. And the jury unanimously found that the aggravating circumstances outweighed, beyond a reasonable doubt, the mitigating circumstances found by any juror to exist. C.A. App. 1138, 1153.

The Arkansas Supreme Court affirmed on direct review. *Thomas v. State*, 257 S.W.3d 92 (Ark. 2007).

3. Thomas then filed a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.5. Pet. App. 92a-100a. Much of his petition to this Court hinges on his characterization of this state postconviction petition as "fact-free." *See* Pet. 5, 16-17, 25. But that characterization focuses solely on the language of his post-conviction petition itself, *see* Pet. App. 95a, and the state court's order denying it on the merits, *see* Pet. App. 88a. Thomas omits any discussion whatsoever of the evidence presented during the state-court postconviction hearing. Indeed, he summarizes the substance of that hearing in a single sentence. *See* Pet. 3-4. That summary understates the efforts of postconviction counsel.

On state postconviction review, Thomas claimed that his "[t]rial counsel was ineffective for failing to properly investigate and present mitigation evidence." Pet. App. 95a. And at the evidentiary hearing held on Thomas's petition for state post-conviction relief, both his guilt- and penalty-phase lead attorneys testified. Llewellyn Marczuk, who led the guilt phase of Thomas's trial, was an experienced criminal-defense attorney. At the time of Thomas's trial, Marczuk had been exclusively representing capital defendants for nearly a decade and had defended between 50 and 70 capital-murder trials. C.A. App. 2813-15.

Importantly, Marczuk testified that Thomas confessed to the trial team that he murdered Ms. Shelton and Ms. Cary. At that point, Marczuk viewed his job as, in part, to mitigate the circumstances of the crime during the guilt phase. C.A. App. 2839-40. Thus, his overarching strategy was to admit that Thomas killed the two women to build credibility with the jury. C.A. App. 2828-29.

Marczuk detailed the trial team's efforts to defend Thomas. He recalled that, because one of their retained mental-health experts was delayed in getting to the courthouse, the trial team got the court to "delay[] the trial for a short period of time so that he could get [t]here." C.A. App. 2819. In the end, the defense expert had to be "helicopter[ed] in and given a special police escort to get him [t]here on time." *Id.* Marczuk told the state court about how his team had spoken to as many witnesses as possible—the majority of whom they interviewed in person. C.A. App. 2826.

Thomas's postconviction counsel also elicited testimony from Marczuk about weaknesses in the investigation. For instance, although Thomas told his defense team that he had a girlfriend in DeQueen (the site of Thomas's double murder), Marczuk looked for the girlfriend but never located her. C.A. App. 2827. Marczuk testified that the girlfriend was relevant to their investigation because Thomas had an unused condom in his pocket when he was apprehended, and the fact that he may have had a girlfriend in DeQueen would help explain why. That, in turn, would be useful to discount any prosecutorial claim of sexual motive in the DeQueen murders. C.A. App. 2827.

Thomas's penalty-phase counsel, Tammy Harris, also testified at the postconviction hearing. *See* C.A. App. 2845. Harris prepared for the penalty phase with help from a mitigation specialist, who collected information from expert and lay witnesses, including family members, and assisted with record collection. C.A. App. 2846-47. Harris testified the team obtained as many records as they could. C.A. App. 2847-48. Early on, the trial team investigated whether "Thomas met the definition of mental

retardation." C.A. App. 2849. But "the state hospital found his IQ up in the 90s," and the defense mental-health "expert didn't find anything to rebut or refute that." *Id.*

Harris detailed the scope of the mitigation investigation. The defense team spoke to Thomas's brothers, sisters, stepmother, aunts, uncles, foster parents, and "as many people as they were made aware of," in addition to multiple experts. C.A. App. 2851-52. Harris said the defense team strove to track Thomas's life from before he was born until the time up to his trial. She agreed that, "from the time before [Thomas] was born until the time up to his trial," she had "used every factor he could have possibly used"—"every factor [she] could have possibly asserted." C.A. App. 2852-53.

The local public defender who served as Thomas's local counsel and assisted with voir dire, also testified. Postconviction counsel asked the public defender whether he had noticed "anything unusual about the behaviors of any of the lawyers," or whether "any of them were somehow distracted." C.A. App. 2857. His answer was unequivocal: "Absolutely not," he said. "They were so dedicated I was amazed." *Id.*

After hearing this evidence regarding trial counsel's performance, the state court denied Thomas's penalty-phase ineffectiveness claim on the merits. It found "no evidence in support of th[is] claim[]." Pet. App. 88a. "To the contrary, the court f[ound] that petitioner's attorneys did in fact adequately investigate the issues petitioner cites and adequately cross-examine witnesses." *Id.*

Thomas appealed the trial court's denial of his postconviction petition in general. But he chose not to appeal its rejection on the merits of his penalty-phase ineffectiveness claim. *See Thomas v. State*, 431 S. W.3d 923, 925 (Ark. 2014). Under longstanding Arkansas law, this failure to appeal the trial court's ruling on this point resulted in a procedural default of it. *See, e.g.*, *Fink v. State*, 658 S.W.2d 359, 360 (Ark. 1983) (treating an ineffectiveness claim as defaulted due to failure to press it on appeal).

4. Thomas then filed a federal habeas petition. Among the host of claims he brought, Thomas attempted to revive the penalty-phase ineffectiveness claim that he had defaulted on appeal to the Arkansas Supreme Court. *See* Pet. App. 78a. The district court below denied all of Thomas's claims except for this one. Pet. App. 76a-77a.

Arkansas argued in the district court that Thomas could not use this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2011), and *Trevino v. Thaler*, 569 U.S. 413 (2013), to show cause for his appellate default of this claim. Although they were "clearly defaulted on appeal of" Thomas's state postconviction preceding, *Martinez* and *Trevino* do "not apply to evidentiary or appellate defaults." Pet. App. 58a. But the district court refused to apply this principle to Thomas's penalty-phase ineffectiveness claim. It did not acknowledge that, based on the evidence presented at the postconviction hearing, the state court had expressly said it "f[ound] that petitioner's attorneys did in fact adequately investigate" evidence relevant to Thomas's mitigation case. *See* Pet. App. 59a. Instead, it focused on the preceding sentence from the state court's order, which said Thomas has "introduced no evidence" to support his

claims. *Id.* Despite the state court's characterization of its decision as ruling on the merits of Thomas's claims, the district court ruled that Thomas had in fact procedurally defaulted his penalty-phase ineffectiveness claim during the initial postconviction proceeding in the state trial court. Pet. App. 60a.

The district court therefore proceeded to consider whether the *Martinez/Trevino* exception allowed Thomas to revive this defaulted claim. *See* Pet. App. 60a-62a, 64a-68a. To determine that Thomas had presented a "substantial" ineffective-assistance claim—one of the four requirements for relying on *Martinez/Trevino*, *see Trevino*, 569 U.S. at 423—the district court identified additional evidence introduced by federal habeas counsel. *See* Pet. App. 66a-68a. But the evidence it identified closely resembled the mitigation evidence introduced at Thomas's trial: of a "dysfunctional" family, surrounded by "[a]lcohol abuse, drug abuse, physical abuse, and violence"; of a troubled man who "began huffing gas as a toddler" and who, "on occasion, stole food, clothing, and shoes to provide for his mother and siblings." Pet. App. 66a. The district court pointed to Thomas's own marital problems after he was released from prison. Pet. App. 67a. And the district court noted that additional expert testimony might have been offered, including from Dr. Livingston, who testified at Thomas's trial. Pet. App. 67a-68a.

As discussed above, however, the jury in fact heard these disturbing details about Thomas's background. "It is hard to imagine expert testimony and *additional* facts about [Thomas's] difficult childhood outweighing the facts of [the] murder[s]"—let alone the facts of Thomas's prior armed robbery. *Wong v. Belmontes*, 558 U.S. 15, 27-

28 (2009). Nevertheless, the district court granted Thomas habeas relief on his penalty-phase ineffectiveness claim.

5. Arkansas appealed the district court's partial grant of Thomas's habeas petition. *See* Pet. App. 1a. From the first page of Arkansas's brief below, it was clear that it challenged the district court's procedural-default ruling. *See* Appellant's Br. i, *Thomas v. Payne*, 960 F.3d 465 (8th Cir. 2020) (describing how the district court "excused [Thomas's] procedural default" and relied on "evidence adduced in the *Martinez* hearing" to grant the writ). Regardless of whether Arkansas did or "did not press the procedural default issue on appeal," Pet App. 7a n.3, at no point did it "deliberate[ly] waive[]" its procedural-default defense, *Wood v. Milyard*, 566 U.S. 463, 466 (2012).

Disagreeing with the district court's procedural-default ruling, the Eighth Circuit reversed the grant of habeas relief to Thomas. *See* Pet. App. 6a-11a, 19a-20a. Specifically, the Eighth Circuit concluded that it was Thomas's "*failure to appeal* that resulted in the default." Pet. App. 11a. The state postconviction court "did *not* decline to hear Thomas's guilt-and-penalty ineffective-assistance claims" but rather "clearly ruled on the merits of the claim." Pet. App. 8a; *see id.* (recounting state court's finding "that Thomas's '[trial] attorneys did in fact adequately investigate the issues petitioner cites'" (alteration in original)). The state court's remark about the lack of evidence "speaks to the weakness of Thomas's claims on the merits"—not to his failure to follow state procedures. Pet. App. 9a.

To cement the conclusion that the state trial court rejected the merits of Thomas's penalty-phase ineffectiveness claim, the Eighth Circuit recounted the proceedings in

that court. "Thomas presented the [state] court with ten different, specific, ineffective-assistance-at-trial allegations." Pet. App. 10a. These included allegations that his trial counsel "fail[ed] to properly investigate and present mitigation evidence." *Id.* And his postconviction counsel "specifically questioned Trial Counsel about the scope of the mitigation and mental health investigation." *Id.* While the Eighth Circuit did "not question the district court's finding that" postconviction counsel "only 'skimmed' the issues at the [postconviction] hearing," it nevertheless concluded that "no procedural default was triggered in the initial [postconviction] proceedings." Pet. App. 10a & n.6.

Thus, "it was his *failure to appeal* that resulted in the default." Pet. App. 11a. Because of that, the Eighth Circuit concluded that the *Martinez/Trevino* exception could not provide cause to excuse Thomas's procedural default. *Id.*

REASONS FOR DENYING THE PETITION

I. Because the Eighth Circuit did not raise *sua sponte* an affirmative defense Arkansas had chosen not to raise, the decision below does not implicate *Wood* and *Day*.

A. From the outset of this habeas proceeding, one of the key issues has been whether Thomas procedurally defaulted his claim that his trial counsel ineffectively presented mitigation evidence during the penalty phase of his trial. In the district court, Arkansas argued that Thomas defaulted this claim during the state postconviction proceedings by failing to appeal the trial court's rejection of it on the merits. *See* Pet. App. 58a. Though the district court disagreed about the timing of the default, it nonetheless agreed that Thomas had defaulted this claim. Pet. App. 59a-60a. The

Eighth Circuit, for its part, rejected the district court's position and adopted Arkansas's. Pet. App. 10a-11a.

Because Arkansas pleaded a procedural-default defense in the district court, this case falls outside the concerns of *Wood* and *Day v. McDonough*, 547 U.S. 198 (2006). Each of those cases concerned a lower court's "authority, on its own initiative, to dismiss a habeas petition" based on limitations or some other threshold, procedural defense, even after "the State has answered the petition without contesting its" compliance with the relevant procedural requirement. *Day*, 547 U.S. at 202; *see Wood*, 566 U.S. at 466. In other words, *Wood* and *Day* are concerned about cases where the State fails in the district court to plead an affirmative defense based on a procedural requirement, not about the requirements for preserving arguments on appeal.

Here, Thomas never claims that Arkansas answered without placing procedural default at issue. Just the opposite: The petition concedes that Arkansas argued in the district court that Thomas had procedurally defaulted his penalty-phase ineffectiveness claim, among others. *See* Pet. 2, 13. Indeed, although he claims that "the Eighth Circuit disregarded the State's intentional abandonment of a procedural-default defense," Pet. 13, he cites nowhere in the proceedings below—neither in a brief nor in a transcript—to support Arkansas's supposedly "textbook waiver," Pet. 14. Contrast *Wood*, where "the State twice informed" the district court "that it '[would] not challenge'" the petition's timeliness. 566 U.S. at 465. This case does not present the same scenario. Because Thomas does not claim that "the State failed to raise"

the "threshold bar" of procedural default "in answering [his] habeas petition," *id.* at 466, this case does not implicate *Wood* and *Day*.

Instead, Thomas contends that Arkansas waived procedural default on appeal by "focus[ing] only on the merits." Pet. 14. As just discussed, however, neither *Wood* nor *Day* addressed a claim that a State had waived or forfeited an argument on appeal. So what Thomas calls a conflict with those decisions is, at most, a refusal to extend their rule as far as Thomas wishes it went.

In any event, procedural default remained at issue in Arkansas's appeal. Its briefing below discussed the merits of Thomas's underlying ineffectiveness claim, but under *Martinez* and *Trevino*, the merits of that claim are central to the procedural-default question. To rely on those decisions to show cause, Thomas needed to show, among other requirements, that his "claim of 'ineffective assistance of counsel' was a 'substantial' claim." *Trevino*, 569 U.S. at 423 (quoting *Martinez*, 566 U.S. at 14). Thus, by challenging the substance of Thomas's ineffectiveness claim, Arkansas was challenging the district court's ruling that Thomas's procedural default was excused. *See* Pet. App. 50a-51a, 68a-73a.

At worst, Arkansas abandoned a *particular argument* for procedural default on appeal—not the affirmative defense itself. *Wood* focused only on the scope of an appellate court's authority to address "a forfeited affirmative defense," not a forfeited argument supporting an affirmative defense. 566 U.S. at 470. That is because the Rules Governing Section 2254 Cases in the District Courts, just like the general pleading rules, are quite strict regarding the presentation of affirmative defense. *See*

28 U.S.C. 2254 Rule 5(b) (requiring respondent to "state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations"); *see also* Wright & Miller, *Federal Practice and Procedure* sec. 1278 (3d ed. Apr. 2021 update) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case . . . ."). The same is not true regarding particular arguments. *See, e.g.*, *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77, 85 (1990) (reversing on the basis of "question antecedent" to the question addressed by the court of appeals and the parties); *id.* at 86 (Stevens, J., concurring) (noting that "neither the parties, the interested agencies, nor the Court of Appeals considered the construction of [the relevant statute] that the Court adopts today").

Thomas's real claim is that Arkansas abandoned one particular argument regarding procedural default—that Thomas's default happened as a result of his failure to appeal the state postconviction court's ruling on the merits of his penalty-phase ineffectiveness claim. But neither *Wood* nor *Day* is concerned with the particular arguments a party makes, as long as the affirmative defense itself was not deliberately waived in the trial court, which it was not in this case. There is thus no conflict between the decision below, and *Wood* and *Day*. This Court should not grant review on this question.

B. For similar reasons, the Court should not grant review on what Thomas terms the second question presented. *See* Pet. i, 13. This question is premised on the idea

that the decision below implicates *Wood* and *Day*'s rules for *sua sponte* adjudication of procedural defenses that were deliberately waived in the district court. But as just explained, the Eighth Circuit did not raise *sua sponte* a procedural-default defense. Instead, Arkansas presented it in the district court. And though Arkansas's arguments changed somewhat on appeal, procedural default remained in issue. Because there was no *sua sponte* injection of this defense into the proceedings below, there was no need for additional briefing. This Court should deny the petition as to questions one and two, because Thomas has not shown any conflict between the decision below and this Court's precedent.

II. Citing a putative split this Court has twice refused to review in recent years, Thomas overstates the conflict among the lower courts.

Besides pointing to *Wood* and *Day*, Thomas makes one other attempt to sidestep the consequences of his procedural default on appeal on state postconviction review. He argues that the evidence he presented in the *Martinez/Trevino* hearing below "fundamentally alter[ed]" his penalty-phase ineffectiveness claim, so as to render it a new claim that he never fairly presented to the state courts. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); *see* Pet. 16. Rejecting this argument, the Eighth Circuit held that "Thomas presented the [state] court with ten different, specific, ineffective-assistance-at-trial allegations," including the penalty-phase claim he presses before this Court. Pet. App. 10a.

Thomas improbably claims that the decision below places the Eighth Circuit in conflict with every regional circuit, except for the First and D.C. Circuits. *See* Pet. 17-23. But his argument in support of this claimed split largely amounts to a four-

page string of quotations of general legal propositions, uncontroversial in the Eighth Circuit and elsewhere. The only decision he analyzes in any depth is *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc). Yet this Court has twice recently refused to grant certiorari to petitioners who sought review of a decision they claimed conflicted with *Dickens*. *See* Pet. for Writ of Cert. 15-17, *Smith v. Mays*, 139 S. Ct. 2693 (cert. den. Jun. 10, 2019) (No. 18-1132), 2019 WL 1014177, at *15-17; Pet. for Writ of Cert. 20, *Pouncy v. Palmer*, 138 S. Ct. 637 (cert. den. Jan. 8, 2018) (No. 17-160), 2017 WL 7688381, at *20. Nothing has changed since June 2019 to warrant this Court's intervention now. The petition should be denied.

A. To give an appearance of depth to the putative division among the lower courts, Thomas claims that the Eighth Circuit's analysis of the "fair presentation" requirement splits with the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. Pet. 17-23. In support of this sweeping claim, Thomas largely offers out-of-context quotations from those other courts stating general legal principles. He argues that, unlike the Eighth Circuit, those other courts follow a rule that "a federal claim that significantly strengthens a state claim with new facts transforms the claim and creates a procedural default." Pet. 18. But he identifies nowhere in the decision below or any other decision by the Eighth Circuit where that court has disagreed with this rule. That is because the Eighth Circuit does not disagree with this rule. Thomas just disagrees with the Eighth Circuit's application of this rule to his case. There is no need for this Court's review.

As an initial matter, some of the decisions that Thomas cites do not discuss exhaustion and procedural default. Instead, they analyze the distinct question of when a federal habeas court may consider evidence outside the state-court record. *See Vandross v. Stirling*, 986 F.3d 442, 450 (4th Cir. 2021) (refusing to "carry the *Martinez* exception to procedural default over to this case to provide an exception to the distinct rule" that a federal habeas court may consider only material in the state-court record); *Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014) (denying certificate of appealability because *Cullen v. Pinholster*, 563 U.S. 170 (2011), "bars [petitioner] from presenting new evidence to the federal habeas court with regard to this already-adjudicated claim").

The somewhat more apt decisions he cites largely comprise uncontroversial applications of this Court's exhaustion decisions, which require federal habeas petitioners to fairly present their legal claims and supporting evidence to the state courts. *See, e.g.*, *Vasquez*, 474 U.S. at 257-60; *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). Nearly all of these decisions predate *Martinez*—many predating even AEDPA. And like *Vasquez* itself, these decisions sought to protect the principle that state courts must have "the first opportunity to hear the claim sought to be vindicated." *Vasquez*, 474 U.S. at 257 (quoting *Picard*, 404 U.S. at 276). Substantially altering a claim after ostensibly presenting it to the state courts would "evade[] the exhaustion requirement." *Id.* at 258. Thomas invokes the fair-presentation requirement for the opposite purpose, however, attempting to use *Martinez* and *Trevino* to frustrate this Court's

insistence that federal courts "afford the state courts a meaningful opportunity to consider" the substance of his claims. *Id.* at 257.

In any event, Thomas is not correct that the Eighth Circuit refuses to "follow a rule that derives from *Vasquez*." Pet. 23. Both before and after *Martinez*, the Eighth Circuit has understood the fair-presentation requirement to force habeas petitioners to exhaust in state court "the same *factual grounds* and legal theories" brought in a federal habeas petition. *Krimmel v. Hopkins*, 56 F.3d 873, 876 (8th Cir. 1995) (emphasis added); *see, e.g.*, *Anderson v. Kelley*, 938 F.3d 949, 961 (8th Cir. 2019) (holding that federal claim was not fairly presented to state court because, although it relied on "the same constitutional rights [the petitioner] claims [were] violated" in his state-court claim, his federal claim involved new facts); *Dansby v. Hobbs*, 766 F.3d 809, 823 (8th Cir. 2014) ("A petitioner must present 'both the factual and legal premises' of his claims to the state courts in order to exhaust the claims properly." (quoting *Flieger v. Delo*, 16 F.3d 878, 884 (8th Cir.1994)) (some quotation marks omitted)).

As in the courts that Thomas cites, it does not suffice in the Eighth Circuit to "present[] a claim to the state courts that is merely similar to the federal habeas claim . . . to satisfy the fairly presented requirement." *Abdullah v. Groose*, 75 F.3d 408, 412 (8th Cir. 1996). Unless "the state court ha[d] a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim,'" the Eighth Circuit will not find that "the exhaustion doctrine is satisfied." *Tyler v. Gunter*, 819 F.2d 869, 870 (8th Cir. 1987) (some quotation marks omitted) (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Thus, for example in *Daniels v. Kelley*, 881 F.3d 607 (8th Cir. 2018),

the court held that the petitioner had not fairly presented his federal claim because of the addition of new facts. The *Daniels* petitioner presented to the state court a Sixth Amendment claim challenging "the trial court's refusal to grant a continuance" to obtain new, private counsel. *Id.* at 610. On federal habeas, he bolstered this claim with additional evidence. Because he had not presented this evidence to the state courts, the Eighth Circuit found it "doubtful that he fairly presented these factual premises of his claim to the appropriate state court as required." *Id.* at 612.

An Eighth Circuit decision issued two weeks ago makes clear that the court faithfully applies the fair-presentation requirement. *See Sasser v. Payne*, No. 18-1678, 2021 WL 2212590 (8th Cir. June 2, 2021). In a prior appeal by Sasser, the Eighth Circuit had remanded four of his habeas claims—all alleging ineffective assistance of counsel—to the district court for further consideration. *Id.* at *2. The district court determined that two of Sasser's claims "as developed on remand were different from those raised in the state postconviction proceeding" and thus procedurally defaulted. *Id.* Like the decision below, the Eighth Circuit in *Sasser* addressed the question whether these two claims were raised in the state trial court but "were then defaulted on appeal in state court." *Id.*

To determine whether Sasser had fairly presented these two claims to the state court, the Eighth Circuit "compare[d] the claims in Sasser's federal habeas petition with those set forth in his petition for postconviction relief" in state court. *Id.* at *2. For both the claims at issue, Sasser's state-court "petition cited the same alleged shortcomings advanced in the federal petition." *Id.* at *3. Because of the factual

similarity between the state and federal claims, *Sasser* held that the federal claims had been fairly presented to the state trial court in Sasser's petition for postconviction relief. *Id.*

At bottom, Thomas really claims that the Eighth Circuit stated the correct standard but simply misapplied it to his case—not that the Eighth Circuit articulated a one-of-a-kind standard for the fair-presentation requirement. Indeed, the decision below acknowledged that Thomas needed to "present[] 'both the factual and legal premises' of his claims to the state court." Pet. App. 9a (quoting *Flieger*, 16 F.3d at 884). And it held that Thomas had done so. *See* Pet. App. 10a (reviewing the "ten different, specific" ineffectiveness claims Thomas made in state court, and the evidence he introduced to support them).

That holding was correct. Thomas claimed in state court that his "[t]rial counsel was ineffective for failing to properly investigate and present mitigation evidence." Pet. App. 95a. At an evidentiary hearing, he presented testimony from the allegedly ineffective counsel about the scope of their investigation. *See supra* pp. 8-11. That testimony, just like the testimony offered in the district court below, went to "the scope of the mitigation and mental health investigation" of Thomas's trial counsel. Pet. App. 10a. And the state court denied Thomas's penalty-phase ineffectiveness claim on the merits. Pet. App. 88a.

The decision below correctly held that Thomas fairly presented this ineffectiveness claim in state court. Thomas's disagreement with that holding is no reason for this Court's review.

B. Nothing in the Ninth Circuit's decision in *Dickens* justifies granting the petition, either. Since this Court last denied a petition claiming a conflict with *Dickens*, there have been no developments that require this Court's review. *See* Pet. for Writ of Cert. 15-17, *Smith v. Mays*, 139 S. Ct. 2693 (cert. den. Jun. 10, 2019) (No. 18-1132), 2019 WL 1014177, at *15-17. If anything, Thomas's petition presents a less compelling case for this Court's review than *Mays*, because the tension between the Eighth and Ninth Circuits is less pronounced than the conflict asserted in the petition there.

Much of Thomas's analogy to *Dickens* depends on agreeing with him that the penalty-phase ineffectiveness claims he raised in state court were "fact-free state claim[s]." Pet. 17; *see Dickens*, 740 F.3d at 1319 (describing the state-court claim there as a "naked *Strickland* claim"). But the decision below did not agree with Thomas on this point. It noted that his state postconviction counsel "specifically questioned Trial Counsel about the scope of the mitigation and mental health investigation." Pet. App. 10a. State postconviction counsel also "asked about the records Trial Counsel obtained and failed to obtain, the scope of the investigation into Thomas's background, and the results of Thomas's mental health and competency evaluations." *Id.* In other words, contrary to Thomas's assertions, the penalty-phase ineffectiveness claim he presented in state court was not devoid of all facts. Thomas's federal postconviction counsel presented additional evidence but his state and federal claims resembled one another. That was not the case in *Dickens*. *See* 740 F.3d at 1319 (stating that the federal claim "b[ore] little resemblance to" the state claim).

The factual distinctions between Thomas's case and *Dickens* explain the differences in result. Any disagreement between the two reduces at most to an alleged misapplication of a correctly stated legal standard—not the "direct split" that Thomas claims. Pet. 17.

Were there a direct conflict between the decision below and *Dickens*, the Eighth Circuit's approach would be the correct one. Three judges dissented from the passage of *Dickens* on which Thomas relies. *See* 740 F.3d at 1324 (Callahan, J., dissenting, with Kozinski, C.J., and Bybee, J.). To adopt Thomas's interpretation of this passage, *see* Pet. 17, would "encourage[] state defendants to concoct 'new' [ineffectiveness] claims that are nothing more than fleshed-out versions of their old claims supplemented with 'new' evidence." 740 F.3d at 1328 (Callahan, J., dissenting). This runs contrary to the purposes of the fair-presentation requirement and exhaustion doctrine more generally, which exist to require "that newly discovered evidence . . . be presented in the first in the state courts. *Id.* at 1331. Instead, *Dickens* would treat "new allegations as fundamentally altering [a prisoner's] previously exhausted [ineffectiveness] claim precisely to excuse his failure to present those allegations to the state courts and to allow him to present them *for the first time* in the federal district court." *Id.* at 1332.

Judges elsewhere have agreed with Judge Callahan's critique of *Dickens*. Thomas's approach to *Dickens* and the fair-presentation requirement would "encourage sandbagging in state court to obtain *de novo* review of a petitioner's 'real' claim in federal court." *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015), *unrelated*

holding abrogated by Ayestas v. Davis, 138 S. Ct. 1080, 1093-94 (2018). Another Fifth Circuit panel rejected an argument based on *Dickens* similar to Thomas's because that court "will not permit the use of *Martinez* 'to bootstrap factual development in federal court in search for unexhausted claims.'" *Runnels v. Davis*, 746 F. App'x 308, 316 n.2 (5th Cir. 2018) (quoting *Ward*, 777 F.3d at 257 n.3).

Not only has Thomas overstated the disagreement that exists among the lower courts on the fair-presentation requirement, he relies on a fractured Ninth Circuit decision that has rightly faced criticism from other courts. This Court should not grant the petition to consider the second question it presents.

III. The decision below is not manifestly erroneous.

As the Eighth Circuit said, "given the strength of the state's case against Thomas," there is no reason for anything but "confiden[ce] in the result of his trial." Pet. App. 11a. Thomas's is one of "the usual case[s]," where his "presumed guilt" as "a prisoner convicted in state court counsels against federal review of [his] defaulted claims." *House v. Bell*, 547 U.S. 518, 537 (2006). Indeed, the jury heard Thomas's own mother testify that he had confessed to her that he killed Ms. Shelton and Ms. Cary. The jury also heard that Thomas had previously committed a violent felony—an armed robbery that included ordering a woman at gunpoint to undress. And the jury heard extensive mitigation testimony from his mother, his siblings, and others, about just how horrible his upbringing had been. Despite that mitigation testimony, the jury sentenced Thomas to death.

In state-court postconviction proceedings, Thomas had his "one fair shot to vindicate his right to effective counsel" by claiming that his penalty-phase counsel was

constitutionally ineffective. Pet. 24. He pleaded in state court that "[t]rial counsel was ineffective for failing to properly investigate and present mitigation evidence." Pet. App. 95a. Represented by new postconviction counsel, Thomas then had the opportunity to develop evidence in support of this penalty-phase ineffectiveness claim during a state-court evidentiary hearing. *See* Pet. App. 2a-3a, 10a (summarizing that evidence). During that hearing, his postconviction counsel questioned all his trial counsel, including his allegedly ineffective penalty-phase counsel. *See supra* pp. 8-10. Having heard that evidence, the state court rejected Thomas's claim on the merits. *See* Pet. App. 88a ("[T]he court finds that petitioner's attorneys did in fact adequately investigate the issues petitioner cites and adequately cross-examine witnesses."). Thus presenting his claim in state court for an adjudication on the merits, Thomas was not entitled to relitigate it in federal court simply because he did not like the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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