No. _____

In the Supreme Court of the United States

MELISSA ELIZABETH LUCIO,

Petitioner,

v.

BOBBY LUMPKIN, 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

PETITIONER'S APPENDIX

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Appendix A

an expert from the coroner's office that stored the rape kit were not called to testify before the grand jury as well, which is commonly done in other cases. Further, defense counsel was a relative of D'Aquilla, giving support to the allegation that the district attorney conspired with Boeker to thwart investigation and prosecution.

Louisiana has long held that "public officials—and prosecutors in particular—are held to a higher standard than ordinary attorneys." *In re Griffing*, 17-0874 (La. 10/18/17), 236 So.3d 1213, 1221–22 (citing *In re Bankston*, 01-2780 (La. 3/8/02), 810 So.2d 1113, 1117–18). "Because the prosecutor is given such great power and discretion, he is also charged with a high ethical standard." *In re Toups*, 00-0634 (La. 11/28/00), 773 So.2d 709, 715–16. As "an administrator of justice, a zealous advocate, and an officer of the court," the prosecutor has the primary duty "to seek justice." ABA Standards for Criminal Justice 3-1.2 (a)–(b) (4th ed. 2017). A prosecutor "should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the defendant, *victims*, and witnesses." *Id.* at 3-1.9(a) (emphasis added). In fact, the 20th Judicial District Attorney's Office (D'Aquilla's office) recognizes this responsibility to victims, as its mission statement prioritizes "provid[ing] comfort and restitution to those victims who have been harmed by criminal offenders."[2] Further, prosecutors "should not use other improper considerations, such as ... personal considerations, in exercising prosecutorial discretion," and "should not permit [their] professional judgment or obligations to be affected by [their] personal ... relationships." ABA Standards for Criminal Justice 3-1.6(a), 3-1.7(f).

Again, if Lefebure's allegations regarding the district attorney's conduct are true, then his handling of the matter was substandard and less than ethical. And by (allegedly) engaging in this course of conduct, D'Aquilla, who occupies a position of public trust, may have caused "inestimable harm to the public's perception of the legal profession." *Bankston*, 810 So.2d at 1117–18.

2. 20th Judicial District Attorney's Office, http://www.felicianasda.org/ (last visited Jan. 27, 2021).

Melissa Elizabeth LUCIO, Petitioner—Appellant,

v.

Bobby LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent—Appellee.

No. 16-70027

United States Court of Appeals,
Fifth Circuit.

FILED February 9, 2021

Background: Following affirmance on direct appeal of petitioner's conviction for capital murder and denial of state postconviction relief, 2013 WL 105179, petitioner sought federal writ of habeas corpus. The United States District Court for the Southern District of Texas, Hilda G. Tagle, Senior District Judge, denied petition. The Court of Appeals, 783 Fed.Appx. 313, reversed and remanded.

Holdings: On rehearing en banc, the Court of Appeals, Oldham, Circuit Judge, held that:

(1) petitioner's claims were sufficiently exhausted in state court;

(2) petitioner failed to demonstrate that the state court's exclusion of expert testimony regarding her psychological functioning and her truthfulness during interrogation was contrary to clearly established law;

(3) Texas Court of Criminal Appeals did not unreasonably apply Supreme Court's decision in *Crane v. Kentucky*, 106 S.Ct. 2142;

(4) state habeas court's adjudication of petitioner's claim that she was denied the right to present a complete defense was not contrary to Supreme Court's decision in *Chambers v. Mississippi*, 93 S.Ct. 1038;

(5) state habeas court's denial of petitioner's claim that she was denied the right to present a complete defense was not an unreasonable application of Supreme Court's decision in *Chambers v. Mississippi*, 93 S.Ct. 1038;

(6) state habeas court's denial of petitioner's claim that she was denied the right to present a complete defense by presenting expert testimony regarding her psychological functioning was not based on an unreasonable determination of the facts; and

(7) state habeas court's denial of petitioner's claim that she was denied the right to present a complete defense by proving through expert testimony that she was unlikely to have engaged in ongoing abuse of her daughter was not based on an unreasonable determination of the facts.

Affirmed.

Southwick, Circuit Judge, filed concurring opinion, which Costa and Willett, Circuit Judges, joined.

Higginbotham, Circuit Judge, filed opinion joining dissent of Haynes, Circuit Judge.

Elrod, Circuit Judge, filed dissenting opinion, which Higginson, Circuit Judge, joined.

Haynes, Circuit Judge, filed dissenting opinion, which Higginbotham, Stewart, Dennis, Elrod, Graves, and Higginson, Circuit Judges, joined.

1. Criminal Law ⚿670, 1036.1(9)

The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion of testimony was erroneous and harmful; a secondary purpose is to allow the trial court to reconsider a ruling in light of the actual evidence.

2. Habeas Corpus ⚿319.1

The exhaustion doctrine, as applied to federal habeas petitions, is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. 28 U.S.C.A. § 2254(b)(1).

3. Habeas Corpus ⚿319.1

Because state courts are obligated to enforce federal law, they must be given the first chance—after a state prisoner fully explains the federal claim—to correct any error. 28 U.S.C.A. § 2254(b)(1).

4. Habeas Corpus ⚿382

The exhaustion requirement provides that a state prisoner who does not fairly present a claim to a state habeas court—specifying both the legal and factual basis for the claim—may not raise that claim in a subsequent federal proceeding. 28 U.S.C.A. § 2254(b)(1).

5. Habeas Corpus ⚿766

On a federal habeas petition, for each claim that a state prisoner fully and fairly presented to the state courts, there is a rebuttable presumption that the state courts adjudicated it on the merits.

6. Habeas Corpus ⚿765.1

For each claim governed by Antiterrorism and Effective Death Penalty Act's relitigation bar, the federal court must identify the relevant state-court decision. 28 U.S.C.A. § 2254(d).

7. Habeas Corpus ⚿765.1

Under the Antiterrorism and Effective Death Penalty Act, federal courts must train their attention on the last related state-court decision that provides a relevant rationale to a particular claim; only then can it consider whether the state court's decision was contrary to or an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C.A. § 2254(d).

8. Habeas Corpus ⚿363, 364

Petitioner, who was convicted of capital murder in state court, raised, and state courts adjudicated, petitioner's due process claim based on exclusion of expert testimony regarding the voluntariness of her custodial statements and her claim that she was denied the right to present a complete defense by proving through expert testimony that she was unlikely to have engaged in ongoing abuse of her daughter, and thus such claims were sufficiently exhausted for federal habeas court to consider them under Antiterrorism and Effective Death Penalty Act; although neither claim was specifically presented to state trial court, Texas Court of Criminal Appeals adjudicated and denied petitioner's due process claim on direct appeal, and state habeas court adjudicated and denied her claim that she was denied the right to present a complete defense. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

9. Habeas Corpus ⚿450.1

To overcome Antiterrorism and Effective Death Penalty Act's relitigation bar, a state prisoner must shoehorn her claim into one of its narrow exceptions; the prisoner can do so only if the state court's decision was so obviously wrong as to be beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d).

10. Habeas Corpus ⚿490(5)

Petitioner failed to demonstrate that the state court's exclusion of expert testimony in her capital murder trial regarding her psychological functioning and her truthfulness during interrogation was contrary to the law clearly established in *Crane v. Kentucky*, 106 S.Ct. 2142, which struck down a state court's categorical exclusion of evidence related to the credibility of a confession after finding the confession voluntary, and thus petitioner was not entitled to federal habeas relief on such basis; petitioner conceded that, at best, her claim was strongly supported by *Crane*, but that no case was on all fours with her claim. 28 U.S.C.A. § 2254(d)(1).

11. Habeas Corpus ⚿452

A state-court decision is contrary to clearly established federal law, as required for habeas relief under Antiterrorism and Effective Death Penalty Act, only if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if it resolves a case differently than the Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1).

12. Habeas Corpus ⚿490(5)

Texas Court of Criminal Appeals did not unreasonably apply Supreme Court's decision in *Crane v. Kentucky*, 106 S.Ct. 2142, which struck down a state court's

categorical exclusion of evidence related to the credibility of a confession after finding the confession voluntary, in excluding expert testimony in petitioner's capital murder trial regarding her psychological functioning and her truthfulness during interrogation, where state court did not categorically prohibit evidence undermining her inculpatory statements, but permitted petitioner to present testimony other than the proffered expert testimony regarding the validity of her inculpatory statements. 28 U.S.C.A. § 2254(d)(1).

13. Habeas Corpus ⚿450.1

To meet the "unreasonable application" of federal law exception to the Antiterrorism and Effective Death Penalty Act's relitigation bar, a habeas petitioner must do much more than establish that the state court erred; rather, the relitigation bar forecloses relief unless the prisoner can show the state court was so wrong that the error was well understood and comprehended in existing law beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d)(1).

14. Habeas Corpus ⚿450.1

Antiterrorism and Effective Death Penalty Act provides a remedy for instances in which a state court unreasonably applies the Supreme Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error. 28 U.S.C.A. § 2254(d)(1).

15. Habeas Corpus ⚿753

The record under review on a habeas claim under the Antiterrorism and Effective Death Penalty Act is limited to the record in existence at the time the state court adjudicated the claim on the merits. 28 U.S.C.A. § 2254(d).

16. Habeas Corpus ⚿489.1

Challenges to state courts' application of state-law evidentiary rules form no part of a federal court's habeas review of a state conviction.

17. Habeas Corpus ⚿383

Flagging, in an argument to a state habeas court, a state-court case that in turn cited the U.S. Constitution is not sufficient to exhaust a federal claim under Antiterrorism and Effective Death Penalty Act. 28 U.S.C.A. § 2254(b)(1).

18. Habeas Corpus ⚿490(5)

State habeas court's adjudication of petitioner's claim that she was denied the right to present a complete defense by proving through expert testimony that she was unlikely to have engaged in ongoing abuse of her daughter was not contrary to Supreme Court's decision in *Chambers v. Mississippi*, 93 S.Ct. 1038, which struck down an idiosyncratic state-law rule preventing a defendant from impeaching his own witness, and thus petitioner was not entitled to federal habeas relief on such basis; state trial court excluded expert testimony pursuant to ordinary rules of evidence concerning admissibility of expert opinions, not pursuant to some idiosyncratic, arbitrary, archaic, and indefensible rule. 28 U.S.C.A. § 2254(d)(1).

19. Habeas Corpus ⚿490(5)

State habeas court's denial of petitioner's claim that she was denied the right to present a complete defense in her capital murder trial by proving through expert testimony that she was unlikely to have engaged in ongoing abuse of her daughter was not an unreasonable application of Supreme Court's decision in *Chambers v. Mississippi*, 93 S.Ct. 1038, which struck down an idiosyncratic state-law rule preventing a defendant from impeaching his own witness, and thus petitioner was not entitled to federal habeas relief on such

basis; Supreme Court never applied its complete-defense cases to discretionary evidentiary decisions under rules that were themselves constitution, such as the rules involving the admissibility of expert opinions. 28 U.S.C.A. § 2254(d)(1).

20. Habeas Corpus ⚿767

While the general standard for evaluating a state court's findings of fact on federal habeas review is reasonableness, the Antiterrorism and Effective Death Penalty Act requires a state prisoner to show that the state court's specific factual determination in her case is unreasonable by clear and convincing evidence. 28 U.S.C.A. § 2254(e)(1).

21. Habeas Corpus ⚿767

A federal habeas court cannot reject a factual finding merely because it would have made a different one. 28 U.S.C.A. § 2254(e)(1).

22. Courts ⚿509.2

A federal court lacks authority to rule that a state court incorrectly interpreted its own law.

23. Habeas Corpus ⚿453

It is not the function of a federal appellate court in a habeas proceeding to review a state's interpretation of its own law.

24. Habeas Corpus ⚿490(5)

State habeas court's denial of petitioner's claim that she was denied the right to present a complete defense in her capital murder trial by presenting expert testimony regarding her psychological functioning was not based on an unreasonable determination of the facts in light of the evidence presented at trial, and thus petitioner was not entitled to federal habeas relief on such basis; state habeas court determined that expert's opinion had no relevance to petitioner's guilt or innocence, and petitioner failed to identify any factual problems with such decision. 28 U.S.C.A. § 2254(d)(2).

25. Habeas Corpus ⚿490(5)

State habeas court's denial of petitioner's claim that she was denied the right to present a complete defense in her capital murder trial by proving through expert testimony that she was unlikely to have engaged in ongoing abuse of her daughter was not based on an unreasonable determination of the facts at trial, and thus petitioner was not entitled to federal habeas relief on such basis; petitioner offered testimony of expert on why petitioner would have given police incorrect information, which was based on petitioner's body language during questioning, her patterns of behavior, and her history with child protection services, but expert admitted that she was not a specialist in detecting human thought processes through physical conduct, which was a reasonable basis for state court to exclude her proffered testimony. 28 U.S.C.A. § 2254(d)(2).

26. Federal Courts ⚿3534

A party who fails to make an argument before either the district court or the original panel waives it for purposes of en banc consideration.

27. Habeas Corpus ⚿385

Where the state court offers an explanation for its decision underling a federal habeas claim, it need not cite or even be aware of federal cases under Antiterrorism and Effective Death Penalty Act. 28 U.S.C.A. § 2254(d).

28. Habeas Corpus ⚿452

Antiterrorism and Effective Death Penalty Act's "contrary to" prong can be satisfied through imposition of a contradictory standard or a diametrically different conclusion on materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

29. Habeas Corpus ⚿452

Under Antiterrorism and Effective Death Penalty Act, a federal court's task is not to determine whether Supreme Court precedent possibly permits a petitioner to argue what she argued, but whether that precedent positively precludes the state court from holding what it held; the absence of precedent commands the denial of relief to a state prisoner, not the grant of it. 28 U.S.C.A. § 2254(d).

30. Courts ⚿26(2)

Court decisions are "discretionary" when they involve an exercise of judgment and choice.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 1:13-CV-125, Hilda G. Tagle, U.S. District Judge

Allen Richard Ellis, Law Offices of A. Richard Ellis, Mill Valley, CA, Timothy Gumkowski, Tivon Schardl, Supervisory Attorney, Federal Public Defender, TXW, Capital Habeas Unit, Austin, TX, for Petitioner - Appellant.

Ari Cuenin, Matthew Hamilton Frederick, Deputy Solicitor General, Office of the Attorney General, Office of the Solicitor General, Austin, TX, Jennifer Wren Morris, Office of the Attorney General, Financial Litigation & Charitable Trusts Division, Austin, TX, for Respondent - Appellee.

Before OWEN, Chief Judge, and HIGGINBOTHAM, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.*

ANDREW S. OLDHAM, Circuit Judge, announced the judgment of the court and delivered an opinion joined by OWEN, Chief Judge, and JONES, SMITH, HO, DUNCAN, and ENGELHARDT, Circuit Judges:

A Texas jury convicted Melissa Lucio of capital murder for beating to death her two-year-old daughter. The state courts affirmed her conviction and sentence on direct appeal and denied her petition for postconviction relief. Now she seeks federal habeas relief. Lucio argues that the state trial court denied her constitutional right to present a complete defense by excluding two expert witnesses from testifying at the guilt phase of her trial. The federal district court held that she cannot surmount the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Ten members of the en banc court agree with that judgment. We affirm.

I.

We begin with the tragic facts of this case. Then we turn to Lucio's proceedings in state and federal court. This case turns on the ever-evolving arguments that Lucio offered at trial, on direct appeal, in state habeas, and in federal habeas. So we recount the procedural history in detail.

A.

On the night of February 17, 2007, paramedics responded to a call at the home shared by Lucio and her husband Robert Alvarez. ROA.14936–37, 14981–82. The call concerned the couple's young daughter, Mariah. ROA.14936. When the EMTs arrived, they found Mariah on the living-room floor. ROA.14922–23, 14936. No one was near her. ROA.14922. Her body was

* This case was submitted before Judge Wilson was confirmed to our court. Judge Wilson did not take part in the consideration or decision of this case.

covered with bruises in various stages of healing, her arm had been broken for several weeks, she had a bite mark on her back, and some of her hair had been pulled out. ROA.14813–16, 14937, 15051–54, 15066. She was not breathing. ROA.14923. She had no pulse. ROA.14923.

The EMTs tried to resuscitate Mariah and rushed her to the hospital. ROA. 14924–28. In the emergency room, a doctor also tried to revive Mariah. ROA.14813. Those efforts were unsuccessful. ROA. 14813. Mariah was pronounced dead. ROA. 14813. She was two years old. ROA.14922.

On the night of Mariah's death, Lucio told the EMTs and the police that Mariah fell down the stairs. ROA.8104–05, 14924. Later that night, during a videotaped interview with investigators, Lucio explained that she had caused the bruises on Mariah's body by spanking Mariah "real hard" and by pinching her vagina. ROA.8224–25. Lucio said "nobody else would hit her." ROA.8189. As for the bitemark on Mariah, Lucio explained that two weeks before Mariah's death, while Lucio combed Mariah's hair, Lucio grew frustrated with her other "kids jumping around." ROA.8223. Although Mariah had done nothing wrong, Lucio "placed [her] mouth over [Mariah's] back and bit her." ROA.8222. During the interrogation, Lucio denied ever punching Mariah, ROA.8227, causing the scratches on Mariah's face, ROA.8228, hitting Mariah on the head, or killing Mariah. ROA. 8200. But she also told investigators, "I'm responsible for it." ROA.5395.

Following the interrogation, Lucio made a phone call. A police officer who had been present with Lucio during the phone call testified that Lucio had told her sister, "Don't blame Robert. This was me. I did it. So don't blame Robert." ROA.14990–91.

The State of Texas charged Lucio with capital murder. At the trial, Lucio's sister took the stand and testified about the phone call. She denied that Lucio said, "This was me. I did it." ROA.15203. Rather, Lucio's sister said that they only discussed spanking, and that Lucio said, "I would spank the kids." ROA.15203. Lucio's sister also denied that Lucio spanked Mariah. In the sister's account, Lucio "never disciplined her children." ROA.15200.

The jury also heard testimony concerning Mariah's injuries. The forensic pathologist who performed Mariah's autopsy testified that her injuries were not the result of a fall: "[T]his is a child that's been beaten. This is a battered child." ROA.15070–71. In the pathologist's expert opinion, Mariah died from blunt-force trauma to the head. ROA.15096. At trial, the emergency-room doctor who tried to revive Mariah testified that this was the "absolute worst" case of child abuse he'd seen in his thirty-year career. ROA.14821. To rebut this evidence, Lucio's medical expert opined that Mariah was physically abused. But he also stated that her death could've been caused by either a fall or being "[h]it by a strong force." ROA.15194.

[1] The defense sought to call two additional expert witnesses, Dr. John Pinkerman and Ms. Norma Villanueva. The defense offered Pinkerman, a psychologist, to testify about Lucio's personal background and "psychological functioning." ROA. 15301. The trial court excluded it on the ground that such evidence is relevant only at the sentencing phase of a capital trial. *See* TEX. CODE CRIM. PROC. art. 37.071(e)(1) (tasking the jury, only *after* finding the defendant guilty, with considering "the defendant's character and background," "the personal moral culpability of the defendant," and "mitigating" evidence). So to preserve the issue for appellate review, defense counsel took Pinkerman's testimo-

ny for an offer of proof.[1] Here is the entirety of what Pinkerman offered to prove in the state trial court:

> On the basis of my review of information, consultation with additional experts, and the evaluation that I have done with the defendant Mrs. Lucio, I was going to testify about the characteristics and makeup of her psychological functioning. I was also going to address how her demeanor, both immediately after the incident and during the interrogation, may be understood by understanding and appreciating the psychological elements and previous history and background that she has lived through. I was also going to address the notion of how difficult it might have been for her to step into some of the treatment, even though it was minimally offered. And those are the highlights.

ROA.15301. Pinkerman did not proffer any opinions on the credibility of Lucio's statements during her interrogation. As Pinkerman acknowledged in a post-trial affidavit prepared for Lucio's state habeas proceeding, that issue was "never raised at the pretrial [sic] or trial."[2] ROA.8975.

The defense also offered the testimony of Ms. Villanueva, a licensed clinical social worker, on "why [Lucio] . . . would have given police officer[s] information in [her] statement that was not correct." ROA. 4691. The trial court conducted a *Daubert* hearing.[3] *See* TEX. R. EVID. 702. During it, Villanueva said her expertise derived from "clinical training and clinical experience, . . . a combination of knowing life span development theories, clinical theories[,] and human behavior social environment interaction theories," ROA.4695, as well as training in deciphering body language from "clinical sources in [her] master's degree, [and] continuing education courses,"

1. ''The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion was erroneous and harmful.'' *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009) (quotation omitted). A secondary purpose is to allow the trial court ''to reconsider [a] ruling in light of the actual evidence.'' *Ibid.* (quotation omitted).

2. Though defense counsel initially suggested Pinkerman might testify that ''as a battered woman, [Lucio] takes blame for everything that goes on in the family,'' ROA.15293, Pinkerman's testimony in the offer of proof included no such opinion. Moreover, Pinkerman's expert report—authored two days before he made his offer of proof—says nothing about battered woman syndrome, nor does it say that Lucio takes the blame for anything. *See infra* Part III.B.3. The Texas Court of Criminal Appeals thus held that no such proffer was preserved in the trial court. *See Lucio v. State*, 351 S.W.3d 878, 902 (Tex. Crim. App. 2011) (''Therefore, appellant's claim on appeal as to what Pinkerman's testimony would have been does not comport with Pinkerman's proffered testimony at trial. Nor does it comport with what the trial attorney claimed that he was offering it for.'' (citation omitted)); *cf. Mays*, 285 S.W.3d at 891 (holding that an offer of proof must contain ''substance'' that ''rises to the level contemplated in our Rules of Evidence and this court's precedent'' in order to preserve an issue for appellate review); *ibid.* (''[T]his sort of summary, in the most general and cursory terms, without any of the meat of the actual evidence, will not suffice to preserve error.'').

3. The term ''*Daubert* hearing'' is a shorthand for the inquiry that federal district courts conduct before admitting expert testimony under the *federal* rules of evidence. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). While the Supreme Court's decision in *Daubert* applies only to federal proceedings, the Texas Court of Criminal Appeals has described the inquiry under the Texas Rules of Evidence as ''virtually identical'' to the standard set out in *Daubert*. *Hartman v. State*, 946 S.W.2d 60, 62 (Tex. Crim. App. 1997) (en banc); *accord Hernandez v. State*, 116 S.W.3d 26, 29 (Tex. Crim. App. 2003) (en banc) (per curiam); *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591, 598–600 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

ROA.4697. On the basis of that experience, Villanueva offered to testify as follows:

> I was going to testify about three separate issues. The first issue was about patterns of behavior with Mrs. Lucio which strongly influenced her behavior during that videotaped statement process with the investigators that night. . . . I was also going to testify that the patterns of behavior as seen in the Child Protective Services records, the patterns in her family, how that influenced her decision making and how she felt with the different investigators, male and female, and also how she makes her life decisions. It influenced her behavior in that—how she felt with the different investigators male and female and how she made her decisions in answering the questions during that process. And lastly, looking at her CPS history, how—and also her social history, how she deals with different people in levels of authority, and also how that influenced her body language, and how body language is interpreted in different ways if you do not have her history of behaviours [sic] or patterns of behavior or her social history.

ROA.4706–07. Villanueva emphasized that she intended to offer an opinion about what Lucio was thinking during the interrogation and whether Lucio was telling the truth based on Lucio's body language. ROA.4695–96.

The state trial court found that a social worker was unqualified to testify about body language, unlike, say, "a psychologist . . . that has done studies on that and has [an] academic background on that." ROA. 4691. The court therefore concluded that Villanueva was not "an expert on whether or not [Lucio's interrogation] statement was true or not true." ROA.4700. The trial court found Villanueva was "imminently qualified on the issue of mitigation." ROA. 4700. But it found she could not hold herself "as an expert as to why that statement is or is not true." ROA.4700.

Ultimately, the defense argued to the jury that, because Lucio admitted that she abused her child, the jury should credit as true her insistence to the police that she did not hit Mariah in the head. ROA. 15340–43. The prosecution asked the jury to infer that Lucio dealt the head blow that killed Mariah, just as Lucio had abused the child in other ways. ROA.15354–61.

The jury found Lucio guilty of capital murder. ROA.8093. And it found insufficient mitigating evidence to warrant a life sentence. ROA.8098. The trial court sentenced her to death. ROA.10284.

B.

Lucio appealed. *See Lucio v. State*, 351 S.W.3d 878 (Tex. Crim. App. 2011). She raised fourteen "points of error" on direct appeal to the Texas Court of Criminal Appeals. *Id.* at 880. Lucio's ninth and tenth points of error are at issue in our decision today.

Points of error nine and ten concerned the exclusion of Villanueva's and Pinkerman's opinions, respectively. *Id.* at 897–902; ROA.10785–86. Lucio argued that the exclusion of those opinions at the guilt phase of her trial violated the Fourteenth Amendment's Due Process Clause as interpreted in *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). With respect to each expert, Lucio argued:

> The defendant has a constitutional right to present evidence before the jury as to the circumstances under which his confession is taken. *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)[.] *Crane* deals with circumstances like how many policemen were there, how big the room was, how long the questioning lasted, etc. But the prin-

> ciple has wider application. The reason the jury [was] entitled to know about the circumstances under which the statement was given [was] so that they could assess the voluntariness of the statement and so that they could use evidence of circumstances and their conclusion on voluntariness to follow the judge's instructions to disregard the statement unless they were convinced beyond a reasonable doubt that the statement was voluntary.

ROA.10841; ROA.10844–45 (same). Lucio insisted that both Villanueva and Pinkerman would have offered "critical evidence" that was "so important" that its erroneous exclusion meant Lucio deserved a new trial. ROA.10841; ROA.10844 (same).

The Court of Criminal Appeals found Lucio's arguments on both points unavailing. *See Lucio*, 351 S.W.3d at 897–902 (overruling points of error nine and ten). As to point nine (concerning Villanueva), the court noted that Villanueva testified at the admissibility hearing that she would give opinions about the truthfulness of Lucio's videotaped statements based on her knowledge of body language. *Id.* at 899–900. But on appeal, counsel claimed she would have given an opinion on whether Lucio suffered from battered woman syndrome. *Ibid.* Noting the inconsistency, the court held that she "failed to preserve the claim that she raises on appeal." *Id.* at 900.

But even if Lucio had preserved point of error nine, the Court of Criminal Appeals held, it would not matter. The court first observed that Villanueva's "*testimony that was actually proffered* had little, if any, relevance" to the question of voluntariness. *Ibid.* (emphasis added). That was so even under Texas law, which offered broader protections than the federal constitution. *See ibid.* (citing *Oursbourn v. State*, 259 S.W.3d 159, 172–73 (Tex. Crim. App. 2008)); *see also Oursbourn*, 259 S.W.3d at 173 (explaining that Texas's statutory protections against "involuntary" confessions are "broader in scope than those covered by the Due Process Clause or *Miranda*"). Furthermore, under the Texas Rules of Evidence, Villanueva could not "testify that [Lucio] may have been telling the truth when she initially denied abusing Mariah." *Lucio*, 351 S.W.3d at 901 n.25 (quoting *Yount v. State*, 872 S.W.2d 706, 708–09 (Tex. Crim. App. 1993) (en banc), for the proposition that an expert's "direct testimony as to a witnesses' [sic] credibility is inadmissible under [TEX. R. EVID.] 702 because it does not concern a subject upon which the testimony of an expert would *assist* the trier of fact" (emphasis in original)). The court also held that any error was harmless. *See id.* at 901 & n.25.[4]

As to point of error ten (concerning Pinkerman), the Court of Criminal Appeals found similar problems. Appellate counsel argued Pinkerman would've testified "that since [Lucio] was an abused woman she would agree with anything a policeman would say." *Id.* at 901 (quotation omitted). But the court observed that was not what

4. The Court of Criminal Appeals noted that testimony about body language might have countered some statements by Officer Escalon, who interrogated Lucio and commented on her demeanor. But Lucio's "subsequent admission during her recorded statement that she abused Mariah, followed by her demonstrating such abuse with the doll" rendered any error on that point harmless. *Lucio*, 351 S.W.3d at 901 n.25. Additionally, that wasn't Lucio's only admission. As the Court of Criminal Appeals noted elsewhere, the jury could have "reasonably infer[red] that [Lucio] was referring to Mariah's fatal injuries when she told her sister during their cell-phone conversation that she 'did it.'" *Id.* at 895. And that statement did not occur during a custodial interrogation, could not have been motivated by a battered woman's willingness to tell male police officers what they wanted to hear, and had nothing to do with body language.

Pinkerman had offered at trial. Instead, at trial, Pinkerman made a "broad and general" offer of proof that referred to Lucio's "psychological functioning" and "demeanor." *Id.* at 902 n.26 (quotation omitted). The court concluded that because of this variance between the offer of proof at trial and Lucio's argument on appeal, Lucio did not preserve her appellate argument concerning Pinkerman. *Id.* at 902.

But even if Lucio had preserved the point, the Court of Criminal Appeals held, it would not matter. That was because, in the court's view, "Pinkerman's proffered guilt-phase testimony had little, if any, relevance" to the voluntariness of Lucio's interrogation statements. *Ibid.* (citing *Oursbourn*, 259 S.W.3d at 172–73). The court also held the exclusion of Pinkerman's opinion was harmless in any event. *Ibid.*

The Court of Criminal Appeals overruled the rest of Lucio's points of error and affirmed the judgment of the trial court. *Id.* at 910. Lucio petitioned the U.S. Supreme Court for a writ of certiorari; the Court denied it. *Lucio v. Texas*, 566 U.S. 1036, 132 S.Ct. 2712, 183 L.Ed.2d 71 (2012) (mem.).

C.

Next, Lucio applied for state postconviction relief. For present purposes, the most important part of her state habeas application is issue four.

She framed that part of her state habeas application in this way: "ISSUE FOUR: The trial court deprived Melissa of the constitutional right to present a complete defense when it excluded the testimony of defense experts during the guilt/innocence phase of trial." ROA.8029. In issue four, Lucio again argued that the trial court erred by excluding the opinions of Villanueva and Pinkerman during the guilt phase of her trial. ROA.8029–34. Lucio took pains to distinguish this claim from her prior claims made during her direct appeal. In a footnote at the start of her discussion of issue four, Lucio said:

> Counsel distinguishes the claim raised in the instant proceeding from the claim raised on direct appeal that the trial court abused its discretion by preventing Melissa from presenting evidence regarding the circumstances under which her confession was taken. *See* Direct Appeal Brief (citing *Crane v. Kentucky*, 476 U.S. 683, 106 S.[ ]Ct. 2142, 90 L.[ ]Ed.[ ]2d 636 (1986)). The instant issue goes to the core of the case—whether Melissa was likely to have engaged in ongoing abuse of Mariah.

ROA.8029 n.36.

After disclaiming reliance on *Crane*, Lucio noted that "a criminal defendant's constitutional right to present a complete defense is violated by the exclusion of evidence pursuant to a state evidentiary rule that categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence that is vital to his defense." ROA.8029. Lucio's application went on to note that Texas's relevance rule itself is constitutional because it "serves a legitimate interest and does not unconstitutionally abridge the right to present a defense." ROA.8032. But, Lucio argued, "the evidence at issue here was not irrelevant to the issue of Melissa's guilt or innocence." ROA.8032. Because the proffered testimony of Villanueva and Pinkerman "was relevant to attack the credibility of the State's case," Lucio argued, "the jury was unable to make an informed decision regarding the weight to be given the State's evidence of ongoing abuse" without their opinions. ROA.8033–34. On that account, "the trial court violated Melissa's right to present a complete defense when it disallowed her

expert's [sic] testimony during guilt/innocence as irrelevant." ROA.8034.

In other grounds of her state habeas application, Lucio also argued her trial counsel provided ineffective assistance of counsel ("IAC"). For example, she argued that trial counsel provided IAC by failing "to file a pretrial motion to suppress [her] custodial statements." ROA.7970 ("Issue Two"). She also argued that trial counsel "failed to make a timely request for or adequately utilize the assistance of a mitigation specialist and psychologist." ROA. 7988 ("Issue Three"). To support these IAC claims, Lucio offered a post-trial affidavit from Pinkerman. ROA.8975. In that affidavit, Pinkerman testified that Lucio's "psychological characteristics increase the likelihood that she would acquiesce while providing her confession" during her custodial interrogation. ROA.8975. Pinkerman stated that Lucio's statements to police "could have been accounted for by her dependent and acquiescent personality," along with her history of "emotional[ly] and physically abusive relationships with males." ROA.8975–76. Pinkerman faulted trial counsel for failing to ask the court if he could offer opinions on these matters: "During meetings with defense counsel I raised questions about these issues. To my knowledge these issues were never raised at the pretrial [sic] or trial." ROA.8975. Pinkerman's IAC affidavit did not purport to offer any opinion on why Lucio might accept blame when talking on the phone to her sister about what happened to Mariah.

The state habeas court rejected all of Lucio's claims, including her complete-defense claim in issue four. ROA.10083–96. The state habeas court explained its analysis of issue four in two paragraphs:

> 39. [Lucio's] complaint about this Court's exclusion of her mitigation experts [Villanueva and Pinkerman] from the guilt-innocence portion of the trial is nearly identical to issues nine and ten raised on direct appeal. Matters raised on direct appeal should not be re-litigated on habeas unless the judgment is subsequently rendered void or a subsequent change in the law is made retroactive. While additional evidence may warrant relief even when the issue was raised on direct appeal, Applicant has not demonstrated that she is entitled to relief herein because of any additional evidence herein.
>
> 40. Moreover, this Court did not abuse its discretion in excluding the testimony of Norma Villanueva and Dr. John Pinkerman from the guilt-innocence portion of the trial. Ms. Villanueva proffered nothing to indicate that she had any sort of specialized experience, knowledge or training in the area of interpreting body language and patterns of behavior during police interviews. Dr. Pinkerman's proffered testimony as to [Lucio's] psychological functioning, including how there was little support in the "historical record" for the idea that [Lucio] physically abused her children, that she suffered from battered woman syndrome, and the meaning of her demeanor after the incident and during questioning had no relevance to the question of [Lucio's] guilt or innocence.

ROA.10091.

Lucio filed objections to the state habeas court's findings of fact and conclusions of law. ROA.5866–93. In those objections, Lucio recognized that her complete-defense claim in state habeas was "nearly identical" to the one she made on direct appeal—but " '[n]early identical' is not 'identical.' " ROA.5884. She emphasized that her state habeas application—unlike her direct appeal—did not challenge the circumstances of her custodial interrogation or the exclusion of her experts under *Crane*. ROA.5884. And Lucio's objections

did not say that Pinkerman's post-trial affidavit—submitted to buttress her IAC claims—had any relevance whatsoever to her complete-defense claim. ROA.5883–84. The Court of Criminal Appeals adopted the lower court's decision and denied relief. ROA.7768–69.

D.

Lucio then petitioned for habeas relief in federal court. *See* 28 U.S.C. § 2254. She raised 25 claims for relief, including a complete-defense claim. *See Lucio v. Davis*, No. 13-cv-125, 2016 U.S. Dist. LEXIS 195659 at *31 (S.D. Tex. Sept. 28, 2016). The district court wrote a thorough 65-page opinion that analyzed all 25 claims. As to the complete-defense claim, the district court held that Lucio "attempt[ed] to dress up [a] state evidence law claim as a constitutional claim" and that her attempt was "without merit." *Id.* at *65–66. The district court denied the petition and denied a Certificate of Appealability ("COA"). *Id.* at *92–94.

Lucio asked for a COA from our court. *Lucio v. Davis*, 783 F. App'x 313 (5th Cir. 2019). We granted one on " the question of whether the exclusion of Lucio's proffered experts on the credibility of her alleged confession violated her constitutional right to present a complete defense." *Id.* at 319 (quotation omitted). Thereafter, a panel of our court determined that Lucio had raised the issue of her right to a complete defense in state court, but that no state court had adjudicated that claim. *Id.* at 314–15. Applying *de novo* review, the panel concluded that the exclusion of Pinkerman's opinion violated Lucio's right to present a complete defense. *Id.* at 325. The panel found *Crane* highly relevant, notwithstanding Lucio's emphatic disclaimer of that authority in her state habeas application. And the panel found Pinkerman's affidavit highly relevant, notwithstanding Pinkerman's concession that none of the material in it had been properly presented to the state trial court on account of alleged deficiencies by trial counsel. The panel reversed the district court's judgment and remanded for the district court to grant habeas relief to Lucio. *Ibid.* Our en banc court vacated the panel decision on rehearing. *Lucio v. Davis*, 947 F.3d 331 (5th Cir. 2020) (mem.).

II.

Our now-vacated panel decision concluded that Lucio fairly presented a complete-defense claim to the state courts; the state courts simply overlooked it; and Lucio therefore got the benefit of *de novo* review of her complete-defense claim in federal court. That was error. To explain why, we begin with the exhaustion requirement. Then we hold that the state courts adjudicated Lucio's claims as she presented them.

A.

The exhaustion requirement is a cornerstone of federal habeas for state prisoners. The Supreme Court first announced it in *Ex parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886), shortly after Congress extended the writ of habeas corpus *ad subjiciendum* to prisoners in state custody. Then, in 1948, Congress codified the exhaustion requirement in 28 U.S.C. § 2254. Today the statute provides that Lucio's federal habeas application "shall not be granted" unless she has exhausted available remedies in the state courts. *Id.* § 2254(b)(1).

[2, 3] "[T]he exhaustion doctrine is designed to give the state courts a *full and fair opportunity* to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728,

144 L.Ed.2d 1 (1999) (emphasis added). It's premised on comity and federalism: Because state courts are obligated to enforce federal law, they must be given the first chance—after the state prisoner fully explains the federal claim—to correct any error. *See id.* at 844, 119 S.Ct. 1728. "This rule of comity reduces friction between the state and federal court systems by avoiding the unseemliness of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *Id.* at 845, 119 S.Ct. 1728 (quotation omitted).

Obviously, it would undermine or eliminate the exhaustion requirement if a state prisoner could change the claim along the way from state court to federal court. As the Supreme Court has explained:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the *same claim* he urges upon the federal courts.

Picard v. Connor, 404 U.S. 270, 275–76, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) (emphasis added) (quotation omitted).

Consider, for example, *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam). In that case, a California jury convicted Henry of sexually molesting a five-year-old. At trial, Henry objected to the introduction of testimony by the parent of another child he allegedly molested 20 years earlier. In the state courts, Henry framed his objection in terms of California evidentiary law. But in the federal courts, Henry argued the erroneous introduction of the testimony violated the Due Process Clause. The Ninth Circuit held that Henry exhausted his state remedies because he gave the state courts "the operative facts" and "the substance of his federal claim." *Henry v. Estelle*, 33 F.3d 1037, 1040–41 (9th Cir. 1993) (quotation omitted).

[4] The Supreme Court summarily reversed. It held the California courts "understandably" decided Henry's claim in the terms he presented it. *Henry*, 513 U.S. at 366, 115 S.Ct. 887. And in presenting his claim to the state courts, Henry did not claim the introduction of the challenged testimony violated the Due Process Clause—even if he presented the "facts" and "substance" of the claim in other terms. *Ibid.* "The failure [was] especially pronounced in that [Henry] did specifically raise a due process objection before the state court based on a different claim . . . ." *Ibid.* Therefore, the exhaustion requirement provides that a state prisoner who does not fairly present a claim to a state habeas court—specifying both the legal and factual basis for the claim—may not raise that claim in a subsequent federal proceeding.

B.

[5] For each claim that Lucio fully and fairly presented to the state courts, there's a rebuttable presumption that the state courts adjudicated it on the merits. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013). It's possible that Lucio did her part by pre-

senting her claims fully and fairly, and that the state courts nonetheless erred and overlooked them. But *Williams* holds such a scenario is unlikely. *See id.* at 300–01, 133 S.Ct. 1088 ("[I]t is by no means uncommon for a state court to fail to address separately a federal claim that the court has not simply overlooked"). Therefore, "a federal habeas court must presume that the federal claim was adjudicated on the merits." *Id.* at 301, 133 S.Ct. 1088.

For each claim that the state court adjudicated on the merits, AEDPA's relitigation bar applies. *See* 28 U.S.C. § 2254(d) (generally barring relitigation of claims that are "adjudicated on the merits" in state court); *see also ibid.* (specifying that the relitigation bar applies on a "claim"-by-"claim" basis). And Lucio can overcome the relitigation bar only by proving that

(1) the state court's "decision" on her claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1); or

(2) the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

[6, 7] For each claim governed by AEDPA's relitigation bar, we must identify the relevant state-court "decision." *Id.* § 2254(d)(1)–(2). To that end, the Supreme Court says that we must "train [our] attention" on the "last related state-court decision" that provides a "relevant rationale" to a particular claim. *Wilson v. Sellers*, —— U.S. ——, 138 S. Ct. 1188, 1191–92, 200 L.Ed.2d 530 (2018) (quotation omitted). Only then can we consider whether the state court's "decision" was contrary to or an unreasonable application of clearly established Supreme Court precedent. *Id.* at 1192; *see also, e.g.*, *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) ("To decide the present case, therefore, we begin by asking which is the last explained state-court judgment on the [federal] claim." (emphasis omitted)); *Premo v. Moore*, 562 U.S. 115, 123–33, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011); *Sears v. Upton*, 561 U.S. 945, 951–56, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam).

C.

[8] In Lucio's case, as in *Henry*, the state courts adjudicated the claims in the same terms as the prisoner presented them. And, as in *Henry*, Lucio's claims shifted over time. That means, over the course of this litigation, different state courts adjudicated different claims. We walk through each relevant decision in turn.

At trial, Lucio urged that expert-opinion testimony from Villanueva and Pinkerman should be admitted under the Texas Rules of Evidence. The trial court excluded Villanueva because she was not qualified to offer an expert opinion about Lucio's psychology, body language, or credibility. *See* TEX. R. EVID. 702 (providing the state-law standard for *Daubert* challenges); *Yount*, 872 S.W.2d at 708–09. And the trial court excluded Pinkerman's opinion about Lucio's "psychological functioning" as irrelevant to her guilt and as relevant only to mitigation. *See* Tex. R. Evid. 402. At no point did trial counsel suggest that the exclusion of either witness would violate Lucio's rights under the federal Due Process Clause. *See Henry*, 513 U.S. at 366, 115 S.Ct. 887 ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.").

And at no point did either expert offer to testify about the circumstances of Lucio's custodial interrogation and whether she felt psychological pressure to admit to abusing Mariah. As Pinkerman himself later said, "To my knowledge these issues were never raised at the pretrial [sic] or trial." ROA.8975.

On direct appeal, Lucio changed her claim and argued that, under the Due Process Clause and *Crane v. Kentucky*, Lucio had the right to present Villanueva and Pinkerman to challenge the "voluntariness" of her custodial statements. Even though Lucio defaulted this claim by failing to present it to the trial court, the Court of Criminal Appeals adjudicated it anyway. And the court held Lucio's voluntariness challenges failed because the testimony that Lucio's experts had actually proffered at trial had "little, if any, relevance" to the issue of voluntariness. *Lucio*, 351 S.W.3d at 901 (Villanueva), 902 (Pinkerman). And again, that was so even though Texas law requires the admission of more evidence than the minimum required by the Federal Constitution. *See id.* at 900 (quoting *Oursbourn*, 259 S.W.3d at 172–73, for various examples of "fact scenarios that can raise a state-law claim of involuntariness (*even though they do not raise a federal constitutional claim*)" (emphasis added)). Thus, the Court of Criminal Appeals adjudicated and denied Lucio's *Crane* claim on direct appeal. *See Williams*, 568 U.S. at 301, 133 S.Ct. 1088 ("[I]f the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits."); *see also Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam).

On state habeas, Lucio changed the claim again. This time, she expressly disclaimed *any reliance* on *Crane* and insisted that she did not want to challenge the exclusion of "evidence regarding the circumstances under which her confession was taken." ROA.8029 n.36. Rather, she argued that the exclusion of Villanueva and Pinkerman deprived her of the constitutional right to present a complete defense by proving that she was "[un]likely to have engaged in ongoing abuse of Mariah." ROA.8029 & n.36. The state habeas court held that Lucio's claim was procedurally barred insofar as she attempted to re-raise her *Crane* claim regarding the circumstances of her custodial interrogation. ROA.10091. And beyond that, the claim was meritless because Villanueva's proffered body-language testimony failed the Texas *Daubert* standard, and Pinkerman's generalized proffer about Lucio's psychological functioning was relevant to mitigation but "had no relevance to the question of [Lucio's] guilt or innocence." ROA.10091.

Based on the state-court proceedings, two things are clear: (1) Lucio exhausted state remedies regarding two relevant claims in two different state proceedings, and (2) the state courts adjudicated both claims on the merits.[5] On direct appeal, the Court of Criminal Appeals heard and rejected Lucio's claim that *Crane v. Kentucky* gives her the federal due process right to present testimony regarding the circumstances of her custodial interrogation. On state habeas, the state court heard and rejected Lucio's distinct claim

5. True, the state courts also identified procedural bars to both claims based on Lucio's ever-changing arguments. But it long has been true that a state court's adjudication of a claim on the merits means that the claim is exhausted. *See, e.g., Castille v. Peoples*, 489 U.S. 346, 350, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989); *Brown v. Allen*, 344 U.S. 443, 447, 73 S.Ct. 397, 97 L.Ed. 469 (1953).

that the exclusion of Villanueva and Pinkerman from the guilt phase of her trial prevented her from proving that she was "[un]likely to have engaged in ongoing abuse of Mariah." This is the way Lucio chose to present her claims and hence the way the state courts were required to adjudicate them. The state courts adjudicated both claims on the merits. So AEDPA's relitigation bar applies. *See* 28 U.S.C. § 2254(d).

III.

[9] We next evaluate the relevant state-court decisions under AEDPA's relitigation bar, 28 U.S.C. § 2254(d). In enacting that provision, Congress imposed strict limitations on federal courts considering habeas applications from state prisoners. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011); *Langley v. Prince*, 926 F.3d 145, 155 (5th Cir. 2019) (en banc), *cert. denied*, —— U.S. ——, 140 S. Ct. 2676, 206 L.Ed.2d 826 (2020) (mem.); *see also Shinn v. Kayer*, —— U.S. ——, 141 S. Ct. 517, 526, —— L.Ed.2d —— (2020) (per curiam) ("Under AEDPA, state courts play the leading role in assessing challenges to state sentences based on federal law."). "To overcome AEDPA's relitigation bar, a state prisoner must shoehorn [her] claim into one of its narrow exceptions." *Langley*, 926 F.3d at 155; *see* 28 U.S.C. § 2254(d)(1)–(2). The prisoner can do so only if the state court's decision was "so obviously wrong as to be beyond any possibility for fairminded disagreement." *Kayer*, 141 S. Ct. at 526 (quotation omitted).

Lucio says she satisfied AEDPA's relitigation exceptions in three ways. She first argues (A) the state court's decision was "contrary to" or "involved an unreasonable application of " *Crane*. 28 U.S.C. § 2254(d)(1). She next argues (B) the state court's decision was "contrary to" or "involved an unreasonable application of " *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). 28 U.S.C. § 2254(d)(1). She finally argues (C) the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). We consider and reject each argument in turn.

A.

We start with Lucio's claim under *Crane v. Kentucky*. We first explain the law clearly established in *Crane*. Then we train our attention on the last state-court decision to adjudicate that claim—the state court's decision in Lucio's direct appeal—and evaluate that decision under the relitigation bar. *See Wilson*, 138 S. Ct. at 1192.

1.

The Supreme Court has held that the "Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Nevada v. Jackson*, 569 U.S. 505, 509, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2013) (per curiam) (quoting *Crane*, 476 U.S. at 690, 106 S.Ct. 2142). But it has also recognized that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Ibid.* (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). "Only rarely" has the Supreme Court "held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Ibid.*

In *Crane*, the Supreme Court considered the constitutionality of a novel evidentiary practice that was first recognized by the Kentucky Supreme Court in *Crane* itself. Prior to his murder trial, Crane

moved to suppress his confession pursuant to Kentucky Rule of Criminal Procedure 9.78. *Crane v. Kentucky*, 690 S.W.2d 753, 753 (Ky. 1985). That rule, adopted on January 1, 1978, stated:

> Rule 9.78. Confessions and searches—Suppression of evidence.—If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

Ibid. The Kentucky trial court conducted a "lengthy hearing and denied the motion to suppress, finding the confession to be voluntary." *Ibid.* Then, at trial, the court refused to allow the introduction of *any* evidence regarding the "circumstances surrounding the taking of the confession." *Id.* at 754. The Kentucky Supreme Court affirmed, holding:

> [O]nce a hearing is conducted pursuant to [Rule 9.78] and a finding is made by the judge based upon substantial evidence that the confession was voluntary, that finding is conclusive and the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue.

Id. at 755.

The Supreme Court reversed because the Kentucky Supreme Court's decision relied on the "assumption that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories." *Crane*, 476 U.S. at 687, 106 S.Ct. 2142. That assumption was "directly at odds with language in several [Supreme Court] opinions," and it "conflict[ed] with the decisions of every other state court to have confronted the issue," *ibid.*, as well as 18 U.S.C. § 3501(a) and Federal Rule of Evidence 104(e), *id.* at 689, 106 S.Ct. 2142. The Court held "on the facts of this case that the blanket exclusion of the proffered testimony," in "the absence of any valid state justification," was unconstitutional. *Id.* at 690, 106 S.Ct. 2142. In making its decision, the Court took pains to note that it was not "question[ing] the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Id.* at 689, 106 S.Ct. 2142.

The Supreme Court subsequently reminded us that *Crane* does "*not* set[ ] forth an absolute entitlement to introduce crucial, relevant evidence" at a criminal trial. *Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion). It explained:

> Our holding that the exclusion of certain evidence in that case violated the defendant's constitutional rights rested not on a theory that all competent, reliable evidence must be admitted, but rather on the ground that the Supreme Court of Kentucky's sole rationale for the exclusion (that the evidence did not relate to the credibility of the confession) was wrong. *Crane* does nothing to undermine the principle that the introduction of relevant evidence can be limited by the State for a valid reason.

Ibid. (quotations omitted).

2.

[10, 11] Lucio argues that the state court's exclusion of Villanueva and Pinker-

man was "contrary to" the law clearly established in *Crane*. *See* 28 U.S.C. § 2254(d)(1). "A state-court decision is contrary to clearly established federal law only if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if it resolves a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Langley*, 926 F.3d at 155 (quotations omitted). For example:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be diametrically different, opposite in character or nature, and mutually opposed to [the Supreme Court's] clearly established precedent because [it] held in *Strickland* that the prisoner need only demonstrate a reasonable probability that the result of the proceeding would have been different.

Terry Williams v. Taylor, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (quotation omitted).

Lucio cannot meet that high bar here. In answering our en banc questions,[6] Lucio conceded that, at best, her claim is "strongly supported" by *Crane* and that no case is on "all fours" with her claim. Lucio Opening En Banc Q & A 25–26. That is insufficient to show that the state court's decision is "diametrically different" from *Crane*. *See Terry Williams*, 529 U.S. at 405, 120 S.Ct. 1495. Therefore, "here, as in most AEDPA cases," the "contrary to" exception does not apply. *Langley*, 926 F.3d at 156.

[12, 13] Next, Lucio argues that the decision by the Court of Criminal Appeals "involved an unreasonable application of " *Crane*. *See* 28 U.S.C. § 2254(d)(1). To meet that exception to the relitigation bar, Lucio must do much more than establish that the state court erred. *See, e.g.*, *Renico v. Lett*, 559 U.S. 766, 773, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." (quotation omitted)). "Rather, the relitigation bar forecloses relief unless the prisoner can show the state court was *so* wrong that the error was well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Langley*, 926 F.3d at 156 (quotation omitted); *see also Kayer*, 141 S. Ct. at 520 (summarily reversing the Ninth Circuit for "ordering issuance of a writ of habeas corpus despite ample room for reasonable disagreement about the prisoner's ... claim").

We hold the Court of Criminal Appeals did not unreasonably apply *Crane* in Lucio's direct appeal. As an initial matter, we note that the Court of Criminal Appeals held that the two witnesses' opinions were inadmissible under state law, which affords broader protections than the *Crane*-Due Process standard in federal law. *See Lucio*, 351 S.W.3d at 900, 902 (citing Tex. Code Crim. Proc. arts. 38.21, 38.22, and *Oursbourn*, 259 S.W.3d at 172–73). Because Texas law is "broader in scope" than the U.S.

6. Because of COVID-19, our court did not conduct our usual en banc argument. Instead, we used a multi-round form of written questions and answers. In the first round, we presented written questions—some for both parties, some solely for Lucio or the State. After the parties provided their answers to the court's questions, they both submitted rebuttals to each other's answers. Both parties provided thorough and helpful answers.

Constitution on this issue, a determination that a claim fails on state-law grounds necessarily adjudicated any federal claim as well. *See Williams*, 568 U.S. at 298–99, 133 S.Ct. 1088 (holding a state-law adjudication necessarily adjudicates the federal question where the former "fully incorporat[es]" the latter). Lucio has never argued that Texas's statutory and decisional standards are in fact narrower than the *Crane* standard. She therefore has forfeited any argument to that effect.

Moreover, we have observed that cases involving *Crane* "typically focus" on evidentiary rules that lead to "categorical prohibitions of certain evidence and not discretionary decisions to exclude evidence under general and otherwise uncontroversial rules." *Caldwell v. Davis*, 757 F. App'x 336, 339 (5th Cir. 2018) (per curiam). As Lucio conceded in her en banc answers, she is not challenging the constitutionality of Texas's evidentiary rules regarding the relevance and the admission of expert-opinion testimony. Lucio Opening En Banc Q & A 24–25. Nor does Lucio allege that the Texas courts categorically prohibited her from undermining her own inculpatory statements. For example, the trial court permitted Lucio's sister to testify about Lucio's background, her tendency to take the blame for things she did not do, and the phone call in which Lucio allegedly said: "This was me. I did it."[7] Her only complaint is that the trial court made discretionary errors in excluding the particular expert opinions proffered by Villanueva and Pinkerman. Therefore, Lucio fails to show that Texas courts *categorically* prohibited evidence undermining her inculpatory statements.

[14] Lucio cannot argue that the Court of Criminal Appeals unreasonably applied *Crane* by failing to extend it to *discretionary* evidentiary decisions. "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* [the Supreme] Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014) (emphasis in original). We, like the Ninth Circuit, are aware of no clearly established law regarding "a court's exercise of discretion to exclude expert testimony" as it relates to a "criminal defendant's constitutional right to present relevant evidence." *Moses v. Payne*, 555 F.3d 742, 758–59 (9th Cir. 2009); *see also Brown v. Horell*, 644 F.3d 969, 983 (9th Cir. 2011) ("[T]he Supreme Court has not decided any case either squarely address[ing] the discretionary exclusion of evidence and the right to present a complete defense or establish[ing] a controlling legal standard for evaluating such exclusions." (quotation omitted) (alterations in original)).

And it's not just the Ninth Circuit. Many of our sister circuits, reviewing state pris-

7. Our now-vacated panel opinion made much of the fact that a police officer overheard this statement while listening to only Lucio's side of the conversation with her sister, and that the officer "did not create a log of Lucio's alleged statements until nearly sixteen months after he interacted with Lucio—the month before trial." *Lucio*, 783 F. App'x at 324 n.6. But far from supporting a *Crane* claim, these propositions disprove it. *Crane* guarantees Lucio the procedural opportunity to present her defense. The trial court gave Lucio the procedural opportunity—and her trial counsel vigorously exercised it—to cross-examine the officer about what he overheard Lucio say and the length of time between that conversation and the officer's report. ROA.14992–93. And as noted above, the trial court afforded Lucio the opportunity—which she again vigorously exercised—to present her sister's side of the phone call. All of this proves that the State did not categorically bar Lucio, as in *Crane*, from presenting any evidence to undermine her inculpatory statement.

oners' applications under § 2254(d)(1), have upheld state courts' wide latitude to make discretionary evidentiary decisions. *See, e.g.*, *Grant v. Royal*, 886 F.3d 874, 959–60 (10th Cir. 2018) (rejecting state prisoner's habeas application under the relitigation bar because *Crane* did not implicate the "discretionary application of evidentiary rules"); *Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305, 1307, 1315 (11th Cir. 2014) (rejecting state prisoner's habeas application under the relitigation bar because *Crane* does not deprive state courts of the "gatekeeping role" to make discretionary evidentiary decisions); *Gagne v. Booker*, 680 F.3d 493, 516 (6th Cir. 2012) (en banc) (rejecting state prisoner's habeas application under the relitigation bar because, consistent with *Crane*, "a trial court may even exclude competent reliable evidence ... central to the defendant's claim of innocence, so long as there exists a valid state justification" (quotation omitted)); *Rucker v. Norris*, 563 F.3d 766, 770 (8th Cir. 2009) (rejecting state prisoner's habeas application under the relitigation bar because "*Crane* proscribed only the 'wholesale exclusion' of evidence pertaining to the credibility of a confession").

Take for example the Sixth Circuit's decision in *Loza v. Mitchell*, 766 F.3d 466 (6th Cir. 2014). It assessed an Ohio court's exclusion of a clinical psychologist that the defendant sought to use "to help explain his confession." *Id.* at 481. The Sixth Circuit held the prisoner could not surmount the relitigation bar because the state court did not apply a "mechanistic, *per se*" rule but instead made an "individual determination" about the appropriateness of the testimony based on the specific facts of the case. *Id.* at 485 (quotations omitted). Importantly, the defendant was given the opportunity to present "other evidence bearing on the credibility of his confession." *Ibid.* And the jury had the opportunity to watch the video of the defendant's confession to see for itself the "tone and manner of the interrogation, the number of officers present, the physical characteristics of the room, and the length of the interrogation." *Ibid.* (quotation omitted). Although more evidence like the clinical psychologist's opinion would have been helpful, the Sixth Circuit found it reasonable to "conclude[ ] that *Crane* did not *require* this evidence to be admitted." *Id.* at 486 (emphasis in original).

We refuse to create a circuit split. As previously discussed, the Court of Criminal Appeals did not affirm any "blanket exclusion" of evidence regarding Lucio's confession. Instead, it considered her two proffered experts on an individualized basis and found their opinions to be inadmissible as a matter of state law. The jury hearing Lucio's case had ample opportunity to assess the credibility of her various statements—it could watch the video of the interrogation, it could listen to her sister's testimony, and it could compare that testimony with the police officer's. Thus, even if we assume *arguendo* that a discretionary evidentiary ruling could violate *Crane*, Lucio has not proven beyond any fair-minded disagreement that the state court's decision on her direct-appeal record rises to that level. Accordingly, the Court of Criminal Appeals' decision was not an unreasonable application of the clearly established federal law in *Crane*.

[15] Nor does the state court's decision become unreasonable, as Lucio argues, because of Pinkerman's post-trial, collateral-review affidavit. The Supreme Court has strictly instructed that our review is "limited to the record that was before the state court *that adjudicated the claim on the merits*." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (emphasis added). To that end, "the record under review is limited to the record in

existence at that same time." *Id.* at 182, 131 S.Ct. 1388. Since the Pinkerman affidavit did not exist at the time the Court of Criminal Appeals evaluated Lucio's *Crane* claim on direct appeal, the record before that court didn't include the affidavit. Therefore, we may not consider the affidavit in reviewing that court's direct appeal decision.

B.

We next consider the complete-defense claim that Lucio exhausted in her state habeas application. We first identify the claim. Then we describe the clearly established law as articulated by the Supreme Court. Then we evaluate the relevant state-court decision under AEDPA's relitigation bar.

1.

Lucio adamantly insisted that her state habeas claim did not involve *Crane*. ROA. 8029 n.36. She presumably did so to avoid the state procedural bar on re-raising claims in state habeas after raising them on direct appeal. *See, e.g.*, *Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006) ("[H]abeas relief is not available to one who has already litigated his claim at trial, in post-trial motions, or on direct appeal."). So we take Lucio at her word that the state habeas claim does not implicate *Crane*.

[16] We also assume that Lucio does not intend to challenge the state courts' application of state-law evidentiary rules. It's well-settled that such state-law challenges form "no part of a federal court's habeas review of a state conviction. We have stated many times that federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (quotation omitted). And that obviates much of Lucio's state habeas claim. The three principal cases cited in that application all involve direct appeals of mine-run evidentiary challenges. *See* ROA.8032–33 (citing *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), *United States v. Cohen*, 510 F.3d 1114 (9th Cir. 2007), and an unpublished, intermediate state-court decision in *Kaps v. State*, No. 05-97-00328-CR, 1998 WL 209060 (Tex. App.—Dallas Apr. 30, 1998, no pet.)). These precedents illustrate that state-law evidentiary claims are cognizable on direct appeal. But they are not cognizable in federal habeas. *See McGuire*, 502 U.S. at 67, 112 S.Ct. 475. So we do not construe Lucio's claim to implicate the state courts' application of state evidence law. *See Lucio*, 2016 U.S. Dist. LEXIS 195659, at *65 ("Lucio's attempt to dress up this state evidence law claim as a constitutional claim is unconvincing.").

[17] What remains unclear is what Lucio's state habeas claim *does* implicate. Our now-vacated panel decision in this case said that "Lucio's argument to the state habeas court flagged her 'complete defense' argument as a 'constitutional' issue and cited a Texas case that relied exclusively on the Federal Constitution." *Lucio*, 783 F. App'x at 319 (citing *Wiley v. State*, 74 S.W.3d 399, 405–07 (Tex. Crim. App. 2002), and *Wiley v. State*, No. 03-99-00047-CR, 2000 WL 1124975, at *1 (Tex. App.—Austin Aug. 10, 2000), *aff'd*, 74 S.W.3d 399 (Tex. 2002)). We disagree that "flagging" a state-court case that in turn cites the U.S. Constitution is sufficient to exhaust a federal claim under 28 U.S.C. § 2254(b)(1). *See, e.g.*, *Williams*, 568 U.S. at 299, 133 S.Ct. 1088 (holding "a fleeting reference to a provision of the Federal Constitution or federal precedent" is insufficient to exhaust a federal claim because "a state court may not regard [it] as sufficient to raise a separate federal claim"). And *Wiley* itself did not purport to apply *Crane*,

Chambers, or any U.S. Supreme Court precedent whatsoever.

The most charitable interpretation of Lucio's state habeas claim is that the exclusion of expert-opinion testimony from Villanueva and Pinkerman infringed her constitutional right to present a complete defense because it precluded Lucio from presenting evidence "regarding the weight to be given the State's evidence of ongoing abuse," ROA.8034, depriving her of the opportunity to prove that she was "[un-]likely to have engaged in ongoing abuse of Mariah," ROA.8029 n.36. This claim does not attack the circumstances of Lucio's custodial interrogation as in *Crane*. Rather, Lucio's objection is that the exclusion of the experts' opinions made her trial unfair because it precluded her from proving that she did not beat her child to death or commit ongoing abuse of Mariah, even though she admitted to committing abuse. And the state habeas court's contrary conclusion, she says, is contrary to or an unreasonable application of *Chambers v. Mississippi*.

2.

Again, we explain the Supreme Court's decision in *Chambers* before considering whether the state court acted contrary to or unreasonably applied that precedent.

The State prosecuted Leon Chambers for murdering a police officer "in the small town of Woodville in southern Mississippi" in 1969. *Chambers*, 410 U.S. at 285, 93 S.Ct. 1038. Another man, named McDonald, confessed in a sworn written statement to murdering the police officer. *Id.* at 287, 93 S.Ct. 1038. Still, Mississippi brought charges against Chambers, not McDonald. At trial, Chambers called McDonald to the stand and entered McDonald's written confession into evidence. *Id.* at 291, 93 S.Ct. 1038. On cross-examination, the State elicited testimony from McDonald repudiating the confession. *Ibid.* After the State's cross-examination, Chambers moved to examine McDonald as a hostile witness. *Ibid.* But the state court denied his request based on an idiosyncratic state-law rule called the "voucher rule"—which prevented Chambers from impeaching his own witness on the theory that "a party who calls a witness 'vouches for his credibility.' " *Id.* at 295, 93 S.Ct. 1038 (quoting *Clark v. Lansford*, 191 So.2d 123, 125 (Miss. 1966)).

The Supreme Court noted that the voucher rule has been "condemned as archaic, irrational, and potentially destructive of the truth-gathering process." *Id.* at 296 n.8, 93 S.Ct. 1038. And it emphasized that Mississippi did not even attempt "to defend the [voucher] rule or explain its underlying rationale." *Id.* at 297, 93 S.Ct. 1038. The Supreme Court therefore held that the "voucher rule" violated Chambers's rights to confront and cross-examine witnesses like McDonald.

[18] The state habeas court's adjudication of Lucio's complete-defense claim is not "contrary to" *Chambers*. 28 U.S.C. § 2254(d)(1). During our en banc Q & A, Lucio recognized that the trial court excluded Villanueva and Pinkerman pursuant to ordinary rules of evidence concerning the admissibility of expert opinions—not pursuant to some idiosyncratic, arbitrary, archaic, and indefensible rule that prohibited her from impeaching her own witness. This significant distinction is far more than sufficient to bar a "contrary to" claim.

[19] Nor is the state habeas court's decision an "unreasonable application" of *Chambers*. *Ibid.* The Supreme Court has instructed us that *Chambers*—like its other complete-defense cases—involved an idiosyncratic state rule of evidence that was "arbitrary," "did not rationally serve any discernible purpose," and "could not be

rationally defended." *Jackson*, 569 U.S. at 509, 133 S.Ct. 1990 (discussing *Holmes*, 547 U.S. at 331, 126 S.Ct. 1727; *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Chambers*, 410 U.S. at 302–303, 93 S.Ct. 1038; and *Washington v. Texas*, 388 U.S. 14, 22, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). The Supreme Court has never applied its complete-defense cases to discretionary evidentiary decisions under rules that are themselves constitutional, like the rules of evidence involving the admissibility of expert opinions here. Thus, to hold that the state habeas court unreasonably applied these cases, we'd have to (1) extend them or (2) frame them "at such a high level of generality" that we'd "transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.' " *Id.* at 512, 133 S.Ct. 1990 (quoting 28 U.S.C. § 2254(d)(1)). The relitigation bar precludes that.

3.

Our panel decision in this case reached the contrary result by taking the facts from Lucio's state habeas application, mixing them with the law from her direct appeal, and using the resulting combination to condemn the evidentiary decision made at trial. Specifically, the panel combined the facts in the Pinkerman affidavit (from state habeas) with the *Crane* claim (from direct appeal) to hold the exclusion of Pinkerman's proffer (at trial) was arbitrary and "complete[ly] irrational[ ]." *Lucio*, 783 F. App'x at 323. The panel held that *Crane* gave Lucio the constitutional right to "take[ ] away" or "undermine[ ]" her custodial-interrogation statements; that without those statements, "the State's case [would have been] much more tenuous"; and that "Pinkerman's opinion was that Lucio was susceptible to taking blame for something that was not her fault and that this behavior was manifested in the interrogation video," thereby "cast[ing] doubt on the State's key evidence." *Ibid.*

AEDPA prohibits whipsawing the state courts in this way. *See* 28 U.S.C. § 2254(d); *cf. Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (rejecting habeas-by-"sandbagging"). This is the entirety of what Pinkerman proffered at trial:

> On the basis of my review of information, consultation with additional experts, and the evaluation that I have done with the defendant Mrs. Lucio, I was going to testify about the characteristics and makeup of her psychological functioning. I was also going to address how her demeanor, both immediately after the incident and during the interrogation, may be understood by understanding and appreciating the psychological elements and previous history and background that she has lived through. I was also going to address the notion of how difficult it might have been for her to step into some of the treatment, even though it was minimally offered. And those are the highlights.

ROA.15301. As the state courts concluded, this proffer provides zero information about what facts or opinions Pinkerman was prepared to offer. It certainly did *not* say—as our panel decision concluded—"that Lucio was susceptible to taking blame for something that was not her fault and that this behavior was manifested in the interrogation video." *Lucio*, 783 F. App'x at 323. To the contrary, Pinkerman provided no basis upon which the state courts could have concluded that his testimony would have assisted the jury in understanding why Lucio made the statements that she did, why her demeanor was what it was, or whether she murdered her child. If AEDPA's anti-sandbagging rules

mean anything, they mean that Lucio and Pinkerman cannot hold back the substance of the proffered testimony with the hope of using it as a trump card later.

The whipsawing embraced by our panel decision is particularly striking because we do not need to guess what Pinkerman would've said if he'd been allowed to testify in the guilt phase of the trial. That's because two days before he was first called to testify and make his proffer, he authored an expert report that detailed his testimony. ROA.15301 (Pinkerman's guilt-phase proffer, dated July 7, 2008); ROA. 5387 (Pinkerman's expert report, dated July 5, 2008). The expert report contained extensive psychological evaluations of Lucio. It also described Pinkerman's findings from watching the interrogation video—including that Lucio had a "constrained" demeanor, a "flat" affect, and that "she tunes out to the male investigator." ROA. 5394. The report recounted Lucio's custodial statement: "Several hours after Mariah's death, [Lucio] said: '*I'm responsible for it.*' " ROA.5395 (emphasis added). And it recounted Lucio's various other inculpatory admissions of abuse against her daughter. *E.g.*, ROA.5395 (recounting Lucio's admissions that she got "frustrated" with Mariah, "spanked" her, and "When I saw the bruises, I hated myself for what I did."). At no point did Pinkerman's report come close even to hinting that any of these statements were false. At no point did Pinkerman's report come close even to hinting "that Lucio was susceptible to taking blame for something that was not her fault and that this behavior was manifested in the interrogation video." *Lucio*, 783 F. App'x at 323. And at no point did Pinkerman's report say anything at all about battered woman syndrome.

We also don't have to guess about what Pinkerman would have said at trial because he was allowed to testify during the punishment phase. Defense counsel asked Pinkerman multiple questions about Lucio's interrogation video to elicit testimony about the circumstances of the offense and Lucio's moral culpability. *E.g.*, ROA.5131–34; *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1) (requiring the punishment-phase jury to consider, *inter alia*, "the circumstances of the offense" and "the personal moral culpability of the defendant"). And again, Pinkerman did not come close even to suggesting "that Lucio was susceptible to taking blame for something that was not her fault and that this behavior was manifested in the interrogation video." *Lucio*, 783 F. App'x at 323. In fact, Pinkerman repeatedly equivocated regarding battered woman syndrome:

> Q. Well, do you feel that this defendant has battered woman's syndrome?
> A. I can't answer, yes or no.
> Q. Why not?
> A. Because my answer would be in the middle.

ROA.5169. When pressed to explain the equivocation, Pinkerman stated that "[b]attered woman syndrome isn't a DSM-4 diagnosis." ROA.5170.

Pinkerman radically shifted his story in the state habeas proceeding. That's the first *and only* time he offered any opinion about the circumstances of Lucio's custodial interrogation or battered woman syndrome. And he did it in a state habeas application that said Lucio was *not* challenging the circumstances of her custodial interrogation or the voluntariness of anything she said during that interrogation. The state courts are entitled to adjudicate the claim that Lucio brought at the time she brought it and in the way she brought it. *See Henry*, 513 U.S. at 366, 115 S.Ct. 887. And we cannot agree with the panel that the state trial court's decision to exclude the proffered testimony was "complete[ly] irrational[ ]," *Lucio*, 783 F. App'x

at 323; *cf. Jackson*, 569 U.S. at 509, 133 S.Ct. 1990, based on an affidavit that wasn't even written until many years after the trial and was first presented in a state habeas application that disclaimed the panel's legal theory, *see Pinholster*, 563 U.S. at 181, 131 S.Ct. 1388 ("[T]he scope of the record for a § 2254(d)(1) inquiry .... is limited to the record that was before the state court that adjudicated the claim on the merits.").

Villanueva fares no better. As Lucio conceded in her opening en banc brief, all of Villanueva's testimony was premised on her comparison of Lucio's body language in pictures that predated the murder to her body language after it. And the state courts had ample reasons under the Texas *Daubert* standard to exclude such guilt-phase testimony based on Villanueva's concession that she had no specialized training, no certification, and no generally accepted science to support interpreting Lucio's body language. ROA.4694–95. In fact, when Villanueva testified at the punishment phase, she conceded that she "was retained to do mitigation. ... I was not instructed *at all* to make judgments about the innocence or guilt, sir." ROA.5057 (emphasis added). Moreover, even if Villanueva were a qualified body-language expert and were retained to render opinions about Lucio's guilt, the Texas Rules of Evidence would bar her from offering an opinion on Lucio's credibility. *See Yount*, 872 S.W.2d at 708–09. It was therefore reasonable for the state courts to exclude Villanueva from the guilt phase of the trial. Even our now-vacated panel decision did not find error in that result. *See Lucio*, 783 F. App'x at 321.[8]

C.

[20, 21] Finally, Lucio argues that the state habeas court's decision was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Because Lucio is challenging a state conviction, "a determination of a factual issue made by a State court shall be presumed to be correct." *Id.* § 2254(e)(1). Furthermore, the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Ibid.* Thus, while the "general standard" for evaluating a state court's findings of fact is reasonableness, § 2254(e)(1) requires a state prisoner to show that the state court's specific factual determination in her case is unreasonable by clear and convincing evidence. *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001); *see also Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011). We cannot reject a

8. Our panel decision noted "the exclusion of Villanueva's testimony raises concerns about the fairness of the trial" because Officer Escalon testified about Lucio's body language during the interrogation. *Lucio*, 783 F. App'x at 321 n.1. That's apples and oranges. Officer Escalon did not purport to offer an expert opinion; he was describing his personal experiences and impressions while interrogating Lucio. *See Osbourn v. State*, 92 S.W.3d 531, 538–39 (Tex. Crim. App. 2002) (explaining that a police officer's "lay opinion about something she personally perceived," even when informed by an officer's training and experience, is distinct from expert testimony). And to the extent Escalon purported to offer *inadmissible* expert opinion, Lucio's trial lawyers had every right to object. They did not. *See* ROA.4410-11; *Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003) (explaining that "to preserve error, an objection must be timely, specific, pursued to an adverse ruling, and, with two [inapplicable] exceptions, contemporaneous—that is, made each time inadmissible evidence is offered"). They also had every right to cross-examine Escalon on the point. Again, they did not. And even if Lucio's counsel allowed inadmissible evidence to come in by failing to object, that would do nothing to qualify Villanueva as an expert on body language under Texas's *Daubert* standard. *See* ROA.4700.

factual finding merely because we would have made a different one. *See Kately v. Cain*, 704 F.3d 356, 361 (5th Cir. 2013).

[22–24] Lucio argues that the state habeas court made an unreasonable factual determination concerning the admissibility of Pinkerman's opinion. The state habeas court held that Pinkerman's proffered opinion "had no relevance to the question of [Lucio's] guilt or innocence." ROA. 10091. Lucio argues that this was error—either under Texas Rule of Evidence 402 or "Texas relevance law" generally. But it is well established that a "federal court lacks authority to rule that a state court incorrectly interpreted its own law." *Charles v. Thaler*, 629 F.3d 494, 500–01 (5th Cir. 2011); *see McGuire*, 502 U.S. at 67, 112 S.Ct. 475. It is "not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law." *Schaetzle v. Cockrell*, 343 F.3d 440, 449 (5th Cir. 2003) (quoting *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995)). Because Lucio fails to identify any *factual* problems with the state habeas court's decision concerning Pinkerman's opinion, she has failed to make a claim that's cognizable in federal habeas, much less one that can push aside the relitigation bar in § 2254(d)(2). To the extent Lucio's argument can be construed as raising a *legal* claim under federal law, we have already rejected it for the reasons discussed in Parts III.A and III.B.

Our panel decision in this case relied heavily on the affidavit that Pinkerman submitted to the state habeas court. But the whole point of that affidavit was to aver facts that Pinkerman discussed with Lucio's trial counsel and that trial counsel *failed to proffer at trial*. Recall that at trial, Pinkerman did not offer to prove that Lucio made false statements. *See supra* at 458 & n.2. Instead, he made a vague offer to prove "how her demeanor . . . may be understood by understanding and appreciating the psychological elements and previous history and background that she has lived through." ROA.15301. It's precisely because trial counsel did not solicit a better proffer that Pinkerman accused him of ineffective assistance. Thus, according to the Pinkerman affidavit, the *trial court* did not violate her constitutional rights—her *trial counsel* did. Lucio cannot now fault the state courts for failing to adjudicate a complete-defense claim based on facts that the defense team failed to present.

[25] As for Villanueva, Lucio argues that the state habeas court unreasonably determined that she "proffered nothing to indicate that she had any sort of specialized experience, knowledge[,] or training in the areas of interpreting body language and patterns of behavior during police interviews." ROA.10091. In her expert-admissibility hearing, Villanueva testified on direct examination that she had a master's degree in social work and was licensed to diagnose and treat mental disorders. ROA. 4692. On cross-examination, she was asked to identify "one treatise or one book" on the "specialty" of "detect[ing] human thought process through physical conduct." ROA.4694–95. Villanueva conceded, "I'm not a specialist in that area." ROA.4695. Villanueva's testimony provided a reasonable basis for the state habeas court to find that she lacked special expertise in "interpreting body language and patterns of behavior" in the specific context of "police interviews." *Cf. Yount*, 872 S.W.2d at 710 ("Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth." (quoting *State v. Moran*, 151 Ariz. 378, 728 P.2d 248, 255 (1986))). Furthermore, to the extent Lucio's argument challenges either (1) the state habeas court's application of Texas Rule of Evidence 702 or (2) the relevancy of this evidence under the Federal Constitution, it

suffers from the same defects as Lucio's arguments concerning Pinkerman's opinion.

[26] Finally, Lucio challenges the state habeas court's determination that her "complaint about [the] exclusion of her mitigation experts from the guilt-innocence portion of the trial is nearly identical to issues nine and ten raised on direct appeal." ROA.10091. "The maxim is well established in this circuit that a party who fails to make an argument before either the district court or the original panel waives it for purposes of en banc consideration." *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005) (en banc). Because Lucio failed to raise this argument before the original panel, we hold that it is forfeited.[9]

IV.

The various dissenting opinions contradict AEDPA, Supreme Court precedent, and the record in this case. Indeed, the dissents even contradict one another. If the dissenters cannot agree amongst themselves, they cannot expect our court to reach the level of certitude necessary to grant habeas relief. *Cf. Richter*, 562 U.S. at 103, 131 S.Ct. 770 ("As a condition for obtaining habeas corpus from a federal court, 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*." (emphasis added)). Four of the dissenters' arguments merit additional responses.

A.

First, the dissenters spill much ink relitigating the facts. For example, Judge Haynes emphasizes that "Lucio had trouble taking care of her many children." *Post*, at 499 (Haynes, J., dissenting). Judges Higginson and Higginbotham suggest Texas's foster-care system is the real culprit. *Id.* at 458 n.1 (Higginson, J., dissenting); *id.* at 490–93 (Higginbotham, J., dissenting). Or perhaps two-year-old Mariah killed herself. *Id.* at 499, 510–11 (Haynes, J., dissenting). Judges Haynes and Higginson suggest that Officer Escalon badgered Lucio during the interrogation. *Id.* at 499–500 (Haynes, J., dissenting); *id.* at 517 n.4 (Higginson, J., dissenting). And all the dissenters have much to say about how they'd weigh Pinkerman's testimony—notwithstanding the stark differences between what Pinkerman says today and what he proffered at trial, and notwithstanding the equally stark differences between the roles of federal judges and state jurors. *See id.* at 500–01, 503–04 (Haynes, J., dissenting); *id.* at 496–97 (Elrod, J., dissenting); *id.* at 493 (Higginson, J., dissenting); *id.* at 516 (Higginbotham, J., dissenting). Judge Elrod captures the dissenters' gestalt by saying Lucio confessed to beating to death her child and then framing the question presented as: "But did she?" *Id.* at 494.

AEDPA and Supreme Court precedent squarely foreclose this entire enterprise. Take for example *Cavazos v. Smith*, 565 U.S. 1, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011) (per curiam). A California jury convicted Shirley Ree Smith of shaking to death her

9. Lucio also argues that the "state court's process for determining the facts" was "itself unreasonable." As Lucio acknowledges, that argument is foreclosed by circuit precedent. *See Valdez,* 274 F.3d at 951 (holding "that a full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review"). We decline Lucio's invitation to overturn *Valdez*.

7-week-old grandson. *Id.* at 2–5, 132 S.Ct. 2. At trial, the State called three experts who testified about the horrific injuries Smith inflicted on the baby. *Id.* at 3–5, 132 S.Ct. 2. The defense called two experts who testified that the baby "died from old trauma," or perhaps the real culprit was sudden infant death syndrome. *Id.* at 5, 132 S.Ct. 2. The Ninth Circuit reweighed this evidence, found the State's evidence insufficient, and granted relief under AEDPA. *Id.* at 6–7, 132 S.Ct. 2.

The Supreme Court summarily reversed. As to the evidence the jury heard, it was the jury's province—not the federal court's—to weigh it. *See id.* at 2, 132 S.Ct. 2 ("Because rational people can sometimes disagree, ... judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold. The Court of Appeals in this case substituted its judgment for that of a California jury ...."). And as to evidence the jury did *not* hear—because Smith developed it after trial—that too failed to justify relief under AEDPA:

> The dissent's review of the evidence presented to the jury over seven days is precisely the sort of reweighing of facts that is precluded by *Jackson v. Virginia*, 443 U.S. 307, 324 [99 S.Ct. 2781, 61 L.Ed.2d 560] (1979), and precisely the sort of second-guessing of a state court decision applying *Jackson* that is precluded by AEDPA, 28 U.S.C. § 2254(d). The dissent's views on how 'adamantly' experts would testify today as opposed to at the time of trial are of course pure speculation, as would be any views on how a jury would react to less adamant testimony.

Id. at 8 n.*, 132 S.Ct. 2 (quoting dissenting opinion by Justice Ginsburg). Exactly the same could be said about the dissents' reweighing of the evidence submitted to the jury (the conditions of Lucio's home, Officer Escalon's interrogation tactics, &c.) and their speculation about evidence not submitted to the jury (from Pinkerman's *post*-trial affidavit).

And even if AEDPA allowed the dissenters to redo the jury's job, the dissenters could not cherry-pick the facts. For example, one dissenter tells us that Lucio had "issues with ... income and housing" and that she "could not pay her rent and was about to lose her apartment." *Post*, at 491 (Higginbotham, J., dissenting). The dissent omits, however, that Lucio's own expert attributed those financial troubles to Lucio's cocaine addiction. Villanueva testified that Lucio received approximately $5,000 every month in food stamps. ROA.15637–38. Yet her refrigerator was completely empty. ROA.15637–38. That's because—again, according to Lucio's own expert—Lucio and Mr. Alvarez sold the food stamps and spent the money on cocaine. ROA.15636. Then they made the children survive on one free meal a day at Loaves and Fishes. ROA.15638.

It's unclear what the dissenters hope to achieve from their counterfactual narratives. But whatever the purpose, the effort is foreclosed by AEDPA, Supreme Court precedent, and the record.[10]

10. Amongst the most troubling of the dissents' factual inaccuracies is their collective assertion that Lucio offered Pinkerman and Villanueva to "'answer the one question every rational juror needs answered: If [Lucio] is innocent, why did [s]he previously admit h[er] guilt?'" *Post,* at 486 (Haynes, J., dissenting) (quoting *Crane,* 476 U.S. at 689, 106 S.Ct. 2142); *see also id.* at 495–96, 496–98 (Elrod, J., dissenting); *id.* at 515–16 (Higginson, J., dissenting); *id.* at 490–91 n.1 (Higginbotham, J., dissenting). The dissenters cannot cite a single page of the record that suggests Lucio *ever* tried to justify admitting Pinkerman and Villanueva for that purpose. To the contrary, Lucio's trial lawyers made the strategic decision that it was better to deny that Lucio ever admitted her guilt rather than try to explain it

B.

Next, the dissenters repeatedly accuse us of "sua sponte" raising procedural arguments that the State waived. *See post*, at 498, 504–08 (Haynes, J., dissenting); *id.* at 494 n.1 (Elrod, J., dissenting); *id.* at 516 & n.2 (Higginson, J., dissenting). For example, some dissenters criticize us for holding that Lucio "procedural[ly] default[ed]" her claims. *Id.* at 504–06, 507, n.9 (Haynes, J., dissenting). Other dissenters accuse us of holding Lucio failed to "exhaust[ ]" her claims. *Id.* at 494 n.1 (Elrod, J., dissenting). These accusations are quite odd. We mention "default" only once above, and only as a description of the Court of Criminal Appeals' direct-appeal decision. *See supra* at 465–66. And we hold that Lucio *did* exhaust her claims. *See supra* at 466–67 & n.5; *post*, at 507–08 (Haynes, J., dissenting) (agreeing with our exhaustion holding). Our sua sponte procedural holdings are nil.

All we've held is that Lucio has changed her complete-defense claim over time. That is an undisputed proposition. Lucio herself recognized it in her state habeas application. ROA.8029 n.36. Lucio conceded it in the district court. ROA.159. Both sides recognized it before our court. *E.g.*, Director's Opening En Banc Q & A 1–8; Lucio's Opening En Banc Q & A 1–11. And because Lucio changed her argument over time, we must analyze each claim as it existed at the time Lucio presented it to the state courts. *See Henry*, 513 U.S. at 366, 115 S.Ct. 887. That is hornbook law.

The dissenters appear to believe that a state prisoner can raise different claims at different times with different facts in the state court, then smush them all together into a single claim in federal court. This belief has no basis in law. Consider for example the Supreme Court's canonical decision in *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). In that case, the state prisoner exhausted a prosecutorial-misconduct claim in state court. He based that claim on five comments the prosecutor made at trial. *Id.* at 511 & n.3, 102 S.Ct. 1198. When Lundy got to federal court, however, he attempted to broaden his claim to include additional prosecutorial statements suggesting "that the State's evidence was uncontradicted." *Id.* at 511, 102 S.Ct. 1198. The federal district court allowed Lundy to lump together his separate claims into a single prosecutorial-misconduct claim and then considered them in the context of the trial "taken as a whole." *Ibid.* The Supreme Court reversed and held that state prisoners must "seek *full* relief first from the state courts, thus giving those courts the first opportunity to review *all* claims of constitutional error." *Id.* at 518–19, 102 S.Ct. 1198 (emphases added). The Court noted that this rule "reduces piecemeal litigation" by forcing prisoners to present the state courts with an *entire* claim and allowing the state courts to adjudicate it. *Id.* at 520, 102 S.Ct. 1198 (emphasis in original); *see also Boerckel*, 526 U.S. at 845, 119 S.Ct. 1728 (holding prisoners must give state courts "a full and fair opportuni-

away. As one of Lucio's lawyers told the jury at closing: "She confessed to what? She confessed to bruising that child from head to foot. She confessed to neglect. She didn't confess to murder." ROA.4789. Lucio's lawyers could've changed that strategy or even made inconsistent alternative arguments when proffering Pinkerman and Villanueva outside the presence of the jury. But the defense decided to maintain its no-confession theory to the very end. AEDPA prevents us from second-guessing that trial strategy. *See Pinholster*, 563 U.S. at 190, 131 S.Ct. 1388 (holding that federal courts apply "doubly deferential" review to the strategic choices of counsel (quotation omitted)); *accord Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009).

ty to resolve federal constitutional claims").

This eliminates the dissenters' various procedural objections. As in *Lundy*, Lucio certainly exhausted *something*. As in *Lundy*, the State concedes that here. As in *Lundy*, we can only consider the claim as Lucio exhausted it. And just as *Lundy* precludes a prisoner from smushing together separate prosecutorial-misconduct claims to create a new one that the state never considered, it also precludes Lucio from smushing together separate complete-defense claims to create a new one that amalgamates her factual and legal contentions at trial, on direct appeal, and in state habeas. *See also Pinholster*, 563 U.S. at 181–82, 131 S.Ct. 1388 (holding the relitigation bar's "backward-looking language requires an examination of the state-court decision at the time it was made").[11]

It's no answer to say that the Texas courts were adjudicating the same complete-defense claim all along. *Post*, at 500–01, 503–05 (Haynes, J., dissenting); *id.* at 516 (Higginson, J., dissenting). That's for two reasons.

First, Lucio's claims are quite different—as she herself concedes. At trial, Lucio did not give the trial court the slightest hint that admission of the Pinkerman-Villanueva testimony was compelled by the Due Process Clause, *Crane*, or anything in federal law. The trial court repeatedly asked Lucio's trial lawyer to explain the basis for admitting the testimony. Counsel never explained why the testimony mattered; never said anything about Lucio's constitutional right to present a complete defense; never said anything about the jury's role in evaluating the credibility of Lucio's custodial statements; and never said anything that could come close to putting the trial court on notice that the question involved anything other than state evidentiary law.[12] It was not until her direct appeal that Lucio first invoked federal law, and even then she had to reimagine her trial proffer to do it. *See Lucio*, 351 S.W.3d at 900 (holding "[Lucio's] claim on appeal as to what Villanueva's testimony would have been does not comport with Villanueva's proffered testimony at trial"); *id.* at 902 (holding "[Lucio's] claim on ap-

11. Two of the dissenters suggest that *Pinholster* requires us to mix together the Pinkerman affidavit (from state habeas) and the *Crane* claim (from Lucio's direct appeal). *See post*, at 505–06 (Haynes, J., dissenting); *id.* at 497 n.5 (Elrod, J., dissenting). Not so. *Pinholster* held "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181, 131 S.Ct. 1388. At the time the state courts adjudicated Lucio's *Crane* claim on direct appeal, the Pinkerman affidavit did not even exist. Nothing in *Pinholster* required the direct-appeal court to predict what Lucio and Pinkerman would file in the future. And when Lucio and Pinkerman eventually did file the affidavit during her state habeas proceedings, nothing in *Pinholster* required the state habeas court to go back in time and re-adjudicate the *Crane* claim that Lucio already raised, especially given Lucio's express disclaimer of a *Crane* claim in her state habeas application. *See Pinholster*, 563 U.S. at 181–82, 131 S.Ct. 1388; ROA.8029 n.36.

12. The dissenters make much of the trial court's apparent absence from the courtroom during trial counsel's bill of particulars. *See post*, at 500–01, 504 (Haynes, J., dissenting). But they cite nothing to suggest the trial court's apparent absence violates any provision of state or federal law or any precedent from any state or federal court. And if the trial court was absent, that makes defense counsel's bill of particulars all the more indefensible. By hypothesis, Lucio's trial lawyer and Pinkerman could have put anything they wanted in the record—unpoliced by an apparently absent trial judge. And still they failed to say anything at all about *Crane*, the Due Process Clause, the complete-defense right, or anything in federal law.

peal as to what Pinkerman's testimony would have been does not comport with Pinkerman's proffered testimony at trial"). And her claims at trial and on direct appeal differed again from her claim in state habeas, which added Pinkerman's affidavit but disclaimed any reliance on *Crane*. Cases like *Henry* and *Lundy* squarely foreclose Lucio from arguing one thing in state court and another broader thing in federal court. That's not a "sua sponte" procedural holding; that's application of AEDPA to the different claims that the state courts adjudicated on the merits at the various times they adjudicated them.

Second, if the dissenters were right that Lucio did offer the exact same argument at all phases of her state-court proceedings, that *would* trigger a variety of procedural obstacles. As noted above, Texas has well-established procedural rules that prohibit prisoners from raising the same claim twice. *See supra* at 472 (citing *Ex parte Brown*, 205 S.W.3d at 546). And if Lucio violated that procedural rule by doing what the dissenters think she did, she would run headlong into the procedural-default doctrine. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750–51, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). We have refrained from applying that procedural bar only to be accused of applying it anyway.

C.

Next, the dissenters offer competing theories of *Crane* and AEDPA. Some dissenters think AEDPA does not apply to Lucio's *Crane* claim, so our review is *de novo*. *See post*, at 498 n.3, 507–08 & n.10 (Haynes, J., dissenting). Others think AEDPA's relitigation bar applies but that Lucio can overcome it because the state court's decision runs "contrary to" *Crane*. *See id.* at 494–95 (Elrod, J., dissenting); 28 U.S.C. § 2254(d)(1). Still others think Lucio can overcome the bar because the state court "unreasonably applied" *Crane*. *See post*, at 498 (Haynes, J., dissenting); 28 U.S.C. § 2254(d)(1). The dissenters agree, however, that Lucio raised a "*Crane* claim" in her state habeas application—notwithstanding the fact that she expressly disclaimed any reliance on *Crane* in that very application. *See* ROA.8029 n.36. The dissenters do not offer a single citation to justify that novel habeas theory.

1.

Let's start with the dissenters' argument for *de novo* review. Those who defend the panel's application of that standard contend that "the state habeas court failed to adjudicate Lucio's complete defense claim on the merits because it erroneously determined that Lucio raised a state evidentiary challenge and rejected that claim based on state evidentiary standards." *Post*, at 508 n.10 (Haynes, J., dissenting).

Not so. Lucio argued in her state habeas application that the trial court violated her right to a complete defense because "the evidence at issue here was not irrelevant to the issue of [her] guilt or innocence." ROA.8032. Lucio herself characterized the claim as one of state evidentiary law. The state habeas court addressed that argument head-on, finding no error in the exclusion of Pinkerman's proffered testimony because it "had no relevance to the question of [Lucio's] guilt or innocence." ROA. 10091. We struggle to see how resolving an issue in the exact same terms presented can constitute a failure to adjudicate it.

The principles of comity and federalism that undergird the entirety of federal habeas for state prisoners dating back to Reconstruction require closer attention to the state-court litigation. So does the party-presentation principle that features so prominently in the principal dissent. *See*

post, at 507 (Haynes, J., dissenting) (describing "the Supreme Court's admonition in *Sineneng-Smith*" as warning courts not to "step in on [their] own initiative" and "redo" the litigation).

2.

Next, consider the dissenters' "contrary to" argument. Judge Elrod reads *Crane* to clearly establish the "bedrock rule" that juries "must be allowed to hear competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Post*, at 496 (quotation omitted). She then says the state court's decision was "contrary" to this "bedrock rule." *See id.* at 497. She concludes that this case and *Crane* should come out the same way because they involve materially indistinguishable facts. *See id.* at 496–97 & n.3.

That analysis falters at every step. *Crane* does not establish—much less clearly establish—a universal, freestanding right to introduce competent and reliable evidence challenging a confession's credibility. The Supreme Court has repeatedly so held. *See Jackson*, 569 U.S. at 509–10, 133 S.Ct. 1990; *Egelhoff*, 518 U.S. at 53, 116 S.Ct. 2013; *accord supra* at 468–69. Rather, *Crane* holds that the wholesale "exclusion of this kind of exculpatory evidence" is constitutionally problematic "[i]n the absence of any valid state justification." *Crane*, 476 U.S. at 690, 106 S.Ct. 2142. That's why the entire dispute in *Crane* hinged on the adequacy of Kentucky's justification for its blanket exclusion. *See supra* at 468–69. What was the justification? "[E]stablished Kentucky procedure" made "a trial court's pretrial voluntariness determination . . . conclusive." *Crane*, 476 U.S. at 686, 106 S.Ct. 2142. *Crane* held these two things—a blanket evidentiary exclusion justified only by a "conclusive" pretrial determination of voluntariness—violate the Due Process Clause.

None of the state-court decisions in this case were "contrary to" *Crane*'s holding. Texas did not impose a categorical prohibition on evidence; it did not establish a procedure for excluding evidence through "conclusive" pretrial rulings; and it justified the trial court's decision as a mine-run, discretionary evidentiary decision in the face of a vacuous proffer by defense counsel. That's far afield from *Crane*.

[27] It's no answer to say the state court "failed to even *identify* the correct legal principle." *Post*, at 495 (Elrod, J., dissenting) (emphasis in original). The Supreme Court has repeatedly explained that a state court need not cite any legal principle at all. *See Richter*, 562 U.S. at 98, 131 S.Ct. 770 ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2). There is no text in the statute requiring a statement of reasons."); *ibid.* ("As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning."). And where the state court offers an explanation, it "need not cite or even be aware of our cases under § 2254(d)." *Ibid.* (citing *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam)).

[28] It's also no answer to declare that this case and *Crane* involve "materially indistinguishable facts." *Post*, at 496 (Elrod, J., dissenting). It is true that "here, as in *Crane*, the trial court pointed to a rule of evidence to find the testimony inadmissible." *Id.* at 497. But at that level of generality, *every* state-law evidentiary rul-

ing in a criminal case implicates *Crane*. *Contra McGuire*, 502 U.S. at 67, 112 S.Ct. 475. That's why the Supreme Court has warned us not to "fram[e] [its] precedents at such a high level of generality." *Jackson*, 569 U.S. at 512, 133 S.Ct. 1990; *accord post*, at 489 (Southwick, J., concurring). In fact, the Court summarily reversed our sister circuit for doing exactly what the dissenters propose here: "characterizing the cases as recognizing a broad right to present evidence bearing on ... credibility." *Jackson*, 569 U.S. at 512, 133 S.Ct. 1990 (quotation omitted).[13]

3.

The dissenters' final *Crane* theory is that the state courts unreasonably applied that decision.

Judge Haynes contends that this case is like *Crane* because in both cases a state court "excluded testimony ... [a]s irrelevant." *Post*, at 512. It's true that *Crane* held that a state court cannot use a pretrial voluntariness ruling to justify the blanket exclusion of exculpatory evidence as "irrelevant." 476 U.S. at 687, 106 S.Ct. 2142. But this case involves neither a pretrial voluntariness ruling nor a blanket exclusion of anything. Instead, the trial court *admitted* the type of evidence that would have been excluded in *Crane* when proffered by Lucio's sister. *See supra* at 469–70. That proves the State in this case did not have a blanket evidentiary prohibition, unlike in *Crane*. And it proves that the trial court excluded Pinkerman and Villanueva by applying a discretionary, non-categorical evidentiary rule, unlike in *Crane*.

[29] Next, Judge Haynes argues that *Crane* applies to discretionary evidentiary decisions because the Supreme Court has not expressly held to the contrary. *See post*, at 513 ("[N]either *Chambers* nor *Crane* holds that a defendant's right to present a complete defense applies only when a state court excludes evidence based on categorical evidentiary rules."). But that gets the AEDPA relitigation inquiry backwards. Our task is not to determine whether Supreme Court precedent possibly permits Lucio to argue what she argued, but whether that precedent positively precludes the state court from holding what it held. *See* 28 U.S.C. § 2254(d); *Woods v. Etherton*, —— U.S. ——, 136 S. Ct. 1149, 1152, 194 L.Ed.2d 333 (2016) (per curiam). The absence of precedent commands the denial of relief to a state prisoner, not the grant of it.

Next, Judge Haynes insists that *Crane* applies to discretionary evidentiary decisions because the Supreme Court has so

13. *Jackson* notwithstanding, Judge Elrod objects to our "materially indistinguishable" analysis. She criticizes our "suggest[ion]" that "if the facts are not *exactly* the same, the 'contrary to' exception automatically fails." *Post*, at 496 n.3. Of course, that's not what we say. We agree with Judge Elrod that AEDPA's "contrary to" prong can be satisfied through "imposition of a contradictory standard" or "a 'diametrically different' conclusion on 'materially indistinguishable' facts." *Ibid.* (quoting *Terry Williams*, 529 U.S. at 405, 120 S.Ct. 1495); *see supra* at 468–69. But we disagree that *Terry Williams* or any other Supreme Court precedent supports a "contrary to" argument in this case. As the *Terry Williams* Court itself explained, "[i]t is difficult ... to describe ... a run-of-the-mill state-court decision as diametrically different from, opposite in character or nature from, or mutually opposed to ... our clearly established precedent." 529 U.S. at 406, 120 S.Ct. 1495 (quotations omitted). And a run-of-the-mill state-court evidentiary decision is exactly what we have here. *See supra* at 469–72, 482–83. "Although the state-court decision may be contrary to the [dissenters'] conception of how [*Crane*] ought to be applied in th[is] particular case, the decision is not 'mutually opposed' to [*Crane*] itself." *Terry Williams*, 529 U.S. at 406, 120 S.Ct. 1495.

held. Judge Haynes acknowledges, as she must, that *Crane* limited its holding to "the *blanket* exclusion of the proffered testimony about the circumstances of petitioner's confession"—but she suggests we should ignore that limitation because it's only "one line" in the Court's opinion. *Post*, at 513 (emphasis added by Judge Haynes) (quoting *Crane*, 476 U.S. at 690, 106 S.Ct. 2142). Of course, it is not true that *Crane*'s limitations come from "one line" in the opinion.[14] And even if it was, *Crane*'s holding remains binding on us in all events.

It's even more troubling to interpret *Montana v. Egelhoff* as extending *Crane* from blanket exclusions to discretionary ones. *See id.* at 513–14. In *Egelhoff*, the Montana Supreme Court interpreted the Due Process Clause and *Crane* to establish "the right to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged." 518 U.S. at 41–42, 116 S.Ct. 2013 (emphasis omitted) (quotation omitted). The Supreme Court emphatically reversed. *See id.* at 56, 116 S.Ct. 2013. We are aware of no authority for turning the Supreme Court's rejection of one prisoner's claim into clearly established law that supports a second prisoner's claim. *Cf. Nerio v. Evans*, 974 F.3d 571, 575 (5th Cir. 2020) (holding a case rejecting one Fourth Amendment claim does not clearly establish the law for another Fourth Amendment claim).

[30] Next, Judge Haynes asserts that *Crane* applies because the state court's discretionary ruling was not actually discretionary. *See post*, at 513–14. The theory seems to be that because Texas's relevance rule prohibits irrelevant evidence in absolute terms, state courts necessarily act "mechanistically" and with "no discretion" when they apply it. *Ibid.* Not so. Court decisions are "discretionary" when they "involv[e] an exercise of judgment and choice." *Discretionary*, BLACK'S LAW DICTIONARY (11th ed. 2019). Both judgment and choice obviously abound when it comes to relevance determinations. *Crane* itself recognizes that trial judges are "called upon to make dozens, sometimes hundreds, of decisions concerning the [relevance] of evidence" in a given case. 476 U.S. at 689, 106 S.Ct. 2142. *Crane* further recognizes that federal law gives judges "wide latitude" in making those decisions. *Ibid.* (quotation omitted). And state law does too. *See Brown v. State*, 96 S.W.3d 508, 511 (Tex. App.—Austin 2002, no pet.) ("Questions of relevance should be left largely to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion." (quotation omitted)); *see also post*, at 502, 512, 513–14 (Haynes, J., dissenting) (noting that the state habeas court reviewed the trial court's evidentiary ruling for abuse of discretion). We refuse to interpret the Due Process Clause to mean otherwise.

In her last effort to liken this case to *Crane*, Judge Haynes admits that the cases are distinguishable. *See post*, at 503–04. Judge Haynes seizes on the statement in *Crane* that "evidence surrounding the

14. *Crane* is replete with references to the distinction between discretionary and categorical evidentiary rulings. *See* 476 U.S. at 689, 106 S.Ct. 2142 ("We acknowledge ... our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts."); *id.* at 690, 106 S.Ct. 2142 ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability ...."); *id.* at 691, 106 S.Ct. 2142 ("[S]ince ... Kentucky ... has [not] advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence, the decision below must be reversed.").

making of a confession bears on its *credibility* as well as its *voluntariness*." 476 U.S. at 688, 106 S.Ct. 2142 (emphases added) (quotation omitted); *see post*, at 503–04, 508–09. From this statement, Judge Haynes concludes that Lucio can disclaim *Crane*'s *voluntariness* holding—as she did in her state habeas petition—while nonetheless relying on its *credibility* holding to support her complete-defense claim. *See post*, at 503–04, 508–09.

AEDPA prohibits this argument too. On direct appeal, Lucio characterized *Crane* as a case about the voluntariness of confessions. *See* ROA.10841; *post*, at 503–04 (Haynes, J., dissenting). She recognized that *Crane* applied the voluntariness requirement to police-created circumstances like "how long the questioning lasted" and "how many policemen were there." ROA. 10841. So she invited the Court of Criminal Appeals to extend *Crane*'s reasoning to a new form of involuntary interrogation statements—namely, those affected by battered woman syndrome. She did not, however, base her direct-appeal *Crane* claim on the theory that battered woman syndrome made her statements less credible, or that it made her less likely to have committed capital murder. That's why the Court of Criminal Appeals resolved Lucio's *Crane* claim in terms of voluntariness alone: she hadn't argued anything else. *See supra* at 461.

In state habeas, Lucio's understanding of *Crane* remained unchanged. She cited *Crane* only once—and only to disclaim any reliance on it. After all, Lucio continued to conceptualize *Crane* as a voluntariness case that restricted a trial court's ability to exclude "evidence regarding the circumstances under which [a] confession [i]s taken." ROA. 8029 n.36. And because Lucio had changed her defense strategy from challenging voluntariness to challenging "whether [she] was likely to have engaged in ongoing abuse of Mariah" in the first place, she no longer needed *Crane*. ROA. 8029 n.36. So, if we take Lucio at her word, she was *not* trying to introduce expert testimony to "answer the one question every rational juror needs answered: If [Lucio] is innocent, why did [s]he previously admit h[er] guilt?" *Contra post*, at 498–99, 512–13 (Haynes, J., dissenting); *post*, at 494, 495–96 (Elrod, J., dissenting). Rather than contesting the credibility of her statements, Lucio contended the Constitution compelled the admission of Pinkerman's testimony because it "was relevant to . . . demonstrating that [she] did not have the propensity to commit violence against Mariah." ROA.8033–34. Some might wish that Lucio litigated the case differently. But we are not free to condemn the state court for addressing Lucio's claims as she presented them. *See also supra* at 479–80 n.10.

D.

Finally, the dissenters point to *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019), and *Fieldman v. Brannon*, 969 F.3d 792 (7th Cir. 2020). *See post*, at 514–15 (Haynes, J., dissenting). Neither helps the dissenters.

Scrimo held that a state court violates AEDPA when it "fails to extend a principle of clearly established law to situations which that principle should have, in reason, governed." 935 F.3d at 112 (quotation omitted); *see also id.* at 114 (reiterating the failure-to-extend principle). Then *Scrimo* held the state court unreasonably failed to extend *Crane* by excluding certain witness testimony about drug deals. *See id.* at 108–10, 120. This is unhelpful to the dissenters for three reasons. First, no member of our court agrees with the Second Circuit's unreasonable-failure-to-extend reading of AEDPA. And that's for good reason—because the Supreme Court has squarely and expressly repudiated it.

See White, 572 U.S. at 426, 134 S.Ct. 1697 (rejecting "the unreasonable-refusal-to-extend rule on which respondent relies").

Second, far from supporting the dissenters, *Scrimo* holds " '[a] court does not unreasonably apply federal law in failing to guess a theory of relevance that was not argued at trial.' " 935 F.3d at 113 (quoting *Fuller v. Gorczyk*, 273 F.3d 212, 222 (2d Cir. 2001)); *see also Corby v. Artus*, 699 F.3d 159, 168 (2d Cir. 2012) ("The state trial judge was not required to read between the lines of counsel's motion to divine a previously unasserted legal theory . . . ." (cited and quoted in *Scrimo*, 935 F.3d at 113)). The fact that Scrimo's lawyer apparently articulated a *Crane*-based challenge to the exclusion of testimony in his trial does nothing to help Lucio, whose lawyer did not.

Third, when it came time to tackle specifics, the Second Circuit produced a rule that looks nothing like the rules the dissenters (or we) set forth here. *Compare Scrimo*, 935 F.3d at 115 ("If the evidentiary ruling was correct pursuant to a state evidentiary rule, . . . [w]e consider whether the evidentiary rule is arbitrary or disproportionate to the purposes it is designed to serve. On the other hand, if the potentially exculpatory evidence was erroneously excluded, we must look to whether the omitted evidence evaluated in the context of the entire record creates a reasonable doubt that did not otherwise exist." (quotations omitted)), *with post*, at 509–10 (Haynes, J., dissenting) ("[A] state court violates a defendant's right to present a complete defense if (1) the excluded evidence was critical to the defense, and (2) the state court failed to provide a rational justification for its exclusion." (citations omitted)). The dissenters cannot claim to embrace *Scrimo* because they reject all three of these holdings.

They fare no better under *Fieldman*. There, the Seventh Circuit held that "the state trial court's exclusion of Fieldman's testimony was a decision contrary to" *Crane*. 969 F.3d at 800. Or perhaps it didn't. *See post*, at 514 n.20 (Haynes, J., dissenting) ("[A]lthough the court in *Fieldman* wrote that the state trial court's adjudication was 'contrary to' clearly established law, the holding was in fact based under the 'unreasonable application' prong."). We take no position as to whether the dissenters misunderstand *Fieldman* or whether *Fieldman* misunderstands itself. Either way, *Fieldman* turned on the state court's exclusion of the *defendant's own testimony* when he took the stand at trial. *See* 969 F.3d at 801. It's well-settled—outside of *Crane*—that trial courts cannot impose such limits on a defendant's own testimony. *See, e.g.*, *Rock*, 483 U.S. at 49, 107 S.Ct. 2704. It's also irrelevant to this case.

* * *

The judgment of the district court is AFFIRMED.

LESLIE H. SOUTHWICK, Circuit Judge, joined by COSTA and WILLETT, Circuit Judges, concurring:

I agree we should deny relief despite the difficult issue of the exclusion of testimony that might have cast doubt on the credibility of Lucio's confession. That exclusion was the key evidentiary ruling at trial. Able colleagues in dissent have shown the factual imperative that jurors hear this testimony. Nonetheless, I cannot accept the legal reasoning of the dissenting opinions. Instead, I conclude that current, clearly established Supreme Court authority falls short of permitting us to reject the state *habeas* court's consideration of that issue.

This separate opinion is offered despite the analysis contained in the erudite prin-

cipal opinion for the court. In a much more thorough manner than here, it explains the denial of relief. I am unable to join all that is there and wish to explain my more limited reasons to affirm.

The dissenters express well their view that there was expert testimony that, if jurors had only heard it, could have impacted the verdict. We are all, though, working within the constraints of AEDPA. Its premise is that someone who has received a criminal conviction in state court has an initial means within the state-court system to challenge the validity of the conviction, then has a much more constrained means of challenging the state-court decision in federal court.

Fundamentally for me, what is at issue in the present appeal is whether a Supreme Court decision with language helpful to Lucio's claims, relied on by the dissenters but explained in other terms by this court's principal opinion, permits us to conclude that the state court erred in rejecting this claim and then to correct the error.

The precedent, of course, is *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Its relevance is to the exclusion of the expert testimony of Dr. John Pinkerman and, less importantly, of Ms. Norma Villanueva. It is now argued that they would have explained for jurors why someone like this defendant, after hours of interrogation, would have falsely admitted to killing someone. Because Lucio's confession admitted to the essentials of the indictment, it was imperative that some doubt about the confession be created. The *Crane* decision certainly is helpful on that claim, most explicitly when it stated that a state court cannot be "permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690, 106 S.Ct. 2142. Interpreting *Crane* as applied to our facts, both to what happened at trial and the proceedings since, is the difficult part of this appeal.

Exhaustion of the claim is one issue. A state prisoner must have "exhausted the remedies available in the courts of the State" on a claim before we may consider it. 28 U.S.C. § 2254(b)(1)(A). It seems the dissenters are correct that the State conceded that the issue is preserved. Regardless, in my view, exhaustion is not outcome-determinative.

The claim is that the state court unconstitutionally prevented the admission of reliable evidence bearing on the credibility of a confession, and that this evidence was central to the defendant's claim of innocence. A constitutional right to its introduction is said to arise under *Crane*, a decision predating the rulings in this case. Thus, the state court allegedly reached "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). To preview the conclusion of the analysis that follows, I state here that the interpretation of *Crane* that is necessary for relief in this case is not clearly established.

The principal opinion for the court already well explains that *Crane* reviewed a decision by a state's supreme court that analyzed for the first time what a new rule of state procedure meant as to juror consideration of confessions. *See* KY. R. CRIM. P. 9.78 (repealed 2014). The state trial-court judge determined prior to trial that the confession was voluntary; at trial, the court excluded evidence relating to voluntariness as not being relevant to the jury's function. *Crane v. Commonwealth*, 690 S.W.2d 753, 753–54 (Ky. 1985), *rev'd*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The Kentucky Supreme Court

agreed with excluding evidence as to voluntariness because the new procedural rule left it solely to the trial judge to decide that issue, while jurors could consider other challenges. *Id.* at 754.

The Court held there were three flaws in Kentucky's evidentiary rule: (1) it found no support in Supreme Court cases, (2) it was based on a misconception of the role of confessions at trial, and (3) "under the circumstances of this case, ... [it] deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense." *Crane*, 476 U.S. at 687, 106 S.Ct. 2142. The Court quoted a precedent that "evidence surrounding the making of a confession bears on its credibility," not just on "its voluntariness." *Id.* at 688, 106 S.Ct. 2142 (quoting *Jackson v. Denno*, 378 U.S. 368, 386 n.13, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)).

The Court then identified a near consensus in the states as well as under federal rules to allow all evidence about a confession to be submitted to jurors regardless of a pretrial failure to suppress. Still, "even a consensus as broad as this one is not inevitably congruent with the dictates of the Constitution." *Id.* at 689, 106 S.Ct. 2142. Important to my analysis of the opinion, the Court recognized that state trial judges need to make countless evidentiary decisions in a trial, and evidentiary rules may be applied that "serve the interests of fairness and reliability." *Id.* The facts in *Crane* easily permitted the Court to decide that this "blanket exclusion ... deprived [Crane] of a fair trial." *Id.*

The Supreme Court did not choose among different possible constitutional sources for its holding. It held that what Kentucky was doing violated this defendant's right for "a meaningful opportunity to present a complete defense." *Id.* at 690, 106 S.Ct. 2142 (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). There was "no new ground" being broken in saying that the "opportunity to be heard" is fundamental to due process, and a component of that is to permit the introduction of "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.*

One possible explanation of what was "clearly established" by *Crane*, even if not with clarity, is that the decision invalidated the application of any evidentiary rule that creates a "blanket" bar to a category of evidence and in the specific case prevented a defendant from presenting a meaningful defense. I agree with that sense of the Court's opinion. Another possibility is that a federal court may grant relief based on an everyday evidentiary ruling, such as the one about relevance in this case, when that ruling prevented a defendant from introducing evidence that can be characterized as central to the defense. Based on *Crane* itself and on other caselaw, my view is that the opinion does not apply to a simple, discretionary, even if errant, evidentiary decision by a state-court judge. To make every evidentiary ruling a potential issue of constitutional dimension is beyond my understanding of *Crane*.

Of particular importance to my conclusion about *Crane*, the Supreme Court has emphasized — in this precise area of limits on examination of witnesses — that lower courts must be careful in defining "clearly established law." To conclude that its precedent supports a "broad right to present 'evidence bearing on [a witness'] credibility,' " the Court held, was framing "clearly established Federal law" at too "high [a] level of generality." *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S.Ct. 1990, 186 L.Ed.2d 62 (2013) (first alteration in original). I find no Supreme Court opinion holding that an error in the discretionary

application of a general evidentiary standard is a constitutional violation.

Related precedents often have addressed a rule governing some evidentiary category, starting with *Chambers v. Mississippi*, 410 U.S. 284, 302–03, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), which concerned a bar to any evidence that ran afoul of the common-law voucher rule; then *Rock v. Arkansas*, 483 U.S. 44, 62, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), in which hypnotically refreshed testimony was inadmissible; later, *United States v. Scheffer*, 523 U.S. 303, 305, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), which concerned a military evidentiary rule barring polygraph results; and *Holmes v. South Carolina*, 547 U.S. 319, 331, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), which involved a prohibition of any evidence of third-party guilt.

In summary, I conclude that *Crane* overrides any blanket evidentiary rule that prevented introduction in the particular case of reliable, competent evidence central to the defense. For Lucio to succeed, *Crane* must do more. Perhaps the Supreme Court will interpret *Crane* more broadly, but I cannot, in light of what I have expressed here, conclude that *Crane* clearly established law helpful to Lucio.

My joining the refusal to allow relief in this case comes from the interplay of my interpretation of the limitations that AEDPA places on federal courts and my analysis of the limitations of *Crane.* This case, though, is a clear example that justice to a defendant may necessitate a more comprehensive review of state-court evidentiary rulings than is presently permissible under law that is established with sufficient clarity.

Patrick E. Higginbotham, Circuit Judge, joining Judge Haynes's dissent:

Dancing with words cannot mask the reality that we execute few with means and by metrics flowing from the pens of judges faithfully drawing upon fealty to an abstraction of our "federalism," one that screens the performance of poorly funded state judicial systems—themselves victims of political subscription to the death penalty while refusing to fund it. As the Court majority upholds the ending of one life at the hand of the state—Melissa Lucio's, now on death row for twelve years—it perversely eases the slide to the end of the death penalty. It does so with a hawking, adversarial draw upon the jurisprudence of capital punishment with springs at every turn. This with a prosecution deeply flawed from its inception and leaving our hand as a failure at every level of government, shadowed by a threadbare narrative leaving backstage Melissa's story, including the role in her life of Texas's Department of Family and Protective Services, for good or naught. To these eyes, it need not and should not have happened, as the thoughtful dissenting opinions explain. I here add a few lines to bring to the fore Melissa's life and her history with DFPS, specifically Child Protective Services, a history that frames this case.

I.

Melissa's father abandoned his wife and six children, leaving Melissa's mother as the family's sole provider. Melissa's mother was drawn to dalliances with men who did not contribute to the family's wellbeing, so care for Melissa and her siblings often devolved to these men while their mother struggled for their living. At age six, Melissa suffered sexual abuse at the hands of one of her mother's live-in lovers. This continued, with her mother's acquiescence, until Melissa was eight years old. Abuse would remain a feature of Melissa's relationships with the men closest to her. At age sixteen, she dropped out of high school to marry Guadalupe Lucio and bore

him five children by the time she turned 24. Guadalupe was a physically and emotionally abusive alcoholic, who abandoned Melissa and his children in 1994. So too was his successor Robert Alvarez, who, among other reported incidents, publicly punched Melissa. Yet on the night Mariah died, after hours of interrogation, it was Robert, not a lawyer, who Melissa asked Ranger Escalante to see.[1]

CPS's involvement with Melissa began in 1995, when the agency charged her with "neglectful supervision" but took no action. By 1998 at the latest, CPS was aware that Robert in service of himself had introduced Melissa to cocaine. Between 1999 and 2000, CPS learned that with the birth of Gabriel, both mother and child tested positive for the drug. CPS records reflect that in 2000, Melissa's children told investigators that she, Robert, and another adult male in the household were "using drugs." CPS conducted no investigation or drug testing in connection with the 2000 report and left the children in Melissa's care.

CPS recorded two drug-related incidents with Melissa in November and December of 2001, as well as two apparently separate incidents of "physical neglect." Again, CPS performed no drug tests and made no inquiry concerning the nature or quantity of drugs involved. In 2002, CPS recorded a charge of neglectful supervision against Melissa, prompted by reports that her young son had been seen in the street "chasing cars" and that several of her daughters were engaged in inappropriate sexual activity. In 2003, CPS was informed that another of Melissa's children, Sara, tested positive for cocaine at birth. CPS recorded additional charges of neglectful supervision and physical neglect in 2004, just prior to Mariah's birth; CPS closed those cases without taking any action. Mariah tested positive for cocaine shortly after her birth at Melissa's home in September 2004.

CPS records indicate that Melissa was directed to undergo substance abuse counseling and parenting courses, but the records reflect that she seldom remained with these programs. Case notes consistently reflect issues with Melissa's income and housing; CPS documented that the family was homeless at least once. Case notes also reflect CPS's awareness of a consistent set of behavioral problems for the Lucio children, including physical aggression to the point of violence and sexual misbehavior. On more than one occasion, there was evidence that the older children had beaten their younger siblings, but CPS made little, if any, inquiry into these incidents.

CPS removed Melissa's children from her care for a period spanning September 2004 to November 2006. In December 2006, with many of Melissa's children just returned to her from foster care, CPS's intervention was required again because Melissa could not pay her rent and was about to lose her apartment. CPS conducted a drug test—Melissa was negative—and provided her with rent support. CPS had no recorded visits with Melissa in

1. It is telling that at 3 a.m., after being denied the opportunity to see Robert, Melissa said to Escalante "I don't know what you want me to say. I'm responsible for it," before making a series of admissions that the State relied on as a confession of responsibility for Mariah's death. At Escalante's prompting, Melissa conceded that she spanked and pinched Mariah at times, without ever admitting to striking the cranial blows that proved fatal. But overlooking the equivocal nature of her confession, Melissa was denied the opportunity to explain why she would have taken responsibility for Mariah's death if she did not inflict the fatal injuries.

January or February 2007 prior to Mariah's death.

These facts compel the observation that the tragedy of Mariah's death unfolded against the depressingly familiar background of the State's struggle with CPS's systemic failures, now documented in this Court's recent opinions.[2] We there observed that DFPS, and by extension CPS, have persisted in a state of "organizational and administrative chaos" for decades resulting in an "epidemic of physical and sexual abuse" among the thousands of children in its care;[3] that "[w]here children have reported abuse or neglect to the agency, investigations are inadequate;" that DFPS sports a 75% error rate in its investigations of abuse;[4] that "DFPS's inability to prevent abuse is exacerbated by its incompetence in responding to incidents once they have occurred."[5]

As of 2019, there were roughly 51,000 children in DFPS's legal care, with several thousand more throughout Texas receiving family preservation services.[6] Its "caseworkers handle, on average, 28 children's cases at a time, with caseworkers at the upper end of the distribution handling 40, sometimes 60."[7] By the State's own reckoning, these caseloads greatly exceed what is practicable for any individual caseworker.[8] As we previously recognized, "high caseloads [ ] are a direct cause of high turnover rates," and "DFPS experiences extraordinary turnover among caseworkers."[9] By conservative estimates, "16% of caseworkers leave in their first six months, 25% in their first year, and 43% in their first two years."[10] The high attrition rates among caseworkers in turn "exacerbate the caseload problem."[11] With evidence that these problems have been presented to the State "repeatedly over the past two decades," this Court determined "that the State is deliberately indifferent to the risks posed by its policies and practices" to the children in its care.[12]

In its long superintendence of Melissa, DFPS never recorded or expressed concern that she physically abused any of the children in her care. To its credit, despite the difficulties of managing this large en-

2. *See M.D. by Stukenberg v. Abbott (Stukenberg I),* 907 F.3d 237, 260–68 (5th Cir. 2018); *M. D. by next friend Stukenberg v. Abbott (Stukenberg II),* 929 F.3d 272, 281–93 (5th Cir. 2019) (Higginbotham, J. concurring in part and dissenting in part).

3. *Stukenberg II,* 929 F.3d at 284 (Higginbotham, J. concurring in part and dissenting in part).

4. *Stukenberg I,* 907 F.3d at 292.

5. *Id.* at 291.

6. *See CPS Conservatorship: Children in DFPS Legal Responsibility,* Texas Dep't of Fam. & Protective Servs., https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Children_in_Conservatorship.asp.

7. *Stukenberg I,* 907 F.3d at 290.

8. "DFPS produced a Work Measurement Study, which concluded that 'DFPS caseworkers expended an average of 9.7 hours per month on case profiles most often associated with PMC children, and that these workers had an average of 137.9 hours per month to spend on their casework.' Dividing the average time available (137.9) by the average time per case (9.7), each PMC caseworker could handle a caseload of 14 children. On the basis of the DFPS Study, the Special Masters recommended that the district court order DFPS to implement a caseload standard in the range of 14 to 17 PMC cases per caseworker.'' *Stukenberg I,* 907 F.3d at 301.

9. *Id.* at 260, 291.

10. *Id.* at 291.

11. *Id.* at 260.

12. *Id.*

terprise,[13] it recognized that Melissa's troubles centered on her inability to escape a succession of relationships with dominating and abusive men who to their own ends, encouraged her use of cocaine, a stimulant. That reality is strong footing for Melissa's claimed denial of the opportunity to present a complete defense: that she only tried to accept the blame for the acts of others, a phenomenon of personality produced by her own lifetime of abuse in a world of abject poverty.

II.

This is not the story writ large. It is the story drawn from the trial record—the factual matrix against which the now assailed proffers of counsel and Dr Pinkerton were made. Their words take their full meaning—not as an excised, freestanding abstraction—but as they were laced into the narrative fabric. Only with a walk away from the developed facts of the full record can the denial of Melissa's sole defense be shrunk into an "evidentiary ruling" with its attending judicial discretion, one that, if rejected, it is then said would bring a cascade of federal reviews of state court rulings in defiance of federalism. But, of course, the walk away elides the reality that even the nigh routine matters of the constitutional order must have their factual footing.

The footing here for Melissa's claim that she was denied a complete defense cannot be brushed aside with an assertion that the trial court and hence the courts that followed were not put on notice. Facts matter. In this morality play of citizen decisions of life or death, the jury represents the people, but they did not hear her defense.[14] The trial court ruled that Melissa's proposed defense was irrelevant to the question of her guilt or innocence, a ruling that amounted to a complete rejection of her defense, one not based on any deficiency in its presentation. For all the years that CPS looked over her shoulder it never found physical abuse; this child did not die of neglect, but of violent blows to her head so powerful as to produce fatal subdural bleeding. Whether these injuries could have been from a fall down the stairs or by a stronger hand than Melissa's was disputed. The jury was entitled to hear her defense that it was not Melissa who struck the blow. And as Melissa well knew, the death of a child in her custody meant the automatic removal of all children from her custody, leaving her without support. It is plain that, with a fair reading of this record, the Court steps on no sovereign interest of the state, as explained by the Supreme Court in *Crane*.

13. DFPS is a participant in a form of cooperative federalism through which the agency receives well over $700 million in federal funding, annually, representing roughly half of the agency's yearly budget. *Stukenberg II*, 929 F.3d at 290 (Higginbotham, J. concurring in part and dissenting in part) ("[R]oughly half of the State's child-welfare agency spending [is] covered by federal funds, over $730 million in fiscal year 2016.").

14. The defense of false confession has for decades played a prominent role in exonerations. *See* Samuel Gross and Maurice Possley, *For 50 Years, You've Had "The Right to Remain Silent" So why do so many suspects confess to crimes they didn't commit?*, The Marshall Project (June 12, 2016), https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent. It is not an esoteric creation of the defense bar, but a widely recognized phenomenon. *See, e.g.*, Richard Leo, *False Confessions: Causes, Consequences, and Implications*, 37, J. Am. Acad. Psychiatry & L. (September 2009), http://jaapl.org/content/37/3/332. The State adopted one of the recommended responses to this problem by taping the interrogation. But it ignored the recommendation that extended accusatorial tactics be banned.

Jennifer Walker Elrod, Circuit Judge, joined by Higginson, Circuit Judge, dissenting:

Melissa Lucio is not without culpability. Her young daughter, Mariah, endured a shockingly violent life, suffering horrific abuse that Lucio either perpetrated or tolerated. After Mariah's death, a Texas jury convicted Lucio of capital murder, and Lucio was sentenced to death.

Lucio now sits on death row. Twelve jurors representing a cross-section of Cameron County concluded that Lucio killed her child, almost certainly because Lucio—five hours into interrogation on the night Mariah died—acceded to the interrogator's pressing that she "did it."

But did she? At trial, Lucio was barred from offering evidence to explain why she would confess if she were innocent.

In America, the vilest offenders—including abusers and murderers of children—are entitled to every protection that the Constitution guarantees. The Sixth Amendment has been called "the heartland of constitutional criminal procedure," enshrining three clusters of rights so that criminal trials—designed to pursue truth and protect innocence—are speedy, public, and fair. *See* Akhil R. Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 641–43 (1996). And the Supreme Court has unanimously held that the right to be heard, an indispensable element of a *fair* trial, forbids the State from excluding, categorically, "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). With confessions, content cannot be divorced from context.

That's the lone issue in this case: Should a capital defendant be allowed to explain to a jury how to square her adamant profession of innocence today with her apparent confession of guilt yesterday?

* * *

Lucio exhausted her complete-defense claim in the state court,[1] which rejected the claim on the merits. Thus, under AEDPA, we may only grant habeas relief if that rejection was "contrary to" or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The principal dissent turns on the latter ("unreasonable application"), and I agree. I would go even further and say the adjudication was "contrary to" that law.

When is a state court decision a collision versus a misapplication?

- A decision is "contrary to" clearly established Federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law *or* if the

1. The plurality opinion makes much of how Lucio phrased her claims throughout the various pleading stages. But as my fellow dissenters have emphasized, the State affirmatively waived any exhaustion arguments by (1) expressly stating before the district court that "Lucio raised this claim in state habeas proceedings," (2) analyzing and arguing against the merits of Lucio's complete-defense claim (applying the same Supreme Court cases that Lucio now asks us to consider), and (3) expressly raising an exhaustion defense against some of Lucio's claims but not the complete-defense claim. *See Carty v. Thaler*, 583 F.3d 244, 256 (5th Cir. 2009) (explaining that a waiver of exhaustion must be express but that AEDPA "does not require 'magic words' "); *id.* (finding express waiver of exhaustion on appeal where the State argued in the district court that one claim—not at issue on appeal—was not exhausted but did not raise the same argument with respect to other claims). "Clearly," the State "considered exhaustion as a defense and chose not to exercise that defense." *Id.*

state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (emphasis added).

- A decision is an "unreasonable application" of Federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

In my view, the state court failed to even *identify* the correct legal principle, let alone apply it, reasonably or otherwise.[2]

I

As all agree, *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), is our North Star. I recap the facts at length to underscore exactly what the Supreme Court considered and what it did not. And to make clear that today's case is about *applying Crane*, not *extending* it.

In *Crane*, the petitioner moved to suppress his confession to murder. *Id.* at 684–85, 106 S.Ct. 2142. The trial court determined that the confession was made voluntarily and denied the motion. *Id.* at 685, 106 S.Ct. 2142. Then, at trial, petitioner sought to introduce testimony regarding the physical and psychological environment in which the State obtained the confession for the purpose of demonstrating that the confession was "unworthy of belief." *Id.* The trial court determined that this testimony pertained exclusively to the issue of whether his confession was voluntary—which, under a Kentucky evidentiary rule, could not be re-adjudicated—and deemed it inadmissible. *Id.* at 686, 106 S.Ct. 2142. The Court heard the case to determine "whether the exclusion of testimony about the circumstances of the confession violated petitioner's rights under the Sixth and Fourteenth Amendments to the Federal Constitution"—the "constitutional right to a fair opportunity to present a defense." *Id.* at 686–87, 106 S.Ct. 2142.

The Court began by explaining the importance of the right to challenge the credibility of a confession. It noted that "the Court has never questioned that evidence surrounding the making of a confession bears on its credibility" and that "the defendant[has a] traditional prerogative to challenge the confession's reliability during the course of the trial." *Id.* at 688, 106 S.Ct. 2142 (internal quotation and emphasis omitted). *See also Lego v. Twomey*, 404 U.S. 477, 485–86, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) ("A defendant has been as free since *Jackson*[*v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964),] as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness."). That's why the Court "has expressly assumed that evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Crane*, 476 U.S. at 688, 106 S.Ct. 2142.

The relevance of this evidence is not limited to assessing a confession's voluntariness; the circumstances surrounding a defendant's incriminating statements "can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." *Id.* at 688–89, 106 S.Ct. 2142. There is a simple reason for this. As the Court explained, a confession does not necessarily mean guilt: "as with any other

2. The state court rejected Lucio's complete-defense argument because, the court reasoned, her claim was "nearly identical to [the issues] raised on direct appeal," and the trial court did not abuse its discretion in excluding Dr. Pinkerman's testimony.

part of the prosecutor's case, a confession may be . . . unworthy of belief." *Id.* at 689, 106 S.Ct. 2142 (internal quotation omitted). Thus, the Court stressed, if the defendant is barred from presenting testimony regarding the circumstances of his confession, he is "stripped of the power to describe to the jury the circumstances that prompted his confession, [and] the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.*

The Court went on to acknowledge that it has a general "reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts," and it emphasized that it had "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves *serve the interests of fairness and reliability*." *Id.* at 689–90, 106 S.Ct. 2142 (emphasis added) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). But given the facts of the case, it had "little trouble concluding" that the "blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." *Id.* at 690, 106 S.Ct. 2142.

As the unanimous *Crane* Court put it, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Id.* (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). And it added this admonition: "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* Therefore, the Court held, "[i]n the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Id.* at 690–91, 106 S.Ct. 2142 (citation omitted).

So that's the bedrock rule we're applying: The jury must be allowed to hear "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690, 106 S.Ct. 2142. And that's the bedrock rule Lucio argues the state court contravened.

II

In my judgment, the state court flouted *Crane* when it rejected Lucio's complete-defense claim by excluding Dr. Pinkerman's testimony as having "no relevance to the question of [Lucio's] guilt or innocence." In *Crane*, on materially indistinguishable facts, the Supreme Court expressly foreclosed this conclusion.[3] Here, as in *Crane*, the State's case relied principally on the defendant's inculpatory statements to argue that she committed the crime.[4] If the confession was false, then

3. *Williams,* 529 U.S. at 406, 120 S.Ct. 1495 (explaining the key inquiry is whether the facts are ''materially indistinguishable''); *cf. Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) (''AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'' (citation omitted)). The plurality opinion suggests that if the facts are not *exactly* the same, the ''contrary to'' exception automatically fails, even though there are two ways in which the ''contrary to'' prong can be satisfied: imposition of a contradictory standard (as occurred here) *or* a ''diametrically different'' conclusion on ''materially indistinguishable'' facts (which *also* occurred here). *See Williams,* 529 U.S. at 405, 120 S.Ct. 1495.

4. For instance, the State's closing argument stressed that it is ''unbelievable'' that Lucio

the State's case crumbles. Also here, as in *Crane*, the trial court pointed to a rule of evidence to find the testimony inadmissible. The *Crane* Court unanimously held that trial courts commit constitutional error when they make such a determination.

The rule again: A trial court cannot reject "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane*, 476 U.S. at 690, 106 S.Ct. 2142. There is no question that Dr. Pinkerman's proffered testimony was "reliable" and "competent"—neither party, nor the court, challenged his qualifications. And Dr. Pinkerman's testimony regarding the credibility of Lucio's supposed confession is central to her defense. Lucio sought to argue that she only confessed to causing Mariah's injuries because she suffers from Battered Woman Syndrome and often takes blame for things that are not her fault, particularly when under the control of a male figure (here, Officer Escalon).[5] Without Lucio's confession, the State had no direct evidence that she hit Mariah in the head, causing the fatal injury. The rule in *Crane* is clear; yet the state court declined to apply it.

Federal habeas relief isn't for correcting run-of-the-mill state law errors. But it is for correcting a state court's evidentiary ruling that violates a defendant's weighty interest in meaningfully presenting to the jury her version of the facts, particularly the circumstances surrounding her "confession," the State's strongest piece of evidence.

Crane's holding clearly established that a court may not exclude reliable testimony regarding the credibility of a confession where that evidence is central to the defendant's innocence claim. Dr. Pinkerman's proffered testimony was reliable. It spoke to the credibility of Lucio's confession. And the credibility (or lack thereof) of Lucio's confession was central to her claim of innocence. She had a constitutionally enshrined right to present her complete defense. And without her expert, she was categorically denied the ability to scientifically explain about how Battered Woman Syndrome played a role in her supposed confession.

* * *

Mariah suffered appalling abuse, including at the hands of her mother. Lucio is not without blame. But neither is she without rights. And the Sixth Amendment protects Lucio's right to put on her defense.

caused Mariah's other injuries—to which Lucio had confessed—but that she never hit Mariah in the head. Because Lucio confessed to otherwise harming Mariah, the State argued, "the inference is clear that she caused [the head] injuries because it's consistent. It's consistent with her behavior. It's consistent with her pattern of conduct towards this child." Lucio must have delivered the final blow.

5. The plurality opinion notes that Dr. Pinkerman's affidavit concerning the circumstances of Lucio's interrogation and her experience with Battered Woman Syndrome was not presented during the original proffer at trial. *See* Pl. Op. at 471–72, 477. But, as the principal dissent explains, that affidavit is not precluded from our review. The State conceded as much in its response to our en banc questions, stating "*Cullen v. Pinholster*, 563 U.S. 170, 180, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), indicates that this Court may also consider Dr. Pinkerman's 2010 affidavit because it was part of the record in the state court." In *Cullen*, the Supreme Court held that our review "is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181, 131 S.Ct. 1388. Here, we are asking whether the state-court adjudication of Lucio's complete-defense claim was contrary to clearly established law; therefore, we must review "the record in existence at *that* same time *i.e.*, the record before the state court." *Id.* at 182, 131 S.Ct. 1388 (emphasis added). That record included Dr. Pinkerman's affidavit.

Sound criminal procedure must adhere to sacred first principles. The Supreme Court is rightly exacting in death penalty cases, and Lucio has a constitutional right to present a complete defense. In my view, the state court disregarded clearly established federal standards and ignored materially indistinguishable Supreme Court precedent.

With great respect, I dissent.

HAYNES, Circuit Judge, joined by HIGGINBOTHAM, STEWART, DENNIS, ELROD, GRAVES, and HIGGINSON, Circuit Judges, dissenting:

Is the conclusion that evidence refuting the core of the State's case against the defendant is irrelevant an unreasonable application of clearly established Supreme Court precedent? Yes. Period. That is the crux of why the district court erred in rejecting Lucio's complete defense claim.

Unfortunately, the plurality opinion [1] drives down numerous backroads untraversed by the parties, basing its affirmance largely on issues that were never raised by either party and necessitating a lengthier response in this opinion. The plurality opinion makes procedural arguments on the State's behalf that the State clearly (and intentionally) waived, ignoring the Supreme Court's recent reminder that we are "passive instruments of government" that should "decide only questions presented by the parties." *United States v. Sineneng-Smith*, —— U.S. ——, 140 S. Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) (internal quotation marks and citation omitted). In addressing only those issues properly before us, I conclude that the state habeas court's adjudication of Lucio's complete defense claim with regard to expert witness Pinkerman [2] involved an unreasonable application of *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), and *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).[3] Pinkerman's testimony would have explained Lucio's tendency to take blame for everything that goes on in the family and refuted the State's core "evidence" of Lucio's guilt: her interrogation statement characterized by the State as her "confession." The testimony thus would have "answer[ed] the one question every rational juror need[ed] answered" before determining Lucio's innocence: "If [Lucio] is innocent, why did [s]he previously admit h[er] guilt?" *Crane*, 476 U.S. at 689, 106 S.Ct. 2142. The state trial court erroneously excluded the testi-

1. It is ironic that the plurality opinion claims that the dissenting opinions disagree with each other when, in fact, the exact same number of judges join this dissenting opinion (7) as join the plurality opinion (7).

2. As the plurality opinion states, Lucio also challenges the trial court's refusal to allow a different expert, Norma Villanueva, to testify. Because of my conclusions regarding Pinkerman, it is not necessary to examine whether the state habeas court's adjudication of Lucio's complete defense as it relates to Villanueva involved an unreasonable application of *Crane* and *Chambers*.

3. I address this case applying AEDPA deference because the majority of our en banc court (several members of our court who conclude that Lucio should prevail as well as those in the plurality opinion) have determined that the state habeas court did adjudicate the merits of Lucio's complete defense claim. I, however, continue to subscribe to the panel opinion's conclusion that Lucio's complete defense claim merits de novo review because she exhausted her claim in state court and the state court failed to adjudicate her claim on the merits. Under de novo review, the state trial court denied Lucio of her right to present a complete defense when it prevented Pinkerman from testifying. Some judges joining in this dissent join in this footnote; some do not. But, under either standard of review, the result is the same: the district court erred in denying Lucio federal habeas relief.

mony as irrelevant, and the state habeas court in turn unreasonably applied Supreme Court precedent in concluding that the exclusion did not violate Lucio's right to present a complete defense. For these reasons, I respectfully dissent from the plurality opinion's judgment, and I would reverse the district court's order denying Lucio's federal habeas claim and remand for the district court to grant Lucio relief.

I. Background

A. Factual Background [4]

Lucio lived in an apartment accessed by a steep exterior staircase with her husband, Robert Alvarez, and nine of her children. *See Lucio v. State*, 351 S.W.3d 878, 880 & n.1 (Tex. Crim. App. 2011). Lucio had trouble taking care of her many children: Lucio's older children were "aggressive to the point of becoming violent," and Lucio had difficulty disciplining her children. Mariah, Lucio's youngest, developed behavioral issues; she would hit her head when having tantrums. A few months later, paramedics responded to a call to Lucio's home and found Mariah dead, "face up on the floor" and with Lucio, Robert, and a number of children nearby. Lucio told the paramedics that Mariah "fell down the stairs," and Lucio was taken in by police for questioning.

Lucio's interrogation on the night her daughter was found dead was not as straightforward as the plurality opinion suggests. *See* Plurality. Op. at 457. Her interrogation was over five hours long, lasting from before 10:00 p.m. to after 3:00 a.m. For the first three hours, Lucio maintained that, although she sometimes spanked her children, she did not hit or abuse Mariah, and she did not know who caused Mariah's injuries. She also described Mariah's physical condition leading up to her death: Mariah was "sick" on the Saturday that she died and the Friday before, but Lucio did not take Mariah to the doctor. Mariah would not eat, and her breathing was heavy. She slept all day Saturday, and she would lock her teeth together when Lucio would try to feed her.

More than three hours after the interrogation began, after 1:00 a.m., Texas Ranger Victor Escalon entered the room and told Lucio—in a long, mostly one-person exchange—that the officers needed her story and that everyone would understand if she had hurt her daughter. At that point, Lucio told Escalon that she wanted a cigarette and wished to talk to her husband. Escalon told her that she could do those things after he took her statement. Escalon then asked Lucio, repeatedly, to tell him "everything."

Lucio eventually told Escalon that she "would spank [Mariah], but [Lucio] didn't think [she] would spank her, to where . . . to where it got to this point." Escalon prompted Lucio for more detail, but she responded, "I don't know what you want me to say. I'm responsible for it." At Escalon's suggestion, Lucio agreed that the spanking was "all over [Mariah's] body." She maintained that she was not angry at Mariah but was "frustrated" by the other kids who were "very hyper," making it difficult to take care of them all. She also stated that she bit Mariah one day while tickling her; she did not know why she did it. While making these statements, Lucio continued to maintain that she had not hit Mariah in the head and had only spanked her.

4. This opinion does not engage in "relitigating" facts or "weighing evidence." Plurality Op. Section IV.A. The reason to include a recitation of the facts is to understand why the *absence* of evidence is critical here. The jury was deprived of key evidence to weigh: that is the point.

Lucio also stated that no one else was responsible for Mariah's injuries and that she was the only one who spanked her.

As the interrogation progressed, Escalon identified specific bruising on Mariah and asked Lucio to tell him how it happened. Lucio usually responded that she did not know how the bruises occurred and often said she that did not hit Mariah in particular spots. When Escalon insisted that Lucio was responsible for specific bruises, she responded, "I guess I did it." She suggested that some of Mariah's other injuries, like scratches, could have been caused by her other daughters. For some of the bruises, Lucio said she was the one who caused them, and said she would sometimes spank Mariah when she woke up other kids.

Escalon then had Lucio take a break at 1:22 a.m. After the break, officers took DNA samples from Lucio, then took another break.

At 3:00 a.m., Escalon resumed the interrogation. He brought in a doll to have Lucio show him how she bit and spanked Mariah. When Lucio was showing Escalon how she bit Mariah, Escalon asked if she was angry at Mariah. She said no, explained that she was frustrated with the other kids, and described how she bit Mariah after she finished brushing Mariah's hair. When asked why she bit Mariah, Lucio said, "I just did it." Escalon then asked Lucio to show how she spanked Mariah. When she demonstrated, Escalon told her, "Well do it real hard like . . . like you would do it." When she said that her demonstration was how hard she spanked Mariah, Escalon himself performed what he thought was a hard spank and had Lucio demonstrate again. He identified several sets of bruises and had her spank the doll in those areas to demonstrate how she would have spanked Mariah.

At Lucio's trial for capital murder, the State's theory of the case depended on two critical points. First, the State sought to prove that Mariah's death was caused by a fatal blow to the head that could not have been sustained from Mariah falling down the stairs, using a forensic pathologist who testified that a fall would not have caused the injuries in question.

Second, the State used Lucio's "confession" to support the conclusion that she killed Mariah. The State introduced the videos of Lucio's interrogation the first day of trial; the state court admitted the videos into evidence and they were immediately played for the jury. The State later put Escalon on the stand, and he testified about Lucio's demeanor during the interrogation. Escalon described Lucio's demeanor as indicating that she was saying, "I did it." During its closing argument, the State characterized Lucio's admission as a "confession" that proved beyond a reasonable doubt that Lucio killed Mariah. The State emphasized that Lucio "did make the statement and the statement that she made was the true and correct statement at the end. She admitted it. She admitted that she caused all of the injuries to that child." The State also highlighted Lucio's demeanor during the interrogation, rhetorically asking why she would look or act a certain way if all she did "was physically beat the child, but didn't cause the death." It also referenced Escalon's testimony that Lucio's demeanor indicated she was "hiding the truth."

Lucio tried to defend against both points. First, she called a neurosurgeon who testified that the blunt force trauma causing Mariah's death could have resulted from falling down stairs. During closing arguments, Lucio's counsel argued that the State failed to overcome reasonable doubt because evidence indicated that Ma-

riah's fatal injury could have resulted from falling down stairs.

Second, Lucio wanted to present two expert witnesses to testify that her supposed confession was not trustworthy, but the state trial court did not let them testify. One of the experts was Dr. John Pinkerman, a psychologist who would have testified about Lucio's psychological issues that cause her to take "blame for everything that goes on in the family."[5] He formed his opinion after reviewing the interrogation tapes, meeting with Lucio on four occasions, reviewing her history, and administering various psychological tests to her. The state trial court prevented Pinkerman from testifying, not due to any lack of qualifications as an expert but because the judge considered the testimony *irrelevant* because Lucio "denied ever having anything to do with the killing of the child." The state trial court permitted Pinkerman to submit a bill of particulars, but the judge left the courtroom after swearing Pinkerman in, not waiting to listen to Pinkerman's proffer.

Beyond her medical expert and the two excluded experts, Lucio called one defense witness and recalled one of the State's witnesses. Lucio's defense witness was her sister, Sonia Chavez, who testified that Lucio "never disciplined her children." The recalled witness was Joanne Estrada, a child protective services worker. Estrada was asked about whether she had reviewed documents that showed that Mariah had tantrums while in foster care and had hit her head on the floor. Estrada testified that she had not come across anything in Lucio's file that showed she was "physically abusive to any of the children." Lucio presented no other witnesses.

In closing argument, the State, citing only Lucio's interrogation statements as evidence, contended that Lucio must have killed Mariah because she abused her. It argued that "there [wa]s no reasonable doubt that [Lucio] killed that little girl" because the jury had "[h]er confession." Ultimately, Lucio was convicted and sentenced to death.

B. Subsequent Appeals & Petitions For Post-Conviction Relief

Lucio appealed her conviction, raising several points of error, but the Texas Court of Criminal Appeals affirmed. *Lucio*, 351 S.W.3d at 910. On appeal, the State's argument continued to rely on Lucio's interrogation. In responding to Lucio's sufficiency of the evidence challenge, the State argued that a "jury could have reasonably concluded that [Lucio] was responsible for delivering the fatal blow to Mariah's head, as she had the opportunity to do so, *and she had admitted to a pattern of abuse that had continued for some two months*." *Id.* at 894–95 (emphasis added) (cleaned up). The Texas Court of Criminal Appeals accepted that argument. *Id.* at 895.

Lucio also claimed that the trial court's exclusion of Pinkerman's testimony violated her "constitutional right to present evidence before the jury as to the circumstances under which [a] confession is taken." She cited *Crane* for the proposition that a jury is "entitled to know about the circumstances under which [a] statement was given ... so that [it] could assess the voluntariness of the statement." The Texas Court of Criminal Appeals rejected Lucio's challenge for two reasons: (1) Lucio's "claim on appeal as to what Pinkerman's testi-

5. The other expert was Norma Villanueva, a licensed social worker with graduate education, who would have testified about why Lucio "would have given police [officers] information ... that was not correct" to show that Lucio "admits to things that she didn't do."

mony would have been d[id] not comport with what the trial attorney claimed . . . he was offering it for," and (2) Pinkerman's proffered testimony "had little, if any, relevance to a jury's voluntariness determination under state law." *Id.* at 902.

After Lucio lost on direct appeal, she sought state habeas relief. As with her direct appeal, she raised several arguments, including the argument that Pinkerman's testimony should have been admitted. This time, though, she distinguished her argument as going "to the core of the case—whether [Lucio] was likely to have engaged in ongoing abuse of Mariah." She stated that the issue was the deprivation of "the constitutional right to present a complete defense," and cited a state law case that relied on the U.S. Constitution for that right. Lucio also argued that her trial counsel provided ineffective assistance of counsel ("IAC"). Her habeas application offered a post-trial affidavit from Pinkerman as support. The state habeas court rejected all of Lucio's claims. It concluded that her complete defense claim was "nearly identical to [the issues] raised on direct appeal," and the additional evidence she presented did not demonstrate that she was entitled to relief. The state habeas court also concluded that the trial court "did not abuse its discretion in excluding" Pinkerman's testimony. His testimony, the state habeas court reasoned, "had no relevance to the question of [Lucio's] guilt or innocence."

Lucio appealed the state habeas court's decision. The Texas Court of Criminal Appeals adopted the habeas court's findings of fact and conclusions of law. It noted that some of the issues Lucio raised were procedurally barred, but it did not list her complete defense claim among them.

Lucio then petitioned for federal habeas relief under 28 U.S.C. § 2254 in federal district court and reasserted the complete defense claim she had raised before the state habeas court. The district court rejected the claim. It considered Pinkerman's testimony to be "only tangentially related to the question of Lucio's guilt or innocence" and noted that the "evidence that anyone but Lucio inflicted the fatal injuries is tenuous at best."

Lucio filed a timely notice of appeal, and we granted her a Certificate of Appealability ("COA") on her complete defense claim. *See Lucio v. Davis*, 783 F. App'x 313, 319 (5th Cir. 2019) (per curiam). A panel of this court reversed the district court's order denying her habeas petition on those grounds. *Id.* at 325. We granted en banc rehearing. *Lucio v. Davis*, 947 F.3d 331 (5th Cir. 2020) (mem.).

II. The Issue Presented on Appeal

The issue on appeal is whether the district court erred in its adjudication of Lucio's complete defense claim. Before addressing the merits, I first explain what Lucio's complete defense claim is and explain why, contrary to the plurality opinion's contention, there are no other issues on appeal.

A. Lucio's Complete Defense Claim

Lucio's complete defense claim is that her "right to present a complete defense [wa]s violated by the exclusion of [Pinkerman's testimony] pursuant to a state evidentiary rule that categorically and arbitrarily prohibits [her] from offering otherwise relevant, reliable evidence that is vital to h[er] defense." She cites *Wiley v. State*, 74 S.W.3d 399, 406–07 (Tex. Crim. App. 2002), to support her claim. Lucio claims that Pinkerman would have testified to Lucio's abuse and tendency to take blame for everything. She claims

that Pinkerman's testimony would have attacked a key part of the State's case—that she physically abused Mariah—and was therefore vital to her defense. In other words, Lucio argues that the state trial court "stripped [her] of the power to describe to the jury the circumstances that prompted h[er] confession" and "effectively disabled" her from challenging the trustworthiness of her custodial confession that was on "every rational juror['s]" mind when they decided her guilt. *See Crane*, 476 U.S. at 689, 106 S.Ct. 2142.

Lucio's complete defense claim has not changed since Lucio first raised it in state habeas court.[6] She argues that, if the state habeas court adjudicated her complete defense on the merits, then the state habeas court's holding was "an unreasonable application of the substantially similar decisions of *Chambers* and *Crane*."[7]

The plurality opinion contends that Lucio's mere "flagging" of *Wiley*, which cites the U.S. Constitution, is insufficient to raise a federal claim and, therefore, is nothing more than an invitation for us to second-guess the state court on the rules of evidence. Plurality Op. at 472–73. But Lucio did much more than cite *Wiley*: she clearly stated that "[t]he trial court deprived [her] of the constitutional right to present a complete defense"—which Texas does not appear to recognize or reject—and she did not mention state evidentiary rules or standards to support her claim. Thus, Lucio does not ask us to act as a state court examining state evidentiary rules. Indeed, the State agrees that this complete defense claim is the issue before us today.

The plurality opinion also contends that "Lucio adamantly insisted that her state habeas claim did not involve *Crane*" and thus her complete defense claim cannot implicate the case, either. Plurality Op. at 472. As explained above, Lucio cited *Crane* in her direct appeal for the proposition that a jury is "entitled to know about the circumstances under which [a] statement was given . . . so that [it] could assess the voluntariness of the statement." In state habeas proceedings, Lucio clarified that her state habeas complete defense claim

6. The plurality opinion states that it "is an undisputed proposition" that Lucio changed her complete defense claim over time. Plurality Op. at 480. The record proves that proposition false. Lucio's complete defense claim—first raised in state habeas court—has not changed. In state habeas court, Lucio argued that the state trial court deprived her "of the constitutional right to present a complete defense when it excluded the testimony of defense experts during the guilt/innocence phase of trial." In her federal habeas petition in district court, Lucio argued the same: that the state trial court violated her right to present a complete defense when it "Excluded the Testimony of Her Defense Experts During the Guilt/innocence Phase of Trial." In her request for a COA from us, Lucio alleged that it was "debatable that [she] was deprived of her due process right to present a defense when the trial court excluded the testimony of defense expert witnesses at the guilt/innocence phase of the trial." In her panel briefing, Lucio claimed that the trial court violated her right to present a complete defense because Pinkerman's testimony would have challenged the credibility of her incriminating statement. She made the same claim in her en banc briefing. This case is therefore distinguishable from *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), which the plurality opinion cites for the proposition that defendants cannot "attempt[ ] to broaden [a state court] claim" in federal court; Lucio has repeatedly made the same claim, over and over, in every post-conviction setting. *See* Plurality Op. at 480.

7. Lucio also argues that the state habeas court's adjudication was contrary to *Chambers*, *Crane*, and *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam), and based on an unreasonable determination of the facts. Because the relevance determination turns on the facts as set forth herein, I do not address this issue separately.

did not concern the *voluntariness* of her confession, which was her point on direct appeal. But this distinction does not mean that we cannot consider *Crane* when assessing Lucio's complete defense claim; a case can support multiple, different arguments.

To see why this one does, it is worth taking a look at the case itself. In *Crane*, the Supreme Court reiterated that due process "requires that a jury not hear a confession unless ... it was freely and voluntarily given." 476 U.S. at 687–88, 106 S.Ct. 2142 (internal quotation marks, alteration, and citation omitted). That due process requirement was relevant to Lucio's argument on direct appeal. But the *Crane* Court also held that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." 476 U.S. at 690, 106 S.Ct. 2142 (internal quotation marks and citation omitted). That point supports Lucio's state habeas claim. The reality that this second aspect of *Crane* is at play here appears to shock only the plurality opinion; again, the State understands that Lucio's complete defense claim may implicate the case.

Lastly, the plurality opinion contends that Lucio whipsawed the state courts with her complete defense claim because Pinkerman never proffered at trial about the credibility of Lucio's interrogation statements. Plurality Op. at 474–75. But how could he have done so? The trial judge chose to leave and not hear the proffer, having already concluded that Pinkerman's testimony was "irrelevant" regardless.

The plurality opinion tries to nuance its whipsawing point by highlighting that Pinkerman signed an expert report before he was called to testify and the report never "hint[ed] that any of [Lucio's interrogation] statements were false." Plurality Op. at 475. But the whole point of Pinkerman's testimony was to *contextualize* Lucio's statements as *potentially* influenced by Escalon's questioning: the report observed that "[i]n times of significant stress, [Lucio] withdraws into simpler, concrete, unrealistic and constricted functioning marked by passivity, denial, acquiescence and resignation[,]" which is likely attributable to her experience with abuse. In that regard, the report noted that Lucio "tune[d] out" Escalon when he "raise[d] his voice" but then "eventually respond[ed] with resignation." The report thus corresponds to the reason why Lucio's trial counsel sought to introduce Pinkerman: it tended to show that Lucio would "take[ ] blame for everything that goes on in the family," including potentially covering for her husband, other children, or Mariah herself.

The plurality opinion further contends that Pinkerman's mitigation testimony failed "to hint[ ] that any of [Lucio's] statements were false." Plurality Op. at 475. Mitigation testimony comes after a jury has decided on a defendant's guilt. So, of course, Pinkerman's mitigation testimony did not concern Lucio's innocence (i.e., that Lucio likely made false statements in her interrogation). Indeed, when asked by the State whether he was testifying that Lucio did not harm her child, Pinkerman responded that he was not "address[ing] the causation."[8] There was no whipsawing.

In sum, the question we have been asked to answer is whether the state trial court violated Lucio's constitutional right

8. Specifically, the State asked: "were you under the understanding that someone else harmed her and all she did was failed to protect her?" Pinkerman responded: "No. Again, I didn't address the causation. What I'm trying to think that any mother would have looked to that pattern of abuse—and in a normal situation, a normal mother would have protected the child."

to present a complete defense when it excluded Pinkerman's testimony about her propensity to take blame for everything from the guilt/innocence stage. To the extent that we evaluate this question under AEDPA deference, the question becomes whether the state habeas court's exclusion of Pinkerman's testimony about her propensity to take blame for everything was an unreasonable application of *Crane* and *Chambers*.

B. Issues Raised Sua Sponte by the Plurality Opinion

The plurality opinion bases its affirmance on the complete defense issue largely on four issues that were never raised by either party. The State has waived all four arguments and so our court should not consider them.

First, the plurality opinion contends that Lucio defaulted on her claim because she failed to raise it to the state trial court. *See* Plurality Op. at 465–66. In particular, it asserts that Pinkerman's bill of particulars was lacking in detail about the psychological pressure Lucio felt when she made her interrogation statements. *See* Plurality Op. at 465–66. On direct appeal, when Lucio made no IAC claim, the State argued this point. It argued that Pinkerman's proffer was "broad and general," referring to only "the characteristics and makeup of [Lucio's] psychological functioning" and her demeanor.

But the State intentionally waived this procedural default in state habeas court. Why? Well, in those proceedings, Lucio raised an IAC claim that her trial counsel had provided ineffective assistance by failing to adequately utilize Pinkerman; Lucio claimed that Pinkerman "could have assisted trial counsel in developing evidence that [her] history provided 'little support for the idea that [she] physically abused her children' to support the defense theory during guilt/innocence." The State clearly made a strategic call not to reassert any failures in Pinkerman's bill of particulars because doing so would effectively concede the legitimacy of Lucio's IAC claim. The State instead went in a different direction, arguing that Pinkerman's bill of particulars "indicated that he would testify as to . . . how there was little support in the 'historical record' for the idea that [Lucio] physically abused her children, that she suffered from battered woman syndrome, and the meaning of her demeanor after the incident and during questioning." Given the switch in argument, it is plain that the State has waived its procedural default argument in these federal habeas proceedings.

Second, the plurality opinion contends that, to the extent that Lucio's direct appeal claim is "nearly identical" to Lucio's complete defense claim, Lucio's complete defense claim is procedurally barred because Lucio failed to raise her claim in state trial court. *See* Plurality Op. at 465–66. But the State also waived this procedural default. If, as the plurality opinion contends, Lucio's complete defense claim from state habeas is the same as her claim on direct appeal, *see* Plurality Op. at 465–66, then the State's response in state habeas proceedings to Lucio's complete defense claim could have been one sentence: As the Texas Court of Criminal Appeals held, Lucio's complete defense claim is procedurally barred because she failed to raise it in state trial court. The State's response was nothing of the sort, and the State has never brought the issue up in any later proceeding.

Third, the plurality opinion contends that Lucio's claim is procedurally barred because the state habeas court held that she had attempted to raise the same argument from direct appeal in her state habeas proceeding. *See* Plurality Op. at 462–63,

466–67. But the state habeas court did not come to that conclusion. What it did was observe that Lucio's complete defense claim was "nearly identical" to her direct appeal claim and that it thus did not have to relitigate it. But, because "additional evidence," here, Pinkerman's affidavit, "may warrant relief even when the issue was raised on direct appeal," the state habeas court did not rely on a procedural bar. Consistent with that reading, the Texas Court of Criminal Appeals, in adopting the state habeas court's findings and conclusions, determined that the state habeas court did not hold Lucio's complete defense claim as procedurally barred. What's more, the State has waived this putative procedural bar, too. Indeed, the State (which drafted this exact finding of fact and conclusion of law on this point for the state habeas trial court) has explicitly argued to the contrary, stating in its en banc brief: "The state court did not deny Lucio's complete-defense claim on procedural grounds."

Fourth, the plurality opinion states that Pinkerman's post-trial affidavit cannot be considered because it was not before the Texas Court of Criminal Appeals on direct appeal. *See* Plurality Op. at 471–72. Not only did the State again waive this argument, but it did so expressly and unequivocally in response to our court's direct question. In response to our en banc Q & A—"whether we may also consider Dr. Pinkerman's 2010 affidavit . . . in deciding whether exclusion of his guilt phase testimony was an unreasonable application of clearly established Supreme Court precedent"—the State answered, "Yes, . . . *Cullen v. Pinholster*, 563 U.S. 170, 180, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), indicates that this Court may also consider Dr. Pinkerman's 2010 affidavit because it was part of the record in the state court."

Even if the State had not clearly waived these arguments (which, as discussed, it did), the plurality opinion errs in making these four procedural holdings sua sponte. As the Supreme Court recently reminded the circuit courts: "In our adversarial system of adjudication, we follow the principle of party presentation." *Sineneng-Smith*, 140 S. Ct. at 1579 (citation omitted). Thus, "in both civil and criminal cases, in the first instance and on appeal . . ., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (quotation omitted). Departures from this principle are usually only warranted in criminal cases when doing so would "protect a *pro se* litigant's rights." *Id.* (quotation omitted). This is not one of those cases; Texas is the largest state in our circuit and our second-biggest litigant. Its Attorney General's office is chock-full of excellent attorneys who do nothing but habeas work. This court should not be making arguments on the State's behalf, especially in a capital case.

If the Supreme Court's admonition were not enough, our precedent also restrains us from doing so in this very context. When dealing with procedural bars, we have held that "even if we do have discretion in some circumstances to apply the procedural bar where the state has waived the defense[,] . . . we will not exercise such discretion" when:

(1) "the habeas petitioner has [not] been given notice that procedural default will be an issue for consideration," and

(2) "the petitioner has [not] had a reasonable opportunity to argue against the application of the bar;" or

(3) "the state intentionally waived the defense."

Fisher v. Texas, 169 F.3d 295, 301–02 (5th Cir. 1999).[9] Here, deciding Lucio's fate on procedural bars that the State never raised denies Lucio notice and a reasonable opportunity respond. Further, the State intentionally waived three of these procedural default arguments.

The issue with the plurality opinion's sua sponte holdings is not merely academic: had the State taken a different tactic in the state habeas proceeding and beyond, then Lucio would have had an excellent IAC claim. Instead, the state habeas court denied that claim, as did the federal district court, and we denied a COA. If we are going to ignore the Supreme Court's admonition in *Sineneng-Smith*, step in on our own initiative, and decide to redo the State's strategic decisions to make the focus on whether the trial attorney properly presented a bill of particulars, well, then, we need to start over on the IAC issue too. If Lucio is to be executed because her lawyer did not make a perfect bill of particulars, that certainly sounds like she suffered ineffective assistance and prejudice.

Rather than decide this case on procedural arguments that the State itself has waived and that Lucio had no idea we would raise on our own, I respectfully submit that we should address the one issue that is actually before us—Lucio's complete defense claim raised in state habeas court—based on the entire state record. Accordingly, I proceed to address the merits of Lucio's complete defense claim.

III. Discussion

To prevail on her complete defense claim, Lucio must satisfy the statutory requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, we review Lucio's complete defense claim de novo if (1) Lucio exhausted her claim in state court, 28 U.S.C. § 2254(b), and (2) the state court failed to adjudicate that claim on the merits, 28 U.S.C. § 2254(d). *See also Johnson v. Williams*, 568 U.S. 289, 303, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013). If the petitioner failed to present a federal claim in state court, then the claim is dismissed. If the petitioner did present a federal claim in state court and the state court adjudicated the claim on the merits, then AEDPA's deferential standard under § 2254(d) applies.

Under § 2254(d), relief will not be granted unless the state court's adjudication of the federal claim was "contrary to ... clearly established Federal law, as determined by the Supreme Court," "an unreasonable application of" that law, or "was based in an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

9. Indeed, we have yet to apply a procedural bar sua sponte in a habeas case when the petitioner lacked notice and a reasonable opportunity to respond or when the State intentionally waived the defense. *See, e.g., Fisher,* 169 F.3d at 302 (declining to apply a procedural bar sua sponte because petitioner lacked notice and had no reasonable opportunity to respond). *But see, e.g., Scott v. Johnson,* 227 F.3d 260, 263 (5th Cir. 2000) (applying a procedural bar sua sponte because petitioner was given notice and an opportunity to respond and the State did not intentionally waive the defense); *Smith v. Johnson,* 216 F.3d 521, 524 (5th Cir. 2000) (per curiam) (concluding that it was appropriate to apply a procedural bar sua sponte because petitioner had notice and an opportunity to respond and the State did not intentionally waive the bar); *Magouirk v. Phillips,* 144 F.3d 348, 360 (5th Cir. 1998) (holding that the federal district court did not abuse its discretion in raising a procedural default sua sponte because petitioner had notice and a reasonable opportunity to respond and the State did not intentionally waive the defense). The plurality opinion does not explain why we should reject this clear precedent as to when it is appropriate to raise procedural default issues sua sponte.

The plurality opinion holds that AEDPA deference applies, *see* Plurality Op. at 467, and that Lucio's complete defense claim fails to satisfy § 2554(d), Plurality Op. at 467–78. As mentioned above, several of the judges joining in this dissenting opinion concur in the now-vacated panel's viewpoint that the state habeas court failed to adjudicate Lucio's complete defense on the merits.[10] However, because the majority of the en banc court has ruled that Lucio's complete defense claim has been exhausted and adjudicated on the merits, I address her claim under AEDPA deference.[11] Even under AEDPA's deferential standard of review, however, the state habeas court's adjudication of Lucio's complete defense claim "involved an unreasonable application of" *Crane* and *Chambers*. *See* 28 U.S.C. § 2554(d)(1). First, I will summarize those cases, and then I will discuss why the state court's determination is an unreasonable application of those key precedents.

A. *Crane*

In *Crane*, the Supreme Court recognized that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," and held that such an "opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." 476 U.S. at 690, 106 S.Ct. 2142 (internal quotation marks and citations omitted). The Court thus concluded that the state court's exclusion of testimony related to the "environment" in which the police secured the defendant's confession violated the defendant's right to present a complete defense. *Id.* at 691, 106 S.Ct. 2142.

The underlying proceedings in the case bring the issue into focus. In particular, the state court had excluded the testimony because it "related solely to [the] voluntariness" of the defendant's confession and state evidence rules prohibited relitigation of a trial court's pretrial voluntariness determination. *See id.* at 686–87, 106 S.Ct. 2142 (citation omitted). Given its voluntariness holding, the state court further held that the testimony "did not relate to the credibility of the confession." *Crane v. Kentucky*, 690 S.W.2d 753, 755 (Ky. 1985).

The Supreme Court disagreed with the state court's separation of those concepts, taking issue with its holding "that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility f[e]ll in conceptually distinct and mutually exclusive categories." *Crane*, 476 U.S. at 687, 106 S.Ct. 2142. It reiterated its precedent that "evidence surrounding the mak-

10. Those of us who adhere to this viewpoint would, absent the en banc conclusion to the contrary, conclude that the state habeas court failed to adjudicate Lucio's complete defense claim on the merits because it erroneously determined that Lucio raised a state evidentiary challenge and rejected that claim based on state evidentiary standards. There is a rebuttable presumption that state courts have rejected a claim on the merits if a written order is silent regarding a claim. *See Williams*, 568 U.S. at 300–01, 133 S.Ct. 1088. But Lucio rebuts this presumption because the state evidentiary standard is "less protective" than the federal standard for a complete defense claim. *Id.* at 301, 133 S.Ct. 1088; *see Wiley*, 74 S.W.3d at 405 (recognizing that a complete defense claim asserts that the exclusion of "otherwise relevant, reliable evidence" precluded the defendant from presenting a defense).

11. Granted, if the state habeas court's decision on Lucio's complete defense claim was error under AEDPA deference, then it was also error under de novo review. Thus, there is nothing inconsistent, as the plurality opinion contends, about applying arguendo a more deferential standard of review when Lucio should prevail either way.

ing of a confession bears on its credibility as well as its voluntariness." *Id.* at 688, 106 S.Ct. 2142 (internal quotation marks and citation omitted). The Court thereby held that evidence on the circumstances of Crane's confession was particularly relevant because Crane's "entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed." *Id.* at 691, 106 S.Ct. 2142. Therefore, the Court concluded it was "plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance" of Crane's defense succeeding. *Id.* The evidence would help answer "the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689, 106 S.Ct. 2142. In other words, the Court held that the evidence was indispensable to Crane's defense.

Further, in holding that the state court violated Crane's right to present a complete defense, the Court determined that it was not a case where the state court excluded the evidence for "fairness [or] reliability" issues. *Id.* at 690, 106 S.Ct. 2142. The state court failed to "advance[ ] any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." *Id.* at 691, 106 S.Ct. 2142.

B. *Chambers*

In *Chambers*, the Supreme Court held that the exclusion of hearsay evidence under a state hearsay rule and the refusal to allow the defendant to cross-examine a key witness under a state voucher rule violated the defendant's right to present a complete defense. 410 U.S. at 302–03, 93 S.Ct. 1038.

The facts of the case illustrate the contours of its rule. Chambers and three of his friends (James Williams, Berkley Turner, and Gable McDonald) were involved in a shooting, for which Chambers was convicted of murder. *Id.* at 285–87, 93 S.Ct. 1038. At his trial, Chambers sought to prove that he did not shoot the victim but that McDonald did. *Id.* at 289, 93 S.Ct. 1038. Chambers called McDonald as a witness to testify that McDonald had written a confession stating that he shot the victim. *Id.* at 291, 93 S.Ct. 1038. On cross-examination, the State elicited from McDonald that he repudiated his prior confession. *Id.* When Chambers attempted to examine McDonald as an adverse witness, the state court denied Chambers's request under the state "voucher" rule that prevented him from impeaching his own witness. *Id.* at 291, 295, 93 S.Ct. 1038. To challenge McDonald's renunciation of his prior confession, Chambers then sought to introduce testimony from three witnesses to whom McDonald had admitted shooting the victim. *Id.* at 292, 93 S.Ct. 1038. All three witnesses were prevented from testifying under state hearsay rules. *Id.* at 292–93, 295, 93 S.Ct. 1038.

In sum, Chambers was prevented from presenting evidence that McDonald shot the victim. *Id.* at 294, 93 S.Ct. 1038. Such evidence, the Court held, was "critical to Chambers' defense." *Id.* at 302, 93 S.Ct. 1038. The Court also held that the state court's reason for its evidentiary decisions were irrational, taking issue first with the voucher rule in its entirety as an "archaic, irrational" rule that was "potentially destructive of the truth-gathering process." *Id.* at 296 n.8, 93 S.Ct. 1038. The state court's *application* of the hearsay rules was also irrational: the hearsay statements, the Court concluded, were "well within the basic rationale of the exception for declarations against interest" and therefore had a "considerable assurance of their reliability." *Id.* at 300, 302, 93 S.Ct. 1038. Because the evidence was vital to Chambers's defense and the state court's

reasons for excluding the testimony were irrational, the Supreme Court held that the state court violated Chambers's right to present a complete defense.

C. Application of *Crane* and *Chambers* to Lucio

"A state court's decision constitutes an unreasonable application of clearly established federal law if it is 'objectively unreasonable.'" *Gray v. Epps*, 616 F.3d 436, 439 (5th Cir. 2010) (citing *Williams v. Taylor*, 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (citation omitted). Lucio satisfies this high threshold.

The Supreme Court in *Crane* and *Chambers* made clear that a state court violates a defendant's right to present a complete defense if (1) the excluded evidence was critical to the defense, *Crane*, 476 U.S. at 689, 691, 106 S.Ct. 2142; *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038, and (2) the state court failed to provide a rational justification for its exclusion, *Crane*, 476 U.S. at 689, 690–91, 106 S.Ct. 2142; *Chambers*, 410 U.S. at 296 & n.8, 302, 93 S.Ct. 1038. Here, Pinkerman's testimony was critical to Lucio's defense because it was the centerpiece of her attempt to challenge the trustworthiness of her interrogation statement. Moreover, the state trial court provided no reason why the testimony was irrelevant and all indications are to the contrary, making its exclusion irrational.

1. *Pinkerman's Testimony Critical to Lucio's Defense*

Pinkerman would have testified that Lucio "takes blame for everything that goes on in the family... [and] for everything that goes on in the house." That tendency had implications for her interrogation: it was Pinkerman's "professional opinion [that Lucio's] psychological characteristics increase[d] the likelihood she would acquiesce while providing her confession." In other words, Pinkerman would have testified that Lucio's interrogation statement, including her abuse of Mariah, posed "serious questions" about its validity.

Pinkerman's excluded testimony was indispensable to Lucio's defense because it rebutted the State's most critical evidence of Lucio's guilt: Lucio's interrogation statement.[12] The State presented no physical evidence or witness testimony establishing that Lucio abused Mariah or any of her children, let alone killed Mariah. Instead, it used Lucio's interrogation statement as its crucial source of proving she committed the act. In closing argument, the State contended that Lucio must have killed Mariah because she abused her. The only evidence it cited in closing to establish that Lucio abused her was Lucio's "confession." On appeal, when the State argued that the evidence was sufficient to convict

12. The plurality opinion suggests that the State had Lucio's phone call to her sister as additional evidence of her guilt. *See* Plurality Op. at 462. But that was not part of the State's argument at trial. *See supra* Section I.A. Indeed, the State made no mention of Lucio's conversations with her sister in its closing argument. As Lucio's trial counsel noted: "This whole case revolve[d] around th[e] video."

The State also argues that Pinkerman's testimony was not indispensable because Lucio could have presented "fact witnesses to testify about her body language, her propensity to take blame, or any other issue." But that is exactly what Pinkerman sought to testify about and, as explained below, the state habeas court provided no rational justification for excluding Pinkerman's testimony.

Lucio, it again relied on the assertion that Lucio "admitted to a pattern of abuse." *See Lucio*, 351 S.W.3d at 894–95. In short, the interrogation statement played a pivotal role in the State's case.

If the interrogation statement is taken away—or its validity is undermined—then the State's case becomes much more tenuous, demonstrating both its criticality and the irrationality of excluding Pinkerman's contextualizing testimony as "irrelevant."[13] A reasonable juror would have much less reason to assume that Lucio—rather than her husband, other children, or Mariah herself—caused Mariah's injuries. To the extent that there was evidence beyond Lucio's statement that implicated her—such as opportunity based upon being Mariah's primary caretaker—it pales in comparison to the force of an alleged confession. Thus, as critical as that evidence was to the State, explaining why it could not be trusted was just as critical to Lucio's defense.[14]

In sum, the indispensability of Pinkerman's testimony to Lucio's defense is on par with the excluded evidence at issue in *Crane* and *Chambers*. Like Crane's excluded evidence, Pinkerman's testimony related to the credibility of Lucio's confession. *See Crane*, 476 U.S. at 688, 106 S.Ct. 2142. Like Chambers's excluded evidence, Lucio had no other means to present evidence to refute the State's reliance on her interrogation statement. *Chambers*, 410 U.S. at 294, 93 S.Ct. 1038. Thus, Pinkerman's testimony was "all but indispensable to any chance of [Lucio's] succeeding."[15] *Crane*, 476 U.S. at 691, 106 S.Ct. 2142. Moreover, as in *Crane*, the credibility of Lucio's "confession" was the focus of the jury's question as to her guilt. *See id.* at 689, 106 S.Ct. 2142. Without Pinkerman's testimony as to why Lucio would have confessed to abusing her daughter if she did not actually do so, the "question every rational juror need[ed] answered"—if she was innocent, why did she say all those things during her interrogation?—was left unaddressed. *Id.* Consequently, Pinkerman's excluded testimony was vital for Lucio's defense.

2. *State Trial Court's Unreasonable Application*

The exclusion of Pinkerman's testimony bears hallmark signs of irrationality such that the state court's ruling was an unrea-

13. The State's best alternate evidence is a statement from a police officer that, after Lucio's arrest and while the officer was driving, Lucio used the phone to call her sister. According to the officer, Lucio told her sister, ''Don't blame, Robert. This was me. I did it. So don't blame Robert.'' But this phone statement could well have stemmed from Lucio's tendency to take blame for everything in the family, which the excluded expert evidence was intended to addressed. Further, this evidence does not come close to the power of Lucio's interrogation statements, which went unchecked. The officer's statement is also subject to attack. For example, he did not create a log of the incident until the month before trial, nearly sixteen months after Lucio allegedly made the statement. The statement also lacks context, which makes it less reliable.

14. The plurality opinion claims that ''the trial court permitted Lucio's sister to testify about Lucio's ... tendency to take the blame for things she did not do,'' but provides no support for this claim. Plurality Op. at 469–70. Nor could it; Lucio's sister said nothing at all about Lucio's tendency to take the blame for anything.

In addition, the plurality opinion and the State argue that Pinkerman's testimony was not vital to Lucio's defense because Pinkerman's testimony at the mitigation stage never hinted that Lucio's statements could not be trusted. Plurality Op. at 474–76. But, as explained *supra* Section II.A., Pinkerman's mitigation testimony holds no bearing on Lucio's tendency to take blame for everything because the jury had already determined that Lucio was guilty.

15. As explained above, Lucio's sister did not testify regarding Lucio's tendency to take blame for everything. *See supra* n.14.

sonable application of Supreme Court precedent. The state habeas court excluded Pinkerman's testimony on relevance grounds.[16] It concluded that Pinkerman's "testimony as to [Lucio's] psychological functioning, including how there was little support in the 'historical record' for the idea that [she] physically abused her children, that she suffered from battered woman syndrome, and the meaning of her demeanor after the incident and during questioning had no relevance to the question of [her] guilt or innocence." It thus held that the state trial court did not "abuse its discretion" in excluding Pinkerman's testimony. That is the entirety of the state habeas court's reasoning on the matter. In other words, Pinkerman's testimony was indispensable to Lucio's defense, as explained above, and the state habeas court provided no reason why Pinkerman's testimony was irrelevant as to the credibility of Lucio's confession.

The plurality opinion contends that the Supreme Court's holding in *Crane* does not permit a defendant to admit evidence that a state court excluded through a state evidence rule that "serve[s] the interests of fairness and reliability." *See* Plurality Op. at 468 (quoting *Crane*, 476 U.S. at 689, 106 S.Ct. 2142). Indeed, that is true. But, like the state court in *Crane*, the state habeas court here did not exclude Pinkerman's testimony based on any rational application of a state evidence rule, even assuming the rule itself serves an interest of fairness or reliability.[17] *See Crane*, 476 U.S. at 690–91, 106 S.Ct. 2142. Rather, the state habeas court held that the state trial court did not abuse its discretion in excluding Pinkerman's testimony because it was irrelevant and had no bearing on Lucio's guilt. That is essentially what happened in *Crane*, where the state court had held that the excluded testimony about the "environment" surrounding the defendant's confession was irrelevant because it had no bearing on the confession's credibility. *See id.* at 687–88, 106 S.Ct. 2142. But the Supreme Court did not defer to the state court's holding on that point. It independently determined that the excluded testimony bore on the credibility of the defendant's confession and was relevant to the defense's theory that his confession could not be trusted. *See id.* at 688–89, 106 S.Ct. 2142. In determining whether the state habeas court's exclusion of Pinkerman's testimony was an unreasonable application of *Crane*, then, we must also determine whether his testimony was relevant and vital to Lucio's defense. As explained above, Pinkerman's testimony was clearly relevant and vital to Lucio's defense. It would have "answer[ed] the one question every rational juror needs answered: If [Lucio] is innocent, why did [s]he previously admit h[er] guilt?" *See id.* at 689, 106 S.Ct. 2142. Thus, the state habeas court's exclusion of the testimony as irrelevant was unreasonable and served no fairness or reliability interest.

The plurality opinion also contends that the state habeas court did not unreasonably apply *Crane* or *Chambers* because those cases concerned categorical, not discretionary, evidence rules. Plurality Op. 26–27, 33. In that regard, the plurality opinion claims that we would create a circuit split because five circuit courts have

16. The State asserts that the state habeas court rejected Pinkerman's testimony as unreliable and as failing to qualify as an expert testimony under Texas Rule of Evidence 702. The state habeas court made no determination about the reliability of Pinkerman's testimony, nor did it make a determination about Pinkerman's qualification as an expert to testify.

17. There was no *Daubert*-like inquiry into the reliability of Pinkerman as an expert witness. Only Villanueva's reliability was questioned.

observed that *Crane* did not implicate discretionary evidence rules. Plurality Op. at 470–72.

But neither *Chambers* nor *Crane* holds that a defendant's right to present a complete defense applies only when a state court excludes evidence based on categorical evidentiary rules. *See Crane*, 476 U.S. at 690, 106 S.Ct. 2142 (holding that an opportunity to present a complete defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence"); *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038 (making no limitation that its holding—that the exclusion of critical evidence violated the defendant's right to present a complete defense—applied to only categorical evidence rules). The only support for the plurality opinion's narrow interpretation of *Chambers* and *Crane* comes from (a) one line in *Crane*, which states "that the *blanket* exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial," *Crane*, 476 U.S. at 690, 106 S.Ct. 2142 (emphasis added); and (b) the fact that the evidentiary rules at issue in those cases were categorical and non-discretionary. However, as the plurality opinion recognizes, the Supreme Court has since explained that the core "principle" of *Crane* is unrelated to either of those two points: rather, *Crane* establishes that the right to present a complete defense is violated when a state trial court excludes competent, reliable evidence without providing a valid reason. *Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996); *accord* Plurality Op. at 468–69. Further, the fact that the evidentiary rules at issue in *Crane* and *Chambers* were categorical would only matter if we were debating whether the state habeas court's adjudication was "contrary to" Supreme Court precedent, but that is not the situation here, as we are only analyzing its *application* of that precedent. *See Boyer v. Vannoy*, 863 F.3d 428, 441 (5th Cir. 2017) (explaining when a state court's decision is contrary to clearly established federal law); *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) (stating that an "unreasonable application" under AEDPA deference includes an unreasonable application of "even a general standard").

The clearly established, general principle that we are evaluating today is straightforward: whether Lucio's right to present a complete defense was violated when the state trial court excluded Pinkerman's testimony without providing a valid reason. *See Egelhoff*, 518 U.S. at 53, 116 S.Ct. 2013; *see also supra* Section III.C. The answer, as articulated above, is "Yes." In *Crane*, the Supreme Court held that the defendant's right to present a complete defense was violated because the state court's "sole rationale for the exclusion (that the evidence did not relate to the credibility of the confession) was wrong." *See Egelhoff*, 518 U.S. at 53, 116 S.Ct. 2013 (internal quotation marks and citation omitted). Same here. The state trial court's "sole rationale for the exclusion" of Pinkerman's testimony (that the evidence was irrelevant to Lucio's innocence) was irrational and wrong. Thus, in the words of the plurality opinion, Supreme Court precedent "positively precludes the state court from holding what it held." *See* Plurality Op. at 484.

Moreover, even if the plurality opinion is right and *Crane* and *Chambers* apply only to categorical rules, just such a categorical rule was applied here: to the extent that the state habeas court determined that the state trial court did not abuse its discretion in excluding Pinkerman's testimony under

Texas Rule of Evidence 402,[18] that rule provides trial courts no discretion to admit or exclude irrelevant evidence. *See* TEX. R. EVID. 402 ("Irrelevant evidence is not admissible."); *cf. Moses v. Payne*, 555 F.3d 742, 758 (9th Cir. 2009) (holding that a California expert testimony rule differed from the categorical evidence rules at issue in *Crane* and *Chambers* because the California rule "d[id] not require a trial court to exclude evidence"). In that regard then, using the plurality opinion's reading of the state court's decision, the state trial court "mechanistically" applied the state's less protective relevant evidence rule "to defeat the ends of justice."[19] *See Chambers*, 410 U.S. at 302, 93 S.Ct. 1038.

Lastly, the plurality opinion's fear of creating a circuit split is unfounded. *See* Plurality Op. at 470–72. The plurality opinion cites the Sixth, Eighth, Ninth, Tenth, and Eleventh circuits as holding that a state court's conclusion that an application of a discretionary rule does not violate a defendant's right to present a complete defense is not an unreasonable application of *Crane*. However, only the Ninth Circuit did what the plurality opinion says it did. *See Moses*, 555 F.3d at 758–59 (holding that "the state appellate court's determination that the trial court's exercise of discretion to exclude expert testimony under [a state expert testimony rule] did not violate Moses's constitutional rights" was not an unreasonable application of *Crane* because *Crane* did not "squarely address . . . a court's exercise of discretion to exclude expert testimony"). The Sixth Circuit independently determined that the excluded evidence at issue was not probative, that is, not critical to the defense, *see Gagne v. Booker*, 680 F.3d 493, 515–16 (6th Cir. 2012) (en banc), and determined that the state court provided a rational justification for excluding the evidence, *see Loza v. Mitchell*, 766 F.3d 466, 485–86 (6th Cir. 2014) (observing that the state trial court explained why the excluded evidence was not vital to the defense). Similarly, the Eighth, Tenth, and Eleventh Circuits held that the excluded evidence was not vital to the defense. *Rucker v. Norris*, 563 F.3d 766, 770 (8th Cir. 2009) (the excluded evidence was cumulative); *Grant v. Royal*, 886 F.3d 874, 957, 960 (10th Cir. 2018) (same); *Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305, 1316 (11th Cir. 2014) (the excluded evidence provided "entirely speculative" testimony). Recently, the Seventh Circuit held that a state trial court's exclusion of the defendant's testimony as irrelevant (the same reason the state trial court gave for excluding Pinkerman's testimony) was an unreasonable application of *Crane* because the testimony was critical to the defense and its exclusion was arbitrary. *Fieldman v. Brannon*, 969 F.3d 792, 802–09 (7th Cir. 2020).[20] Rather than support

18. The state trial court's reason for excluding Pinkerman's testimony did not specify the evidentiary rule it applied, stating only: "I am having a hard time figuring out how [Pinkerman's testimony] goes to the guilt or innocence." But, the plurality opinion contends that the state trial court applied Texas's relevance rule, Rule 402, *see* Plurality Op. at 465, and this opinion does as well for argument sake.

19. Although the plurality opinion observes that the question of relevance is discretionary, once relevancy is determined, I note that the exclusion of that evidence (if deemed irrelevant) is not.

20. In explaining the requirements to obtain relief under AEDPA deference, the Seventh Circuit summarized and applied the legal standard for the "unreasonable application" prong under § 2254(d)(1). *See Fieldman*, 969 F.3d at 802, 809 (summarizing *Panetti*, 551 U.S. at 953, 127 S.Ct. 2842). Thus, although the court in *Fieldman* wrote that the state trial court's adjudication was "contrary to" clearly established law, the holding was in fact based under the "unreasonable application" prong.

the plurality opinion's circuit-split thesis, these cases actually contradict its argument that *Crane* prohibits courts from independently determining whether excluded evidence is relevant and vital to the defense as part of deciding the complete defense question. *See* Plurality Op. at 470–72.

The plurality opinion is also wrong that, if we applied *Crane* and *Chambers* to a discretionary rule (which, again, this opinion does not), we would *create* a circuit split by disagreeing with the Ninth Circuit. The Second Circuit has held that a state court unreasonably applied *Crane* on evidence subject to a trial court's discretion. *See Scrimo v. Lee*, 935 F.3d 103, 112, 115 (2d Cir. 2019) (holding that the state trial court's exclusion of witness testimony as extrinsic evidence on a collateral matter, a discretionary rule, was an unreasonable application of *Crane* and *Chambers*).[21] We have as well. *See Kittelson v. Dretke*, 426 F.3d 306, 310, 319–21 (5th Cir. 2005) (per curiam) (holding that a state trial court's discretionary limitation on cross-examination was an unreasonable application of complete defense precedents). Therefore, even if this case concerned a "discretionary evidence rule" (which it does not), our holding that the state habeas court unreasonably applied *Crane* and *Chambers* would not create a circuit split—the Ninth Circuit has already done so with a decision inconsistent with seven other circuits, including ours.

21. The plurality opinion contends that *Scrimo* does not support our position, but the plurality opinion misses the point. *See* Plurality Op. at 486–87. I identify *Scrimo* for the proposition that this opinion's position—that an unreasonable application of *Crane* is not limited to evidence subject to categorical evidence rules—would not create a circuit split.

IV. Conclusion

Pinkerman's testimony on Lucio's susceptibility to take blame for everything was critical to refuting the State's primary evidence of her guilt: Lucio's interrogation statements. The state habeas court's rejection of Lucio's complete defense claim as irrelevant was irrational and an unreasonable application of *Crane* and *Chambers*. I would thus reverse the district court's order and remand for the district court to grant Lucio relief. Accordingly, I respectfully dissent from the decision to affirm.

Stephen A. Higginson, Circuit Judge, joined by Stewart and Elrod, Circuit Judges, dissenting:

If we are to accept the death penalty as a practice, the Supreme Court has been exactingly clear that it is applied only to those whose cases leave no doubt that they are deserving of the ultimate punishment.

I write separately for emphasis, an opportunity made possible by the comprehensiveness of Judge Haynes's opinion, which I gratefully join, albeit with the caveat kindly noted in her third footnote. My emphasis is about what this case is, and what it is not.

It *is* a death penalty case with one issue, namely Ms. Lucio's effort to respond to the government's insistence at trial that she confessed five hours into interrogation to killing her child.[1] Legally, it *is* a case

1. Ms. Lucio's comments arose out of the reality that Mariah was also a victim of Texas's broken foster care system. The Texas Department of Family Protective Services ("DFPS") removed all of Ms. Lucio's children from her care in September, and then returned them, including Mariah, two months later; Mariah died in February. *See Stukenberg v. Abbott*, 907 F.3d 237, 256–68 (5th Cir. 2018) (finding that the State was deliberately indifferent to the substantial risk that children in the Texas foster care system would be exposed to serious harm such as physical, sexual, and psychological abuse given that it was "aware of the systemic deficiencies plaguing its monitor-

whose resolution should be controlled by the Supreme Court's unanimous ruling in *Crane v. Kentucky* that the due process clause's guarantee of an opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Fieldman v. Brannon*, 969 F.3d 792 (7th Cir. 2020).

Indeed, we are controlled by the Supreme Court's verbatim vindication of the constitutional imperative that a capital defendant's answer must be heard as to why, during government interrogation, without counsel present, she incriminated herself. *Crane*, 476 U.S. at 689, 106 S.Ct. 2142 ("[S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?").

On the other hand, what this case is *not* is a criminal prosecution where the execution should proceed because, contrary even to Texas's arguments, we say constitutional error was forfeited, waived, shifted, or, in the words of the court, "radically shifted," causing injury to "whipsaw[ed]" and "sandbagg[ed]" state courts.[2] From the first, Ms. Lucio only had one answer to the prosecutor's insistence that she was guilty because she said she was. Yet the trial court excluded that answer on a ground so indefensible that neither the plurality nor Texas defends it, namely that Ms. Lucio "denied ever having anything to do with the killing of the child," making evidence about the circumstances of her confession irrelevant. Even if that reason for exclusion were not counterfactual, under *Crane*, "the physical and psychological environment that yielded [Ms. Lucio's] confession" is of "substantial relevance to the ultimate factual issue of [Ms. Lucio's] guilt or innocence," especially because the State rested its case on that very confession. *Id.*; *Fieldman*, 969 F.3d at 803.

Furthermore, this is *not* a case about "extending" *Crane*'s imperative that a capital defendant's answer to self-incrimination during interrogation is inherently relevant information for the jury to consider. Very specifically, it is *not* about constitutionalizing expert opinion testimony admissibility. As the facts of *Crane* demonstrate, fact testimony or other evidence about Ms. Lucio's circumstances bearing on the credibility of her confession, situational and dispositional, could have taken the place of the proposed expert testimony offered. *Crane*, 476 U.S. at 688, 106 S.Ct. 2142 (" '[E]vidence surrounding the making of a confession bears on its credibility' as well as its voluntariness." (quoting *Jackson v.*

ing and oversight practices'' and did not ''take[ ] any steps at all'' to address them).

2. Notably, Texas agreed before the district court that the issue was preserved, conceding that ''Lucio raised [her claim that Villanueva and Pinkerman were improperly excluded] in state habeas proceedings.'' Even in its most recent briefing to our full court, Texas stated that ''Lucio's state habeas application presented a specific complete-defense claim: The trial court violated her right to present a complete defense when it excluded her expert testimony as irrelevant because 'the evidence at issue here was not irrelevant to the issue of [her] guilt or innocence.' '' Unmistakably, therefore, it is our court, and only at the en banc stage, that erects procedural bars against a capital defendant's constitutional claim being considered on the merits. *See United States v. Sineneng-Smith*, —— U.S. ——, 140 S. Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) (reiterating the importance of ''party presentation'' and emphasizing that courts should function as ''essentially passive instruments of government'' (citation omitted)).

Denno, 378 U.S. 368, 386, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964))). The fundamental problem is not the form of evidence excluded, but that the trial judge applied an indefensible "blanket exclusion" of Pinkerman's testimony by deeming it irrelevant without providing any "rational justification" for its exclusion. *Id.* at 690–91, 106 S.Ct. 2142. Stated otherwise, the trial judge never reached any issue relating to the admissibility of Pinkerman's testimony as expert opinion. The exclusion of Ms. Lucio's evidence was a threshold irrelevancy one.[3] *Fieldman*, 969 F.3d at 807.

A battered woman was convicted of capital murder because, in a case lacking direct evidence, prosecutors told the jury that, five hours into interrogation, in the middle of the night after the discovery of her dead child, Ms. Lucio accepted a seasoned interrogator's suggestion that she was responsible, ultimately agreeing with him that she "did it." The jury's best proof of guilt was Ms. Lucio's eventual capitulation blaming herself.[4] That may be appropriate inference and argument, but what violates our Constitution and disregards binding, bedrock Supreme Court law, is

3. By contrast, the trial judge did consider Villanueva's testimony and determined that she was not qualified as an expert. Right or wrong, we must defer to that ruling.

4. As Judge Haynes highlights, Ms. Lucio for hours proclaimed her innocence. About three hours into the interrogation, however, responding to suggestive questions and after viewing dozens of photographs of the child, she acquiesced:

Texas Ranger: Explain it [t]o us. Ok?
Ms. Lucio: I mean I would spank her, but I didn't think I would spank her, to where . . . to where it got to this point.
Texas Ranger: Cause you were mad?
Ms. Lucio: No. I mean I never took out my anger on my kids. I never did.
Texas Ranger: Ok. Frustration? [Melissa nods head no]. Melissa. I'm being straight with you. And I need you to be completely honest with me. ok? It's just you and I. ok? I'm meeting you halfway. ok? . . . Ok? . . . it's ok. . . . You did it? Who did it?
Ms. Lucio: I did.
Texas Ranger: Ok. You did? Did the world stop moving? No. . . . It's for your own good. . . . You're doing good. You're doing good. Start from the beginning and break it down for me. Just let it out. I wanna hear your said. Layed it all out. And then I'll come back with questions. Explain this well this is anybody else responsible?
Ms. Lucio: No.
Texas Ranger: Or am I talking to the right person? [Melissa nods head Yes]. Ok. Perfect. Tell me. Melissa tell me. Let's do this together. ok? Let's get it over with. Say yeah. We can get it over with and move on. Ok Melissa? Let's just get it over with.
Ms. Lucio: I don't know what you want me to say. I'm responsible for it.

About thirty minutes later, and after viewing more photographs of her dead child, Ms. Lucio acquiesced again:

Texas Ranger: What about all these [inaudible] spots? On her vagina?
Ms. Lucio: uh uh. I never did that.
Texas Ranger: Who did?
Ms. Lucio: [shaking head no]
Texas Ranger: Your husband?
Ms. Lucio: No.
Texas Ranger: Why don't you wanna tell me? Why don't you wanna tell me?
Ms. Lucio: I didn't do that and my husband didn't do that. Must been he would touched her when he would spank her.
Texas Ranger: The who did it?
Ms. Lucio: [Melissa shakes head no]
Texas Ranger: Just tell me Melissa. . . . I can move on to the next. Get this picture out of your face. How did this happen? We know this is you . . . . You did this.
Ms. Lucio: I guess I did it. I guess I did it.
Texas Ranger: How?
Ms. Lucio: I don't know.
Texas Ranger: You would hit her there?
Ms. Lucio: No. I never hit her there.

Finally, at about 3:00 a.m.—five hours into the interrogation—Ms. Lucio uttered the phrase seized on by the government to convict her, remarking "I just did it" in the context of a series of questions about whether she bit Mariah.

the government's simultaneous, successful effort excluding Ms. Lucio's one answer to why she might capitulate, namely that a lifetime of abuse had made her acquiescent, desirous to please and to accept responsibility, and to avoid confrontation.[5]

This case squarely implicates *Crane* and we do no harm—whipsaw no court—when we vindicate binding Supreme Court law that a defendant, especially a capital defendant—here a battered woman and mother—must be heard to answer why she acquiesced and told her interrogator, "I just did it."

STATE of Texas; State of Kansas; State of Louisiana; State of Indiana; State of Wisconsin; State of Nebraska, Plaintiffs - Appellees Cross-Appellants

v.

Charles P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue; United States of America; United States Department of Health and Human Services; United States Internal Revenue Service; Alex M. Azar, II, Secretary, U.S. Department of Health and Human Services, Defendants - Appellants Cross-Appellees

No. 18-10545

United States Court of Appeals, Fifth Circuit.

FILED February 12, 2021

Background: States brought action against Department of Health and Human Services (HHS) and its Secretary, and Internal Revenue Service (IRS) and its Acting Commissioner, alleging that HHS's certification rule, which required the States to pay Patient Protection and Affordable Care Act's (ACA) health insurance provider fee (HIPF), violated ACA, Administrative Procedure Act (APA), Spending Clause, Vesting Clause, and Tenth Amendment, seeking declaration that certification rule was unconstitutional and permanent injunction enjoining defendants from denying Medicaid funds to States based on their refusal to pay the HIPF or refusing to approve the States' proposed Medicaid capitation rates based on their failure to account for the HIPF, and seeking tax refund of their HIPF payments. The United States District Court for the Northern District of Texas, O'Connor, J., 2016 WL 4138632, entered interlocutory order dismissing States' tax refund

5. Notably again, Texas does not dispute that Pinkerman's detailed affidavit given after trial is in the state record and therefore is properly before us in reviewing whether the district court's ruling was violative of *Crane*. This affidavit further clarifies Pinkerman's testimony that "in [his] professional opinion her psychological characteristics increase the likelihood that she would acquiesce while providing her confession" due to being isolated for 5 hours, "repeatedly interrogated by male police officers in close quarters, not provided a place or opportunity to rest nor provided food or water." Pinkerman also would testify to Ms. Lucio's behavior based on her "emotional and physically abusive relationships with males," including being "very capable of making self-sacrifice in providing a false confession in order to avoid investigation of her children," several of whom had "bad behavioral disorders marked by severe aggression against the[ir] siblings," including Mariah. Pinkerman's proffer *therefore* interlocks with interrogation techniques used against Ms. Lucio where the interrogator targeted Ms. Lucio's desire for male approval. For example, at 1:22 a.m., so hours into interrogation, the interrogator offered to "to let [Ms. Lucio's] hair down" and "put it in a pony tail" and then left the room. After he returned, Ms. Lucio uttered her "I just did it" confession at about 3:00 a.m.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70027

MELISSA ELIZABETH LUCIO,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion July 29, 2019, 5 Cir., 2019, 783 Fed.Appx. 313)

Before OWEN, Chief Judge, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 29, 2019

Lyle W. Cayce
Clerk

No. 16-70027

MELISSA ELIZABETH LUCIO,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District Court
USDC No. 1:13-CV-125

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:*

Melissa Lucio was convicted of murdering her two-year-old daughter Mariah and sentenced to death. *See Lucio v. State*, 351 S.W.3d 878, 880 (Tex. Crim. App. 2011). Her daughter's body had been badly bruised, but the State's examiner concluded that she died from a final blow to the head. The State's case against Lucio was built primarily on a videotaped interrogation of Lucio,

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

filmed in the midnight hours just after Lucio's daughter was declared dead. After about five hours of interrogation, Lucio admitted to, in her words, spanking her daughter. The State used those statements to argue to the jury that she confessed to abusing Mariah and that, by inference, she must have killed her. Lucio tried to rebut the impact of the interrogation by putting on an expert witness to explain why she would admit to facts that were not true. But the state trial court would not allow the expert to testify because it concluded such testimony was "irrelevant," depriving Lucio of her most compelling challenge to the statements.

Lucio has now sought federal relief under 28 U.S.C. § 2254, arguing she was deprived of her constitutional right to meaningfully present a complete defense. She raised that issue first in the state court, but no state court ever adjudicated the claim. We thus review her claims under a de novo standard of review. Under that standard, we conclude that the state trial court deprived Lucio of her constitutional right to present a meaningful defense. We thus REVERSE the district court's order denying her claim and REMAND for the district court to grant Lucio relief.

I. Background

Before her daughter's death in 2007, Lucio lived with nine of her children and her husband. On a February evening that year, paramedics were called to Lucio's home. When they entered the apartment, they found two-year-old Mariah "unattended and lying on her back in the middle of the floor not breathing and with no pulse." Lucio told the paramedics that Mariah had "fallen down some stairs." The paramedics took Mariah to an emergency room, where doctors declared her dead.

Doctors at the hospital noticed that Mariah's body had been "severely abused"; in addition to bruises "covering her body, there were bite marks on her back, one of her arms had been broken probably about two to seven weeks

before her death, and she was missing portions of her hair where it had been pulled out by the roots."

That same night, several investigators questioned Lucio. The interview began just before 10:00 p.m. Lucio told the police that Mariah had fallen down some stairs outside of her apartment on Thursday night. Though she admitted that she sometimes spanked her daughters "on the butt," she repeatedly denied hitting or abusing Mariah. Over about three hours, her story remained the same: Her kids were rough with Mariah but she did not know who caused Mariah's specific injuries. She also described Mariah's physical condition leading up to her death. Mariah was "sick" on the Saturday that she died and the Friday before, but Lucio did not take Mariah to the doctor. Mariah would not eat, and her breathing was heavy. She slept all day Saturday, and she would lock her teeth together when Lucio would try to feed her. The interrogation went on for more than three hours.

Then, after 1:00 a.m., Texas Ranger Victor Escalon entered the room and told Lucio—in a long, mostly one-person exchange—that they needed her story and that everyone would understand. At that point, Lucio told Escalon she wanted a cigarette and to talk to her husband. Escalon told her she could do those things after she gave her statement. Escalon then asked Lucio repeatedly to tell him "everything."

Lucio eventually told him that she "would spank [Mariah], but [Lucio] didn't think [she] would spank her, to where . . . to where it got to this point." (ellipsis in transcript). At Escalon's suggestion, Lucio said that the spanking was "all over [Mariah's] body." Escalon prompted her for more, but she responded, "I don't know what you want me to say. I'm responsible for it." She maintained that she was not angry at Mariah but was "frustrated" by the other kids who were "very hyper," making it difficult to take care of them all. She also stated that she bit Mariah one day while tickling her; she did not know

why she did it. While making these statements, Lucio continued to maintain that she had not hit Mariah in the head and only spanked her. She also stated that no one else was responsible for Mariah's injuries and that she was the only one who spanked her.

As the interrogation progressed, Escalon identified specific bruising on Mariah and asked Lucio to tell him how it happened. Lucio usually responded that she did not know how the bruises occurred and often said she did not hit her in particular spots. When Escalon insisted she was responsible for specific bruises, Lucio responded, "I guess I did it. I guess I did it." She suggested that some of the other injuries, like scratches, could have been caused by her other daughters. For some of the bruises, Lucio said she was the one who caused them, and said she would sometimes spank Mariah when she woke up other kids.

Escalon then had Lucio take a break at 1:22 a.m. After the break, officers took DNA samples from Lucio, then took another break.

At 3:00 a.m., Escalon resumed the interrogation. He brought in a doll to have Lucio show him how she bit and spanked Mariah. When showing him how she bit Mariah, Escalon asked if she was angry at Mariah. She said no, explained she was frustrated with the other kids, and described how she bit Mariah after she finished brushing her hair. Escalon then asked Lucio to show how she spanked Mariah. When she demonstrated, Escalon told her, "Well do it real hard like . . . like you would do it." (ellipsis in transcript). When she said that was how hard she spanked her, Escalon performed what he thought was a hard spank and had Lucio demonstrate again. He identified several sets of bruises and had her spank the doll in those areas to demonstrate how she would have spanked Mariah.

Lucio was charged with "intentionally and knowingly" causing Mariah's death "by striking, shaking or throwing Maria[h] . . . with [her] hand, or foot,

or other object," which constituted a capital murder charge. *See* TEX. PENAL CODE §§ 19.02(b)(1), 19.03(a). The issue then was not simply whether Lucio inhumanely neglected Mariah—virtually a given on this record—but whether she intentionally or knowingly killed Mariah and did so by striking her. *See Louis v. State*, 393 S.W.3d 246, 251 (Tex. Crim. App. 2012) ("Capital murder is a result-of-conduct offense; the crime is defined in terms of one's objective to produce, or a substantial certainty of producing, a specified result, i.e. the death of the named decedent." (quoting *Roberts v. State*, 273 S.W.3d 322, 329 (Tex. Crim. App. 2008))).

The State's theory of the case depended on two critical points. First, it sought to prove that Mariah's death was caused by a fatal blow to the head and that the fatal blow could not have been from Mariah falling down the stairs. The State presented testimony from the chief forensic pathologist for Cameron and Hidalgo Counties, who conducted Mariah's autopsy. She testified that Mariah's cause of death was "blunt force trauma." The pathologist defined this as being "beat[en] about the head with something—an object, a hand, a fist, or slammed." According to her, the trauma would have occurred within a day before Mariah's death. It would have been immediately apparent that Mariah needed medical attention, as symptoms like vomiting or lethargy would have appeared "fairly quickly" after the trauma. The pathologist also explained that a fall down the stairs would not have caused all of Mariah's injuries. Even considering just the bruises on her head, the pathologist concluded that a single fall down the stairs could not have caused all of them. She also testified that this was the most severe case of child abuse she had ever seen in her fourteen-year practice. Mariah had more bruises, of varying color and age, than she had ever seen on one child.

Second, the State used Lucio's "confession" to try to establish that she abused Mariah and, in turn, caused her death. The State admitted the videos

of Lucio's interrogation during the first day of trial and immediately played them for the jury. It later put Escalon on the stand, and he testified about Lucio's demeanor during the interrogation. During its closing argument, the State characterized Lucio's admission as a "confession," which proved beyond a "reasonable doubt that [Lucio] killed that little girl." It emphasized that Lucio "did make the statement and the statement that she made was the true and correct statement at the end. She admitted it. She admitted that she caused all of the injuries to that child, ladies and gentlemen." The State also highlighted Lucio's demeanor during the interrogation, rhetorically asking why she would look or act a certain way if all she did "was physically beat the child, but didn't cause the death." It also referenced Escalon's testimony that Lucio's demeanor indicated she was "hiding the truth."

Lucio tried to defend against both points. First, she tried to present evidence that it was possible that Mariah's head trauma was caused by a fall down the stairs. She called a neurosurgeon who testified that the blunt force trauma causing Mariah's death could have resulted from falling down stairs. During closing arguments, Lucio's counsel argued that the State failed to overcome reasonable doubt because evidence indicated that Mariah's fatal injury could have resulted from falling down stairs.

Second, Lucio wanted to present two expert witnesses to testify that her interrogation statements were not trustworthy, but the state trial court did not let them testify. The first expert was Norma Villanueva, a licensed social worker with graduate-level education. She was presented to explain "why [Lucio] would have given police [officers] information . . . that was not correct" to show that Lucio "admits to things that she didn't do." Villanueva's training included courses on how to understand what people "are trying to convey by the way they act, by the way they hold their body, by the way they move their arms and hands." Her claimed expertise was based on over twenty years of

"clinical training and clinical experience [and] a combination of knowing life span development theories . . . and human behavior social environment interaction theories." The state trial court would not permit Villanueva to testify over doubts that she was qualified to testify on body language interpretation and concerns that she could not testify about "why [a] statement is or is not true."

The second expert that Lucio wanted to present was Dr. John Pinkerman, a psychologist who would have testified that Lucio was a "battered woman" who "takes blame for everything that goes on in the family." He formed his opinion after reviewing the interrogation tapes, meeting with Lucio on four occasions, reviewing her history, and administering various psychological tests to her. The state trial court prevented Pinkerman from testifying; it considered his testimony irrelevant because Lucio "denied ever having anything to do with the killing of the child."

Beyond her medical expert and the two excluded experts, Lucio called one new witness and recalled one of the State's witnesses. The new witness was Lucio's sister, Sonia Chavez, who testified that Lucio "never disciplined her children." The recalled witness was Joanne Estrada, a child protective services worker. Estrada was asked about whether she had reviewed documents that showed that Mariah had tantrums while in foster care and had hit her head on the floor. Estrada testified that she had not come across anything in Lucio's file that showed she was "physically abusive to any of the children." Lucio presented no other witnesses.

Ultimately, Lucio was convicted and sentenced to death. Lucio appealed her conviction, but the Texas Court of Criminal Appeals affirmed. *Lucio*, 351 S.W.3d at 910. The State's argument on appeal continued to rely on Lucio's interrogation. In responding to Lucio's sufficiency of the evidence challenge, the State argued that a "jury could have reasonably concluded that [Lucio] was

responsible for delivering the fatal blow to Mariah's head, as she had the opportunity to do so, *and she had admitted to a pattern of abuse that had continued for some two months*." *Id.* at 894–95 (emphasis added). The Texas Court of Criminal Appeals accepted that argument. *Id.* at 895.

Lucio also appealed the district court's decision to bar her experts, Villanueva and Pinkerman, from testifying. *Id.* at 897–902. She argued that she should have been permitted to present Villanueva's and Pinkerman's testimonies to help prove her "confession" was involuntary. Lucio contended that the jury could have "used it to decide whether the battered woman voluntarily gave the statement at the station to the police" and to show that she "would have and did tell the police whatever they wanted her to say." *Id.* at 898.

The Texas Court of Criminal Appeals rejected Lucio's arguments for primarily procedural reasons. It concluded that what she argued on appeal did "not comport" with the experts' "proffered testimony at trial." *Id.* at 900, 902. She thus was found to have failed to preserve her arguments for appeal. *Id.* The court alternatively noted that Villanueva's and Pinkerman's testimonies were only marginally relevant to the issue of whether Lucio's alleged confession was voluntary under state law. *See id.* at 900–02. Finally, it footnoted that excluding Villanueva's testimony would have been harmless "in light of appellant's subsequent admission during her recorded statement that she abused Mariah, followed by her demonstrating such abuse with the doll." *Id.* at 901 n.25. It did not appear to make that same conclusion about Pinkerman's testimony.

After Lucio lost her appeal, she sought state habeas relief. As with her direct appeal, she argued that Villanueva's and Pinkerman's testimony should have been admitted. This time, though, she distinguished her argument as going "to the core of the case—whether [Lucio] was likely to have engaged in

ongoing abuse of Mariah." She stated that the issue was the deprivation of "the constitutional right to present a complete defense," and cited a state law case that relied on the Federal Constitution for that right. This issue is the only one on which a COA was granted and, using the terminology from that order, we refer to this as the "complete defense" claim.

The state habeas court rejected her argument. It concluded that her claim was "nearly identical to [the issues] raised on direct appeal," and she had not presented any additional evidence in support of the claim. Her claim thus failed. The state habeas court also concluded that the "district court did not abuse its discretion in excluding" the expert testimony. It concluded that Villanueva was not an expert in "interpreting body language and patterns of behavior during police interviews." It separately concluded that Pinkerman's testimony "had no relevance to the question of [Lucio's] guilt or innocence."

Lucio appealed the state habeas court's decision. The Texas Court of Criminal Appeals adopted the habeas court's findings of fact and conclusions of law. It noted that some of the issues Lucio raised were procedurally barred, but her "complete defense" claim was not among those found barred.

Lucio later filed an application for federal habeas relief pursuant to 28 U.S.C. § 2254 in federal district court, again asserting her "complete defense" claim. The district court rejected the claim. It concluded that she had not shown that the state trial court's "exclusion of Villanueva's testimony on the basis of Villanueva's lack of expert qualifications was incorrect" and there were no indications of "police misconduct, or any police action that rendered Lucio's statements involuntary." The district court considered Pinkerman's testimony to be "only tangentially related to the question of Lucio's guilt or innocence." It also noted that the "evidence that anyone but Lucio inflicted the fatal injuries is tenuous at best."

Lucio filed a timely notice of appeal and this court granted her a COA on "the question of whether the exclusion of Lucio's proffered experts on the credibility of her alleged confession violated her constitutional right to present a complete defense."

II. Discussion

Lucio asserts that she was deprived of her due process right to present a complete defense when the district court excluded the testimony of Villanueva and Pinkerman. To prevail, she must satisfy the statutory requirements of AEDPA. She and the State dispute whether AEDPA's typical standard of review—whether the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1)—applies here. Lucio asserts her claim should be reviewed de novo instead of under § 2254(d)'s stringent standard, because the claim was not "adjudicated on the merits," as that provision requires. The State argues the claim was adjudicated on the merits or, if it was not adjudicated, it is because Lucio failed to present the claim to the state court. Both parties assert they win on the merits of Lucio's claim regardless of the standard of review. We begin by addressing the procedural questions and then turn to the merits.

A. Exhaustion and Standard of Review

The State argues that Lucio did not exhaust her claim or, alternatively, that her claim is subject to the strict standards of review under § 2254(d)(1). We reject those arguments. Lucio exhausted her "complete defense claim," and the state court did not adjudicate that claim.

We begin with exhaustion. A petitioner seeking federal relief under § 2254 must first exhaust her state remedies. *See* 28 U.S.C § 2254(b)(1)(A). The State argues that Lucio did not exhaust her claim because she argued a state law claim in state court, not a federal constitutional claim. To exhaust a

claim, a "prisoner must 'fairly present' [her] claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

Lucio fairly presented her claim in state court. A prisoner can exhaust a claim in state court by raising it through post-conviction proceedings, even if she did not raise it in her direct appeal. *See Orman v. Cain*, 228 F.3d 616, 620 & n.6 (5th Cir. 2000). Lucio's argument to the state habeas court flagged her "complete defense" argument as a "constitutional" issue and cited a Texas case that relied exclusively on the Federal Constitution. *See Wiley v. State*, 74 S.W.3d 399, 405–07 (Tex. Crim. App. 2002)); *Wiley v. State*, No. 03-99-00047-CR, 2000 WL 1124975, at *1 (Tex. App. Aug. 10, 2000) (discussing exclusively the Federal Constitution). Texas does not appear to have recognized (or rejected) a "complete defense" right under its own constitution, and Lucio did not mention state evidentiary rules or standards in her state filings. So her argument could not easily be mistaken for raising an exclusively state law claim. After the state habeas court rejected her claim, Lucio sought review from the Texas Court of Criminal Appeals, which also rejected her claim. She has thus exhausted the claim.

We need not decide whether Lucio's claim was procedurally defaulted in state court and thus provided an adequate and independent state ground to support the state court's judgment. Default on state law grounds is a separate doctrine related to the exhaustion requirement. *See Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). The State has not argued, either below or on appeal, that Lucio defaulted her complete defense claim on state law grounds. We are not required to raise the issue sua sponte, though we retain discretion to do so. *See Trest v. Cain*, 522 U.S. 87, 89 (1997); *Magouirk v. Phillips*, 144 F.3d 348, 357–58 (5th Cir. 1998); *Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000) (per

curiam); *Moreno v. Dretke*, 450 F.3d 158, 165 n.3 (5th Cir. 2006). We decline to do so. Before we could conclude that an adequate state law ground existed, we would have to determine that the state rule barring consideration was "firmly established and regularly followed." *Walker v. Martin*, 562 U.S. 307, 316 (2011) (internal quotation marks omitted). We have found no Texas case law regarding the appropriate time to raise a "complete defense" claim. Then, even if we concluded there was an adequate and independent state law ground, we would have to determine whether there was "cause" that would excuse Lucio's state default. *See Davila*, 137 S. Ct. at 2064–65. These hurdles are likely why the State forfeited any argument that Lucio defaulted her claim on state law grounds. We thus decline to raise the issue sua sponte.

The parties do dispute whether Lucio's "complete defense" claim was adjudicated on the merits. A claim is adjudicated on the merits if a state court issues an opinion rejecting the claim, and state courts are presumed to have rejected a claim on the merits if a written order is silent regarding a claim. *See Johnson v. Williams*, 568 U.S. 289, 300–01 (2013). That presumption may be rebutted by some "indication" or "state-law procedural principles to the contrary." *Id.* at 298 (quoting *Harrington v. Richter*, 562 U.S. 86, 99 (2011)). The Supreme Court provided rhetorical examples of indications that the presumption should not apply, including:

- If the state standard, "in at least some circumstances[,] . . . is *less* protective" than the federal standard, *Id.* at 301;
- If the state and federal standards are "quite different" and a party makes "no effort to develop" the alternative standard, *id.*; or
- If a party only passingly cites the relevant standard, *id.*

Thus, "while the . . . presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable." *Id.* at 302.

The state court did not expressly adjudicate Lucio's claim. The State argues that the state habeas court adjudicated the claim in paragraphs thirty-nine and forty of its findings of fact and conclusions of law. Those paragraphs address state evidentiary standards and assert that Lucio's claim was redundant of her direct appeal argument. But Lucio explicitly framed her argument as a constitutional claim distinct from what she argued on direct appeal. The state habeas court's order thus did not adjudicate the claim that Lucio made.

Lucio has rebutted the presumption of adjudication. Lucio has identified aspects of her case that are like those that the Supreme Court suggested could rebut the presumption of adjudication. Instead of adjudicating her actual claim, the state habeas court adjudicated a similar state claim. It likely did so because the State responded to Lucio's argument as though it should be adjudicated on state evidentiary standards. But the standards for Lucio's constitutional claim and state evidentiary rules are "quite different" from each other. *Williams*, 568 U.S. at 301. Indeed, the whole point of Lucio's "complete defense" claim is that, even if state evidentiary laws were correctly followed, she was deprived of a constitutional right. The state habeas court thus adjudicated a separate issue without addressing the heart of Lucio's claim under the appropriate standards. This case thus fits one of the examples the Supreme Court recognized as rebutting the presumption of adjudication on the merits. *See id.* The state habeas court did not adjudicate Lucio's "complete defense" claim.

Consequently, Lucio's claim is subject to de novo review in federal district court and on appeal. *See id.* at 301–02; *Lewis v. Thaler*, 701 F.3d 783, 787 (5th Cir. 2012).

B. "Complete Defense" Claim

Lucio argues she was deprived of the right to present a complete defense. She argues that by excluding Villanueva's and Pinkerman's testimony, the trial court made it impossible for her to meaningfully dispute the importance and meaning of the videotaped interview. We agree that excluding Pinkerman's testimony deprived her of the right to present a complete defense; because we do, we do not need to examine whether excluding Villanueva's testimony was also a violation of her constitutional rights.[1]

The Supreme Court has recognized that the Constitution guarantees criminal defendants a "meaningful opportunity to present a complete defense." *United States v. Scheffer*, 523 U.S. 303, 329 (1998) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). In a series of cases, it held that the applications of various state evidentiary rules infringed that right.[2] Though the Supreme Court's case law has "typically focus[ed] on categorical prohibitions of certain evidence," *Caldwell v. Davis*, 757 F. App'x 336, 339 (5th Cir. 2018) (per curiam), we have at least once held that a state court's application of a discretionary

[1] At the very least, the exclusion of Villanueva's testimony raises concerns about the fairness of the trial. The State asked Ranger Escalon to describe Lucio's demeanor during her interrogation; he responded that it indicated that she was saying, "I did it." The State then asked him to detail his experience interviewing people and to contrast Lucio's demeanor with others' demeanor. Escalon did not indicate he had any formal training on reading body language. By contrast, Villanueva did have such training and was not allowed to testify on that subject.

[2] *See Crane*, 476 U.S. at 684, 691 (holding that the state court's exclusion of evidence probative of the credibility of the defendant's confession because the proffered evidence was relevant to voluntariness, an issue the court had already ruled on, violated the defendant's right to a fair trial under the Sixth and Fourteenth Amendments); *Washington v. Texas*, 388 U.S. 14, 15, 23 (1967) (holding that a state statute barring the defendant from calling a "principal[], accomplice, or accessor[y] in the same crime" as a witness in his defense violated the defendant's rights to call witnesses in his own defense and to compulsory process for obtaining such witnesses); *Chambers v. Mississippi*, 410 U.S. 284, 297–98, 302–03 (1973) (holding that the Mississippi voucher and hearsay rules were unconstitutional as applied to the extent that they prevented the defendant from: (1) putting on evidence of a third party's confession to the crime with which the defendant was charged and (2) challenging that witness's subsequent retraction).

evidentiary rule violated a defendant's right to present a complete defense. *See Kittelson v. Dretke*, 426 F.3d 306, 321 (5th Cir. 2005) (per curiam).

But the right to present a complete defense is not unfettered. The Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Scheffer*, 523 U.S. at 308. "[T]he Constitution leaves to the judges who must make [evidentiary] decisions 'wide latitude' to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, 476 U.S. at 689–90 (ellipsis and third set of brackets in the original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)); *see also Patterson v. Cockrell*, No. 01-11170, 2002 WL 432402, at *2 (5th Cir. 2002) (unpublished) (per curiam) ("*Crane* cannot be interpreted to convert every arguable misapplication of state evidentiary rules into an unconstitutional denial of a fair trial.").

The trial court's decision to exclude Pinkerman's testimony "infringed upon a weighty interest of the accused" so as to be "unconstitutionally arbitrary." *Scheffer*, 523 U.S. at 308. Lucio's counsel made clear that Pinkerman would present expert evidence that, as a result of her psychological profile, Lucio "takes blame for everything that goes on in the family. . . . She takes blame for everything that goes on in the house," even for acts that she did not commit. The state trial court concluded that Lucio "admitted actions that she took that could have resulted in the death. But she denied ever having anything to do with the killing of the child." It thus had "a hard time figuring out how it goes to the guilt or innocence" and denied Lucio the opportunity to present Pinkerman's testimony.

The trial court's conclusion was inconsistent with the reality of this trial. Lucio's admissions of abuse within her interrogation statement were the most significant evidence in the case. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279,

297 (1991) ("Absent the confessions, it is unlikely that [the defendant] would have been prosecuted at all, because the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict."); *Bruton v. United States*, 391 U.S. 123, 139 (1968) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."). The State presented no physical evidence or witness testimony directly establishing that Lucio abused Mariah or any of her children, let alone killed Mariah. Instead, it presented Lucio's interrogation statement—admitted and played during the testimony of its first witness—as its crucial source of proving she committed the act. The State's theory was that Lucio's interrogation admissions were true, that she was responsible for a pattern of brutal abuse of Mariah, and that, from these admissions, the jury could infer beyond a reasonable doubt that Lucio also struck the fatal blow to the head that killed the child. In closing argument, the State summarized its case by contending that Lucio must have killed Mariah because she abused her. The only evidence it cited in closing to establish that Lucio abused her was Lucio's "confession." On appeal, when it argued the evidence was sufficient to convict Lucio, it again relied on the assertion that Lucio "admitted to a pattern of abuse." *See Lucio*, 351 S.W.3d at 894–95 (internal quotation mark omitted). Contrary to the state trial court's conclusion, the interrogation statement played a pivotal role in the State's case as to guilt or innocence.

If the interrogation statement is taken away—or its validity is undermined—then the State's case becomes much more tenuous. A reasonable juror would have much less reason to infer that Lucio—rather than her husband, other children, or Mariah herself[3]—caused Mariah's injuries, much

[3] Lucio's counsel introduced evidence about records that reported that Mariah would hit her head against the ground when throwing a tantrum.

less her fatal head injury. To the extent that there was evidence beyond Lucio's statement that implicated her—such as opportunity as Mariah's primary caretaker—it pales in comparison to the force of an apparent confession of abuse.

As critical as that evidence was to the State, explaining why it could not be trusted was as critical to Lucio's defense. To paraphrase the Supreme Court, why Lucio would confess to abusing her daughter if she did not actually abuse her was a "question every rational juror need[ed] answered" before acquitting. *Crane*, 476 U.S. at 689. Lucio attempted to explain the alleged confession with Pinkerman's testimony. Neither the State nor the state trial court questioned Pinkerman's expert credentials. Pinkerman's opinion was that Lucio was susceptible to taking blame for something that was not her fault and that this behavior was manifested in the interrogation video. It thus cast doubt on the State's key evidence and was paramount to Lucio's defense. The state trial court's exclusion of Pinkerman's testimony impinged on Lucio's "weighty interest" in explaining why her "confession" to abuse did not support an inference of guilt beyond a reasonable doubt. *Scheffer*, 523 U.S. at 308.

The exclusion bears the hallmark sign of arbitrariness: complete irrationality. The state trial court asserted that Pinkerman's testimony's casting doubt on the veracity of the interrogation statement was not relevant because Lucio did not admit she struck the fatal blow. But the State's argument that Lucio struck the fatal blow relied on an inference from the statements that she abused Mariah. To undercut the State's premise (i.e., Lucio abused Mariah) is to undercut its conclusion (i.e., Lucio killed Mariah). "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane*, 476 U.S. at 690–91 (quoting *United States v. Cronic*, 466 U.S.

648, 656 (1984)).[4] We thus conclude that the state court's ruling was "of such a magnitude or so egregious that [it] render[ed] the trial fundamentally unfair." *Gonzalez v. Thaler*, 643 F.3d 425, 430 (5th Cir. 2011).

Our conclusion bears strong resemblance to our previous conclusion in *Kittelson v. Dretke*, where we concluded that a state trial court deprived a defendant of the right to present a complete defense. *See* 426 F.3d at 321. There, a state court prohibited a defendant accused of sexually assaulting a young girl from "mention[ing] or allud[ing] to" the fact that one of the girl's friends had also accused him of sexual assault, only to later recant. *Id.* at 309–12, 321. But the State was permitted to present evidence that the friend was present and questioned about the abuse. *Id.* Like here, the state trial court in *Kittelson* was not "concerned about the prejudicial effect of the jury hearing" the excluded testimony. *Id.* at 321. Like here, the other evidence that the defendant was permitted to present did not go "directly" to the "critical" evidence that the State presented. *Id.* The same type of unfair, arbitrary consequences present in *Kittelson* are present in Lucio's case.

The State primarily contends that the state trial court's decision was not arbitrary based on a rationale that the state trial court never considered. It argues that Pinkerman's testimony would have been "tantamount to a direct

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[4] But even assuming the state trial court were right that the only issue was whether she struck the fatal blow and that evidence undermining the interrogation statement was not relevant, its ruling would still be arbitrary. Based on those assumptions, the state trial court should not have admitted the interrogation in the first place. As the state trial court said, Lucio does not admit to striking the fatal blow, so it would not (on the assumptions it made) go to her guilt or innocence. Worse yet, admitting such an irrelevant video would be far more prejudicial to Lucio than admitting Pinkerman's testimony would be to the State. So even if the state trial court's theory were right, the decision to permit the State's irrelevant, prejudicial evidence but exclude Lucio's irrelevant, non-prejudicial evidence is arbitrary. Favoring the State over Lucio on such a critical issue also approaches irrationality. *See Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) ("Arbitrariness might be shown by a lack of parity between the prosecution and defense; the state cannot regard evidence as reliable enough for the prosecution, but not for the defense.").

opinion on truthfulness" and was therefore inadmissible under other state evidentiary rules. That argument suffers two problems. First, it relies on state evidentiary rules that address bolstering a witness's trial testimony. *See Yount v. State*, 872 S.W.2d 706 (Tex. Crim. App. 1993); *Duckett v. State*, 797 S.W.2d 906 (Tex. Crim. App. 1990), *disapproved of by Cohn v. State*, 849 S.W.2d 817 (Tex. Crim. App. 1993). Setting aside the fact the State's brief ignores the nuance in those rules, the State's argument lacks any force because Lucio was not a witness at trial and because Pinkerman was not there to bolster her credibility. Second, the State does not explain why excluding Pinkerman's testimony under those state evidentiary rules would not have denied her the right to present a meaningful defense any more than excluding it under relevance rules would.[5]

The exclusion of Pinkerman's testimony prejudiced Lucio. "Complete defense" claims are subject to harmless error analysis. *See United States v. Skelton*, 514 F.3d 433, 438 (5th Cir. 2008). As discussed above, Lucio's interrogation statement was the most significant evidence in the case, on which the State repeatedly relied. None of the alternative evidence the State points to as making the exclusion harmless comes close to the impact of the interrogation statement.[6] So this is not a situation where the evidence is so

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[5] In passing, the State argues that the state trial court's decision was proper because Pinkerman's bill of particulars—the procedural mechanism used to capture what an excluded witness would have testified about—did not specifically mention battered wife syndrome. But the bill of particulars tracks the same type of evidence that Lucio's counsel argued Pinkerman would present, even if they do not use the same terms. Moreover, the state trial court excluded Pinkerman's testimony before he offered his bill of particulars, so Pinkerman's subsequent summary is of little value in deciding whether the state trial court's actions were arbitrary.

[6] The State's best alternative evidence is a statement from a police officer that, after Lucio's arrest and while driving, Lucio used the phone to call a sister. According to the officer, Lucio told her sister, "Don't blame, Robert [i.e., her husband]. This was me. I did it. So don't blame Robert." Though this is evidence in the State's favor, it pales in comparison to the power of Lucio's videotaped "confession," which went unchecked. It was a hearsay statement

overwhelming that Lucio would have been convicted regardless. Without Pinkerman's testimony, Lucio's only evidence left to rebut the notion she abused her children was her sister's testimony. The arbitrary exclusion of Pinkerman's testimony prejudiced her.

Preventing Pinkerman from testifying infringed Lucio's right to meaningfully present a complete defense and it was not harmless error.

III. Conclusion

Consequently, we REVERSE the district court's order and REMAND for the district court to grant Lucio relief.

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without the context of what was being said on the other end of the phone. Additionally, the credibility of the officer's testimony is subject to attack. He did not create a log of Lucio's alleged statements until nearly sixteen months after he interacted with Lucio—the month before trial.

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70027

United States Court of Appeals
Fifth Circuit
FILED
October 17, 2018
Lyle W. Cayce
Clerk

MELISSA ELIZABETH LUCIO,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:13-CV-125

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:*

Melissa Elizabeth Lucio, a state prisoner sentenced to death in 2008 for the murder of her two-year-old daughter, Mariah, seeks a certificate of appealability ("COA") with respect to the following claims: (1) deprivation of her Sixth Amendment right to counsel relating to (a) court-ordered therapy sessions through Child Protective Services ("CPS"), and (b) a post-arrest guilty plea to a separate offense of driving while intoxicated ("DWI"); (2) ineffective

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

assistance of counsel at the guilt-innocence phase of trial for (a) failure to file a pre-trial motion to suppress custodial statements, and (b) failure to adequately investigate and present available evidence in support of her defense; and (3) deprivation of her constitutional right to present a complete defense at the guilt-innocence phase of trial. We conclude that reasonable jurists could debate only the district court's resolution of issue 3. Accordingly, we GRANT a COA on issue 3 and DENY a COA on issues 1 and 2.

I. Background

The facts of the offense are described in detail in the opinion of the Texas Court of Criminal Appeals, so we address them only briefly. *See Lucio v. State*, 351 S.W.3d 878, 880–91 (Tex. Crim. App. 2011). The chief forensic pathologist who conducted Mariah's autopsy testified that the condition of Mariah's body indicated that she had been severely abused, and her cause of death was "blunt force head trauma," which would have occurred within twenty-four hours of her death.

On the night that Mariah was pronounced dead, February 17, 2007, Lucio was taken into custody, informed of her *Miranda*[1] rights which she agreed to waive, and then questioned by investigators for several hours. Lucio claimed that Mariah had fallen down some stairs. She eventually admitted to beating Mariah and inflicting all of Mariah's visible injuries except for two minor scratches. Lucio also stated that Mariah was sick on the day she died: she refused to eat, her jaw would lock up, her breathing was heavy, and she slept all day. This account of Mariah's sickness was consistent with the symptoms of blunt force head trauma subsequently described by the State's medical expert. Shortly after Mariah's death, Lucio's remaining children were removed by CPS and placed in foster care.

[1] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Lucio was arrested on February 18, 2007, and then brought before a magistrate pursuant to Texas Code of Criminal Procedure article 15.17. She was formally indicted on May 16, 2007, and appointed counsel on May 31, 2007, shortly before her arraignment that same day. Between the time of her arrest for murder and the appointment of counsel for that case, Lucio pleaded guilty to a prior unrelated DWI offense from 2006.

While Lucio was awaiting trial in prison, the CPS court ordered her to visit with a therapist and take parenting classes, in addition to ordering visitation with some of her children. The CPS therapist talked with Lucio about her social history; discussed the circumstances of Mariah's death, Lucio's subsequent treatment in the legal system, and her mental health; and recommended additional sessions to help Lucio with coping and problem solving skills. Lucio's counsel did not receive prior notice of the CPS therapy sessions.

At trial, the prosecution asked the jury to infer that Lucio caused the fatal blow responsible for Mariah's death because it was consistent with her history of abusing Mariah. The defense argued that Mariah's death was caused by falling down stairs, not by Lucio. A neurosurgeon called as a medical expert for the defense testified that the blunt force trauma causing Mariah's death could have resulted from falling down stairs. Moreover, during closing arguments, the defense counsel argued that the State failed to overcome reasonable doubt because evidence indicated that Mariah's fatal injury could have resulted from falling down stairs and the State failed to produce any evidence indicating otherwise.

At the punishment phase of the trial, Lucio's mitigation experts provided extensive testimony covering Lucio's troubled childhood, sexual abuse by her mother's boyfriend, physical abuse by her siblings, lack of an aggressive history, physical and emotional abuse from her husband and subsequent

boyfriend, cocaine addiction, history of homelessness, history of having children at a young age, characteristics of a battered woman, low-average range IQ, afflictions from depression and post-traumatic stress disorder, and low probability of reoffending in a prison setting. The State used the therapist's written record of his conversations with Lucio indirectly to impeach Lucio's mitigation experts regarding Lucio's history of sexual abuse. The State first sought to introduce as evidence the therapist's "Confidential Treatment and Progress Notes." However, the state trial court concluded that the notes were inadmissible hearsay. The State therefore referenced the record by way of a hypothetical, asking the mitigation experts how they would respond, or if they would be surprised, upon finding out that Lucio had told the therapist that she had not been sexually abused as a child.

The Texas Court of Criminal Appeals denied relief on both Lucio's direct appeal, *Lucio*, 351 S.W.3d at 910, and habeas appeal, *Ex Parte Lucio*, No. WR-72,702-02, 2013 WL 105179, at *1 (Tex. Crim. App. Jan. 9, 2013). Thereafter, Lucio filed an application for federal habeas relief pursuant to 28 U.S.C. § 2254 in federal district court. The district court denied relief and also denied a COA. *Lucio v. Davis*, No. B-13-125 (S.D. Tex. Sept. 28, 2016). Lucio filed a timely notice of appeal.

II. Standard of Review

The standards for a COA are well settled. Lucio must demonstrate that her claims of constitutional violations were such that jurists of reason could debate the district court's disposition of the claims or that the claims were "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). We are charged with reviewing the case only through this prism and thus making only a general assessment of the merits. *Id.* at 336–37; *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). However, we must approach the debatability of the district court's decision through the lens of the

Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Miller-El*, 537 U.S. at 336.

Under AEDPA, where the state determined the issues on the merits, federal habeas relief may not be granted unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). An unreasonable application of clearly established federal law means 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." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). Said another way, "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (quoting *Harrington v. Richter,* 562 U.S. 86, 101 (2011)). "This is 'meant to be' a difficult standard to meet." *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam) (quoting *Harrington,* 562 U.S. at 102), *reh'g denied*, 138 S. Ct. 35 (2017) (mem.).

A factual determination made in state court "shall be presumed to be correct" in a subsequent federal habeas proceeding and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011) (quoting 28 U.S.C. § 2254(e)(1)). "The clear-and-convincing evidence standard of § 2254(e)(1)—which is arguably more deferential to the state court than is the unreasonable-determination standard of § 2254(d)(2)—pertains only to a state court's determinations of particular factual issues, while § 2254(d)(2) pertains

to the state court's decision as a whole." *Id.* (citations and internal quotation marks omitted).

We must also assess the COA question in a case asserting ineffective assistance of counsel in light of the well-established standards of *Strickland v. Washington*, 466 U.S. 668 (1984), which are deferential to strategic decisions of counsel. However, in a death penalty case, doubts about granting a COA should be resolved in favor of a grant. *Escamilla v. Stephens*, 749 F.3d 380, 387 (5th Cir. 2014).

III. Discussion

A. Right to Counsel

Following the commencement of adversary judicial proceedings in a criminal case, the Sixth Amendment entitles a defendant to counsel at "critical stages" of the criminal proceedings. *Rothgery v. Gillespie*, 554 U.S. 191, 212–13 (2008). "The cases have defined critical stages as proceedings between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." *Id.* at 212 n.16 (internal quotation marks, citations, and ellipsis omitted). Lucio seeks a COA based upon two alleged violations of her right to counsel: (1) failure to notify Lucio's appointed counsel in advance of CPS therapy sessions that were used at trial to impeach both of Lucio's mitigation experts on allegations of her childhood sexual abuse; and (2) an unreasonable delay in appointment of counsel resulting in an uncounseled guilty plea to a separate DWI misdemeanor offense that was briefly referenced in questions to one of her mitigation experts but which she contends was used as evidence of future dangerousness.

1. CPS Therapy Sessions

As to the first alleged violation, the federal district court determined that the state habeas court reasonably concluded that the therapy sessions did not implicate Lucio's Sixth Amendment rights. Lucio maintains that the CPS therapist was part of the state prosecutorial team. In *Maine v. Moulton*, the Supreme Court held that "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." 474 U.S. 159, 171 (1985). "[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel *as is the intentional creation of such an opportunity*." *Id.* at 176. However, "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Id.*

The state habeas court found that the CPS therapist was not working in concert with law enforcement to investigate Lucio's alleged crime and that the interviews were non-investigatory. Lucio has failed to cite evidence rebutting this factual finding, let alone clear and convincing evidence. Furthermore, Lucio points to no evidence that law enforcement colluded with the CPS court in ordering mental-health counseling for Lucio or otherwise exploited that opportunity to confront Lucio without counsel being present. Thus, on this record, jurists of reason could not debate whether the district court erred in its determination on this issue. *See Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) ("As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern . . . is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation.").

Alternatively, Lucio asserts that her mental-health counseling is the same situation as a pretrial psychiatric examination that the Supreme Court

held in *Estelle v. Smith* to be a "critical stage" of the proceedings requiring prior notice to counsel. *See* 451 U.S. 454, 469–71 (1981). Federal law is not clearly established when state courts must extend Supreme Court precedent before applying it. *Woodall*, 134 S. Ct. at 1706. However, application of federal law to "new factual permutations" can still be clearly established if "the necessity to apply the earlier rule [is] beyond doubt." *Id.* It must be "so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id.* at 1706–07 (quoting *Harrington,* 562 U.S. at 103).

We will assume arguendo that the question of whether Lucio has stated an error regarding application of *Estelle* to these facts is debatable by jurists of reason. We nonetheless conclude that a COA on this issue is not appropriate because jurists of reason could not debate that any error "had substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Accordingly, we DENY a COA on Lucio's right to counsel claim based on the CPS therapy sessions.[2]

2. DWI Conviction

We also decline to grant a COA on Lucio's remaining claim relating to the unreasonable delay in appointment of counsel resulting in an uncounseled guilty plea to a DWI misdemeanor offense. The state habeas court concluded

[2] Lucio also asserts in her reply brief an *Estelle*-based Fifth Amendment claim for failure to read her *Miranda* warnings prior to the therapy sessions. However, in her initial brief she repeatedly stated that her *Estelle*-based claim was grounded in the Sixth Amendment. Because she raises this claim for the first time in her reply brief, that issue is waived. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Even if it were not waived, we would not grant a COA on this issue for the same reasons we decline to do so for her *Estelle*-based Sixth Amendment claim. Moreover, the Supreme Court has repeatedly stated that failure to properly warn of *Miranda* rights does not preclude the use of voluntary testimony for *impeachment purposes*. *See United States v. Patane*, 542 U.S. 630, 639 (2004) (plurality opinion); *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *Harris v. New York*, 401 U.S. 222, 226 (1971).

that Lucio failed to show any prejudice as to the DWI conviction and that trial counsel's failure to object to punishment phase questions about the conviction was strategic because it would have come in anyway. The federal district court concluded that Lucio's Sixth Amendment right to counsel did not extend to the DWI case and thus the state habeas court's determination was reasonable.

Even if there were a violation,[3] Lucio fails to meet her burden of showing that jurists of reason could debate the reasonableness of the state court's determination that it did not prejudice her case. Lucio points to nothing in the record indicating the prior conviction was introduced as substantive evidence on the issue of future dangerousness. Rather, the prosecution merely asked one of the mitigation experts whether she had learned of the DWI conviction.[4] The mitigation expert answered, "yes," diminishing any attempt to undermine her knowledge of Lucio's history. No additional details about the DWI conviction itself were disclosed, not even how old the conviction was. Lucio has failed to show that jurist of reason could debate whether briefly asking one of

[3] The Supreme Court has expressly declined to determine the appropriate standard for when a delay alone violates the Sixth Amendment right to counsel. *Rothgery*, 554 U.S. at 213. *Rothgery* involved a six-month delay, thus jurists of reason could not debate the potential for fairminded disagreement as to whether Lucio's three-month delay violated her Sixth Amendment right to counsel. *See id.* Therefore, to be entitled to a COA, Lucio's unreasonable delay claim must be based on denial of counsel at a critical stage of the proceedings. *See id.* at 212–13. The only potential critical stage that Lucio identifies is her uncounseled guilty plea to the DWI charges. Although Lucio identifies Supreme Court precedent indicating that an uncounseled guilty plea to the DWI charges was a "critical stage" of her DWI criminal proceedings, *see White v. Maryland*, 373 U.S. 59, 60 (1963), she does not identify any Supreme Court precedent indicating that her DWI guilty plea was a "critical stage" of her separate criminal proceedings for the murder of Mariah, *see McNeil v. Wisconsin*, 501 U.S. 171, 175–78 (1991) (stating that the Sixth Amendment is "offense specific" and provides protection "with respect to a particular alleged crime").

[4] The prosecution also asked the mitigation expert whether Lucio mentioned using an alias in connection with the DWI offense, and whether she would be "surprised" to learn that Lucio used an alias. However, Lucio's use of an alias in connection with the DWI offense occurred prior to the attachment of her Sixth Amendment right to counsel for criminal proceedings relating to the murder of Mariah. Thus, any reference to her use of an alias would not implicate her Sixth Amendment right to counsel in this case. *See McNeil*, 501 U.S. at 175.

two mitigation experts about her awareness of an unrelated, non-violent prior conviction "had substantial and injurious effect or influence in determining the jury's verdict." *Id*. We therefore DENY the COA on her DWI guilty plea claim.

B. Right to Effective Assistance of Counsel

To show a deprivation of effective assistance of counsel under the Sixth Amendment, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" and that the deficient performance "deprive[d] [her] of a fair trial." *Strickland*, 466 U.S. at 687–88. Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689; *see also Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). Accordingly, we have "repeatedly held that complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

1. Failure to Move to Suppress Custodial Statements

Lucio argues that her trial counsel was ineffective in failing to move to suppress as involuntary her statements about abusing Mariah made during her custodial interrogation.[5] More specifically, Lucio contends that her incriminating statements were the result of psychological coercion and thus

[5] In addition to a Sixth Amendment violation, Lucio also contends that her counsel's failure to move to suppress the custodial statements violated the Eighth and Fourteenth Amendments. However, because the Eighth and Fourteenth Amendment claims were not raised below, we will not consider them for the first time on appeal. *See Yohey*, 985 F.2d at 225.

inadmissible under the Fifth Amendment, which could have been supported by expert testimony.[6]

A defendant's statement "during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (alteration in original) (quoting *North Carolina v. Butler,* 441 U.S. 369, 373 (1979)). The "waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id.* at 382–83 (quoting *Moran v. Burbine,* 475 U.S. 412, 421 (1986)). "[T]he law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Id.* at 385. "There is no requirement that a suspect be continually reminded of his *Miranda* rights following a valid waiver." *Soffar v. Cockrell*, 300 F.3d 588, 593 (5th Cir. 2002).

Lucio was informed of her Miranda rights, indicated she understood them, and then proceeded to answer the officers' questions. The state habeas court concluded, as a matter of law, that law enforcement did not coerce any of Lucio's statements, that Lucio's trial counsel was not deficient, that Lucio failed to show the outcome would be different even had trial counsel moved to suppress the statements, and that Lucio failed to show that trial counsel's actions were not sound trial strategy. The federal district court concluded that

[6] Before both the state and district habeas courts Lucio also argued that she invoked her right to remain silent during the interrogation. Because Lucio does not make this argument on appeal, it is abandoned. *See Yohey*, 985 F.2d at 224–25. We address only the psychological coercion argument made in the brief on appeal. *See id.*

the state court reasonably determined that there was no Fifth Amendment violation and thus no ineffective assistance of counsel. Lucio has not met her burden of showing that reasonable jurists could debate this conclusion.

We conclude that no jurist of reason could debate that the state habeas court's decision was not an unreasonable application of clearly established federal law as determined by the Supreme Court and did not result in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented. We DENY a COA on this claim.

2. Failure to Investigate and Present Evidence

Lucio also contends that her trial counsel was ineffective because he failed to investigate and present certain evidence supporting her defense, and this omission was not based on any reasonable trial strategy. Specifically, she argues that her counsel was deficient in calling only a neurosurgeon to challenge the source of the blunt force trauma to Mariah's head instead of also calling a forensic pathologist to challenge the source of Mariah's other injuries. Lucio additionally argues that her trial counsel was deficient in retaining the medical expert late in the process at the recommendation of her co-defendant's counsel and failing to present additional evidence supporting Lucio's defense that she was not dangerous and did not abuse her children.[7]

The state habeas court determined that trial counsel's decision to call only a neurosurgeon as an expert medical witness was part of the defense strategy to show that the fatal blow was consistent with falling down the stairs. It also determined that Lucio failed to show any harm in either the timing of retaining the medical expert or the failure to retain a forensic pathologist, and any additional evidence showing that Lucio was not dangerous to her children

[7] These were the only arguments that Lucio adequately briefed. Any additional arguments made before the state habeas court or federal district court as to trial counsel's ineffective assistance are abandoned. *See Yohey*, 985 F.2d at 224–25.

would have been of limited value given her confession to abusing Mariah. The state habeas court further explained that it was sound trial strategy not to offer an alternative explanation for Mariah's injuries, but instead deny only that Lucio inflicted the fatal blow, because it would have been contradicted by Lucio's own admission to causing nearly all of Mariah's injuries. *See, e.g.*, *Quarterman*, 566 F.3d at 538–39 (concluding, inter alia, that petitioner failed to establish prejudice as to an uncalled expert witness whose testimony would have been contradicted by petitioner's own statements about her involvement in the injury of two children). The district court concluded that the state habeas court's decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court and did not result in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented. Because we conclude that reasonable jurists could not debate the district court's conclusion, we DENY a COA on this claim.

C. Right to Present a Complete Defense

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690 (1986)). Defendants are deprived of this right when evidence rules "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (alteration in original) (internal quotation marks and citation omitted). Even if an evidentiary rule itself is not arbitrary or disproportionate to its purposes, a specific application of the rule can nevertheless violate the right to present a complete defense if "it does not rationally serve the end that [the rule] . . . [was] designed to promote." *See id.* at 327–31. The Supreme Court has further explained that, absent a valid justification, the state may not "exclude competent, reliable evidence bearing

on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane,* 476 U.S. at 690; *see also Green v. Georgia*, 442 U.S. 95, 97 (1979) (holding that excluded evidence violated the Due Process Clause because it was "highly relevant to a critical issue . . . and substantial reasons existed to assume its reliability"); *Skillern v. Estelle*, 720 F.2d 839, 852 (5th Cir. 1983) (noting that a state court evidentiary error is subject to habeas relief if "it is of such magnitude as to constitute a denial of fundamental fairness under the due process clause").

Lucio contends that the state habeas court's exclusion of two expert witnesses deprived her of her constitutional right to present a complete defense. She points to evidence indicating that her proffered experts would have testified that (1) her patterns of behavior influenced her answers during the interrogation, and (2) her psychological functioning caused her to take the blame for Mariah's injuries, thus undermining the credibility of her confession to inflicting nearly all of Mariah's injuries. Lucio's confession was critical to the state's theory of the case that Lucio's repeated abuse of Mariah culminated in a fatal blow.

The state habeas court found that Lucio's expert was unqualified to testify about Lucio's body language and patterns of behavior because she had no relevant "specialized experience, knowledge, or training." The federal district court concluded that Lucio failed to rebut this finding. However, Lucio points to evidence indicating that her expert had formal training and professional experience in interpreting body language and patterns of behavior as a mental health clinician. The state habeas court also determined that testimony relating to Lucio's psychological functioning was irrelevant to Lucio's guilt or innocence. The federal district court agreed that the evidence was "only tangentially related to the question of Lucio's guilt or innocence" and concluded that its exclusion did not deny Lucio a fair trial. However, Lucio's

trial counsel indicated that the testimony related to Lucio's potential to provide a false confession on a critical issue of the prosecution's case. The State provides no additional justifications for excluding this potentially "competent, reliable evidence bearing on the credibility of [Lucio's] confession." *See Crane,* 476 U.S. at 690.

"[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. We, therefore, conclude that Lucio's claim that she was deprived of her right to present a complete defense is debatable enough to deserve encouragement to proceed further and GRANT a COA on this issue.

IV. Conclusion

We GRANT a COA on the question of whether the exclusion of Lucio's proffered experts on the credibility of her confession violated her constitutional right to present a complete defense. We will allow for additional briefing now that a COA has been granted; however, the parties should avoid repetition and, if they wish, may rest on their briefs. *See, e.g., Butler v. Stephens,* 600 F. App'x 246, 248 n.4 (5th Cir. 2015) (per curiam). Lucio should file any additional briefing on this issue within thirty days of this order, and the State may respond within thirty days thereof. Extensions will be granted only by order of this panel for exceptional circumstances shown.

All other relief is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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NEW ORLEANS, LA 70130

October 17, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 16-70027 Melissa Lucio v. Lorie Davis, Director
USDC No. 1:13-CV-125

Enclosed is a non-dispositive opinion entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Mr. David J. Bradley
Mr. Allen Richard Ellis
Mr. Timothy Gumkowski
Ms. Jennifer Wren Morris
Mr. Tivon Schardl

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MELISSA ELIZABETH LUCIO,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. B-13-125
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

Memorandum and Order

This case is before the Court on Petitioner Melissa Elizabeth Lucio's Petition for Writ of Habeas Corpus (Docket No. 6), Respondent Lorie Davis' Motion for Summary Judgment (Docket No. 18), and Lucio's Reply (Docket No. 30). For the following reasons, Respondent's Motion for Summary Judgment is granted and Lucio's petition is denied and is dismissed with prejudice.

I. Background

Lucio was convicted of capital murder and sentenced to death for the murder of her two year old daughter, Mariah. The Texas Court of Criminal Appeals ("TCCA") summarized the facts of Lucio's case, as developed at trial.

> The evidence presented in this case shows that, at about 7:00 p.m. on Saturday, February 17, 2007, paramedics were dispatched to an apartment where [Lucio] lived with nine of her children and an adult male named Robert Alvarez, who was the father of at least seven of these children and whom [Lucio] referred to as her husband. One of the paramedics (Nester) testified that, when the paramedics entered the apartment, they found Mariah unattended and lying on her back in the middle of the floor not breathing and with no pulse. Nester observed that [Lucio]'s "distant" and not "overly distressed" behavior was "so far out of the ordinary" that he "put it into the report." Nester also testified that he "noted the fact that [Lucio] was not—she wasn't

even within arm's reach of the child much less trying to gasp [sic], hold her, or trying to do anything to hold them [sic]."

[Lucio] told police and paramedics at the scene that Mariah had fallen down some stairs. Mariah was transported to a hospital emergency room where she was pronounced dead. The condition of Mariah's body indicated that she had been severely abused. There were bruises in various stages of healing covering her body, there were bite marks on her back, one of her arms had been broken probably about two to seven weeks before her death, and she was missing portions of her hair where it had been pulled out by the roots. The emergency room physician (Vargas) testified that this was the "absolute worst" case of child abuse that he had seen in his 30 years of practice. Vargas also testified that his emergency-room visual and manual inspection of Mariah indicated no apparent signs of a head injury.

The chief forensic pathologist for Cameron and Hidalgo Counties (Farley), who conducted Mariah's autopsy on Monday, February 19, 2007, testified that Mariah's cause of death was "blunt force head trauma," which would have occurred within 24 hours prior to her death, and it would have been immediately apparent that Mariah was in distress and in need of medical attention. Farley testified that Mariah suffered "multiple contusions" to her head area and that "blunt force head trauma ... basically means, beat about the head with something—an object, a hand, a fist, or slammed." Farley testified that these injuries would not have been caused by falling down some stairs and that this was the most severe case of child abuse she had ever seen.

On the night of February 17, 2007, several investigators questioned [Lucio] for about five hours, beginning at about 10:00 p.m. This interview was videotaped and was admitted into evidence in three separate DVDs (State's Exhibits, 3, 4, and 5). [Lucio] initially told the police that Mariah had fallen down some stairs on Thursday night, February 15, 2007. For about three hours, [Lucio] denied any knowledge of how Mariah became so badly bruised and suggested that her older children could have been responsible.

Texas Ranger Escalon began to question [Lucio] about two and one-half hours into the interrogation. Escalon testified at trial that, while he observed other investigators questioning her, he could tell from [Lucio]'s demeanor that she was "beat" and that she was "hiding the truth."

Q. [STATE]: Now, Officer, as you went in, you waited for a pause before you went in and you introduced yourself?

A. [ESCALON]: Yes, sir. I did.

Q. Can you describe to the jury how you go about doing that?

A. Well, my initial observation—that's when the investigation starts, is when I walked into the room and I see the investigators interviewing the suspect.

I'm just observing right now, trying to soak it all in, and see what we have, and try to get a better idea about this lady. And I observe her, how she's answering these questions, her demeanor, how she's standing. All of that is telling me—it's like a picture, almost—I'm observing everything, and that is already feeding me—that's already telling me what I'm dealing with. Okay? And then I see the investigators and I'm just making note—I'm am [sic] making note—you know: Okay. This is what I have.

Q. What type of demeanor would you describe her having?

A. When I walked in, she was not making eye contact with the investigator. She had her head down. So right there and then, I knew she did something. And she was ashamed of what she did, and she had a hard time admitting to officers what had occurred. That's what crossed my mind. And I knew she was beat. I knew—when I say she was "beat"—she was giving up. She wants to tell because she's giving that slouched appearance—you know: I did it. I've given up. I need to interview her, visit with her a little more. That's what I sensed. And I get that because of my experience in law enforcement, and my experience in interviewing people. Every time it's pretty much similar, in demeanor, in people and that's what I have experienced.

> Q. Have you had other types of experiences in your experience as a trooper and investigator in interviewing people?
>
> A. That's one of the most common clues you would call—that you see—somebody with their head down, and like their shoulders are slouched forward, and they won't look at you. They're hiding—hiding the truth.

Escalon testified that [Lucio] began to "open up" with him after about 20 minutes of questioning. [Lucio]'s recorded statement reflects that she told Escalon that she, and only she, had been "spanking" or "hitting" Mariah since sometime in December 2006. [Lucio] stated that Alvarez never "hit" or "spanked" Mariah and that Alvarez was unaware of most of the bruises on Mariah's body. [Lucio] also stated that none of the other children "beat" Mariah and that no one except [Lucio] "beat" Mariah. [Lucio] also stated that Mariah had been in her care for at least the previous three days. The jury also saw [Lucio] on the videotape demonstrate with a doll how she abused and "spanked" Mariah.

[Lucio] also stated that she would "hit" Mariah when [Lucio] got mad. [Lucio] also described how she pinched Mariah's vagina and how she would sometimes grab and squeeze Mariah's arm. [Lucio] described how she bit Mariah twice on the back at different times about two weeks before Mariah's death. [Lucio] said that on one occasion she bit Mariah on the back for no reason while she was combing Mariah's hair. [Lucio] said, "I just did it." [Lucio] also stated that she would "spank" Mariah several times "day after day."

[Lucio] stated that Mariah was "sick" on the day that she died, but that she was afraid to take Mariah to the doctor because of all the bruises on her. [Lucio] also stated that Mariah would not eat and that her breathing was heavy. [Lucio] said that Mariah slept all day on February 17, 2007, and that she would lock her teeth together when [Lucio] would try to feed her. This was consistent with "blunt force head trauma symptoms that Farley described.

> Q. [STATE]: If the child suffers the type of brain injury that you've identified on this exhibit, would this child be able to sit up, eat Cocoa Crisps, and things of that nature?

A. No. Usually with this kind of hemorrhage, the child has some type of immediate sign. Most of the time, they say they're very tired. They may seize and get very tense, and then relax, and get very tense, and then relax. People may not realize what it is, but sometimes parents will realize that that's a seizure, and they'll say, they're seizing. Yet, they've never had a seizure before.

The other thing they will tend to do, is, the pressure increases because the brain will start to swell. They might start to vomit. And so if an ER doctor sees them, they may think they have a gastrointestinal virus, or something. But they're vomiting because of the pressure in the head. So seizing—lethargy being very tired. Coma is very consistent. Abnormal respirations—they're breathing a little funny. They take a big breath, and then they sit. And then it might go out. And then—ten seconds later, maybe another breath. So the breathing starts to also be affected as the brain starts to swell.

Q. Like on this type of injury, how far back would those symptoms had [sic] been known to somebody that is watching the child? At least since the inception, or when?

A. It's usually fairly quickly after the fatal blow occurs that they'll start to have the symptoms. And the first symptom is, they're usually, they're tired. They can't keep awake. That's the lethargy. They just can't get them up—can't get them awake. They won't eat or drink, usually. And if they do, they vomit it.

Q. Do they ever suffer a condition where they can't open their mouth—where their jaws are locked?

A. If the jaws are locked, that's probably a seizure. Because things tighten up and you have muscles here that tighten and relax, tighten and relax, but it shouldn't stay that way, indefinitely.

Escalon also testified that, when he questioned [Lucio], he did not

know, but he suspected, that Mariah had died from a fractured skull. Escalon can be seen and heard on the videotape informing [Lucio] that an autopsy would be performed on Mariah and asking [Lucio] "if they're going to find a fractured skull." [Lucio] replied that an autopsy would show that Mariah did not have a fractured skull, and [Lucio] denied hitting Mariah in the head. Escalon also testified at trial:

> Q. [STATE]: Now when you're going through the interview with her, did you know the cause of death—the exact cause of death at that point?
>
> A. [ESCALON]: No, sir. I did not.
>
> Q. Based upon your experience of being a police officer or a ranger, and a DPS trooper, did you have a suspicion of what that cause of death was?
>
> A. Yes, sir. I did.
>
> * * *
>
> Q. What had you suspected occurred here to the child?
>
> A. Head trauma.
>
> * * *
>
> Q. And I think at one point she admits to all of the [visible] injuries except for the scratch on the face and one on the heel?
>
> A. Yes.
>
> * * *
>
> Q. Now in the video, there is no actual—she doesn't actually say that she in one direct blow, or one direct shot, hits Mariah on the head, or the head area other than general spanking. Is that true?

A. Yes, sir.

* * *

Q. [DEFENSE]: Okay. But the head trauma you didn't learn until, when you went into the autopsy, when you found out there was brain hemorrhage, and that's what killed this child. Not the beatings, and the black and blue marks all over her body?

A. [ESCALON]: Again, when she was telling me what she did to that child, led [sic] me to believe based upon my experience the head trauma was very suspicious in this case.

* * *

Q. The emergency room doctor, yesterday, stated that you couldn't see that there was brain hemorrhage, and that the brain hemorrhage was something that wasn't noticeable until later on.

A. There's other signs of trauma that can cause bleeding inside of the brain. It doesn't have to be visible. Other signs of shaking—hitting.

A police officer (Villarreal) testified that he allowed [Lucio] to make a cell-phone call to her sister while he was transporting [Lucio] to a dental office for a dental mold. Villarreal testified that [Lucio] appeared to be agitated and that he heard her say during the telephone call, "Don't blame Robert. This was me. I did it. So don't blame Robert."

The defense presented the testimony of a medical expert (Kuri), who seemed to testify that Mariah's fatal injuries could have been caused by a fall down the stairs.

Q. [DEFENSE]: And your testimony, basically, is that the falling down the stairs is consistent with—just as consistent with the cause of death of this child as what the State is trying to suggest as the beating?

A. Well, we received a patient—a body that have [sic] a severe head injury. It was not caused by a simple force. It was caused by a serious force. So what type of serious force? But she—the mother hit her against the wall or somebody else? I am not saying the mother. But any person that would have caused her, okay, or fell, that's trauma. See? There's trauma on the head. What produced it? I don't know. I don't think—in the head, it is specific. There is no doubt that she died because of the hemorrhage that was produced by the trauma. Now, if you ask me the question: Which would be the type of trauma? So, if she fell from the stairs and rolling, if that's how she died? That could be one. Hitting against the board? Yes. Hit by a strong force? Too. It could be.

During closing jury arguments, the defense argued that the jury should acquit [Lucio] because she was guilty only of "injury to a child" for the nonfatal injuries that she inflicted upon Mariah before the fatal injuries that Mariah suffered for which [Lucio] disclaimed responsibility. The defense also claimed that [Lucio] was guilty only of "injury to a child" for failing to get medical attention for these fatal injuries. The defense thus claimed that [Lucio] did not cause any of Mariah's fatal injuries. The defense also questioned whether the State's evidence excluded the possibility that these fatal injuries were caused by Mariah falling down stairs.

[DEFENSE]: Now, in the opening remarks that we made in the beginning of the trial after you were all seated here, I told you my client is not up for "Mother Of The Year." I told you that my client is guilty of injury to a child. She is and she has admitted that. The question here before you is whether or not on February 17, 2007, Melissa Lucio intentionally and knowingly killed Mariah Alvarez. That's the issue. That's the issue. Not whether she beat her. Not whether she broke her arm. Not whether she's a lousy mother or didn't provide for her children. That's not an issue. The issue is whether or not she killed Mariah on the 17th of February, 2007.

* * *

This whole case revolves around this video. This video is real important. If you have—if you cannot remember it all, play it again. It's a long, long video. And I'm sorry for that. But this is the key to everything in this case.

* * *

Folks, the State wants you to believe that that's a confession. Does the State know at the time of the video, the caused [sic] of death of Mariah? No. They don't know the cause of death of Mariah until the next day when they go do the autopsy. They learn after the autopsy that Mariah died from brain hemorrhage. Blunt force trauma to the head. That's when they first know about it.

She confessed to what? She confessed to bruising that child from head to foot. She confessed to neglect. She didn't confess to murder.

* * *

But I want to go back to the video because the video says a lot. The video is very important. Study that video because that's where the [sic] all of the key is [sic]. Melissa Lucio said things. She didn't have an attorney. Nobody is there to coach her and tell her what to say or how to say it. She's there on her own. She has got Salinas, Cruz, Banda, Villarreal, and Escalon. Five law enforcement officers throwing questions at her. She's there on her own. Nobody is helping her.

And she has told everything she knows and nobody is listening. She is telling us much: I beat this child. I neglected this child. I hurt my child, but I didn't kill her. I didn't hit her in the head. So how did she get the brain hemorrhage? Fell down the stairs. She fell down

the stairs. Melissa Lucio says she fell down the stairs. What evidence does the State have to prove to you that this is not possible, that it didn't happen? They don't have anything.

* * *

And there's a reasonable doubt, and that is the possibility of falling down the stairs.

The State argued that the evidence and inferences from the evidence that [Lucio] abused Mariah show that it was [Lucio] who inflicted Mariah's fatal injuries.

[STATE]: What injuries did the child have, if not a brain injury? Well, they tried to differentiate between: Well, you know what? I may have caused 110 bruises. I may have caused two or three bites on the body. I may have twisted the arm and broken it. But you know what? I never hit her on the head. Is that reasonable? Is that reasonable? That child was slapped, according to Dr. Farley, that child was hit across the head and that's what caused the brain hemorrhage. It wasn't. Because the evidence was inconsistent because of the abuse that this child had taken.

* * *

But the bottom line is she committed the acts which led to the cause of [Mariah's] death. This child had bruised kidneys, a bruised spinal cord and bruised lungs. How do you do that? I mean, what force does it take somebody to cause such devastating injuries to a child and then say: You know what? I never touched her across the head. That's just totally—totally unbelievable.

* * *

You can draw inferences from the evidence, ladies

> and gentleman. And the inference is clear that she caused those injuries because it's consistent. It's consistent with her behavior. It's consistent with her pattern of conduct towards this child. If this child had just come in with a head injury and nothing else, you might have said: You know what? It may have been a fall.

The State presented evidence at the punishment phase that [Lucio] has a prior driving-while-intoxicated conviction. The State also presented evidence that [Lucio] committed several disciplinary violations in the county jail such as fighting with and having verbal disagreements with other inmates, possession of contraband, unauthorized communication with another person, and being disrespectful to a guard. The defense characterized these incidents as minor. The State also presented the testimony of a criminal investigator (A.P. Merrillet) for the State of Texas Special Prosecution Office, who testified about the opportunities that a life-sentenced [Lucio] would have to commit criminal acts of violence in prison. Merrillet also testified that he had prosecuted many prison guards for having consensual and nonconsensual sex with female inmates. The defense elicited testimony from Merrillet on cross-examination from which a jury could conclude that there would be a low statistical probability that a life-sentenced [Lucio] would be dangerous in prison.

The State also presented the testimony of Estrada, who was a Child Protective Services (CPS) case worker. Testifying under a grant of transactional immunity because "[t]here was talk about [CPS] being indicted" as a result of Mariah's death, Estrada testified that CPS removed Mariah and all of the other children living with [Lucio] from [Lucio]'s home for physical neglect and negligent supervision just after Mariah was born on September 6, 2004, and placed them in foster care. [Lucio] visited Mariah while she was in foster care. CPS returned Mariah and eight other children to [Lucio]'s home on November 21, 2006. [Lucio] told the police, during her recorded statement, that she was not close to Mariah because CPS removed Mariah from her home three weeks after she was born.

Estrada also testified about the various contacts that CPS had with [Lucio] between December 21, 1995, and Mariah's death on February 17, 2007. Estrada testified that the CPS investigated various

allegations, usually involving allegations of neglect and neglectful supervision, in 1995, 1996, 1998, 2000, 2001, 2002, 2003, and 2004. Estrada testified that [Lucio] often tested positive for cocaine and that two of [Lucio]'s newborns tested positive for cocaine during this period of time. Estrada testified that "since '04 [[Lucio]] had about 17 or 18 positives and about 11 negatives." The defense suggested, through its cross-examination of Estrada, that CPS should not have returned the children "to a parent who tested positive for drugs 18 times and negative for drugs 11 times.

Estrada also testified that [Lucio] tested negative in the two drug tests that were offered between November 2006 and February 17, 2007. In her recorded statement, [Lucio] told the police that she had not used drugs since February 2006, but that Alvarez had recently begun using crack cocaine. The police found paraphernalia for smoking crack cocaine in a search of [Lucio]'s apartment after Mariah's death. Farley testified that Mariah had cocaine in her blood at the time of her death. Other evidence was presented that [Lucio] received about $5,000 per month in welfare benefits most of which the State claimed [Lucio] used to support a cocaine habit.

[Lucio] presented the testimony of two mitigation experts (Villanueva and Pinkerman). These experts testified, based primarily on [Lucio]'s statements to them after the charges in this case had been filed, that [Lucio] was depressed and that she was a battered woman and had been sexually abused as a child. For example, Villanueva and Pinkerman testified,

> Q. [DEFENSE]: Was she—is there any indication that she was ever abused as a young child?
>
> A. [VILLANUEVA]: Yes, she was. She was sexually abused by one of her mother's lovers, a live-in lover, and it lasted for approximately two years, the duration that he was in the home.
>
> * * *
>
> Q. [DEFENSE]: Is there any kind of abuse by her first marriage?
>
> A. [VILLANUEVA]: Yes. Her first husband, which

was her only legal marriage, Mr. Lucio, he was an alcoholic. And he was emotionally and verbally abusive most of the time and physically abusive when he was drunk. But being an alcoholic, that was quite active. There was also a very manipulative relationship there with her sister-in-law Sylvia, who introduced her to cocaine. She was 16 years old.

* * *

Q. [DEFENSE]: And your findings in this case?

A. [PINKERMAN]: In the part of the assessment with the intelligence test, the other part is more of a personality test to determine my general diagnostic impressions. And my general diagnostic impressions of her were that she was overutilizing a lot of repression and denial. And repression to the point where, again, a disconnect between thoughts and feelings or experiences and feelings. And I saw that in both her test behavior and in my observations that I reported earlier.

In assigning diagnosis to her, what I identified is that she had a presentation consistent with major depression with prior substance abuse which was in remission. But maybe most importantly post traumatic stress disorder in how she, I guess, psychologically was organized. And those are the three major areas of concern that I saw with her. She was also, and I also acknowledged it in a different report, the victim of prior physical and sexual abuse both as an adult and as a child.

Villanueva also testified that [Lucio] "has no history of aggression at all as a child, adolescent or through her entire CPS history, which was a good part of her adult life." Pinkerman testified that there is a low probability that [Lucio] is a risk to reoffend "in a prison setting."

Q. [DEFENSE]: And what did you use to reach that conclusion. [sic].

A. [PINKERMAN]: Her presentation in the interview, the history that I had before me, her description of the history, the psychological testings like I'd done with her in my formal psychological evaluation, and then the large body of literature both in the psychological literature and in the State Department of Corrections literature that talks about the different levels of risk for offenders within a prison population. Because when I'm looking at the risks, I'm not considering getting the parameters of the present circumstances any issue of risk to the community. That is often not a part of my assessment.

Q. And your opinion then, sir, is what?

A. Her risk—there's—okay. I'll try to just answer your question. There's a low probability that she's a risk to reoffend—

Q. Okay.

A. —in a prison setting.

During its initial closing jury arguments, the State emphasized the "horrific" circumstances of this offense, [Lucio]'s "history" of violence against Mariah, and [Lucio]'s misbehavior in the county jail in arguing that "[t]his isn't going to end with Mariah. This is going to continue."

[STATE]: The defense argued at the beginning of this trial that Mariah died of injury to the child. She was beaten. Now, the first expert told you that the defendant—there is no history of aggression at all. She's obviously wrong. That's not what the defense told you. That's not what the [police] video shows. And she demonstrates on that video how she hit that little girl time and time again. There is history of aggression. Mariah's death is proof of that. What can you conclude from the first expert's testimony? She is simply wrong. She got it wrong.

The next expert tells you: No history of violence. Again, remember what [[Lucio]'s lawyer] told you?

She's guilty of injury to a child. She's guilty of beating that little girl. Well, obviously this expert got it wrong, too.

* * *

What can you conclude? Look at Mariah. You've seen the photographs. No history of violence? Really? Are we talking about the same person, the same defendant? They got it wrong.

I want to talk to you about Mariah and the nature of this crime against her. Because we've all seen the photographs. We heard from Dr. Vargas who told us it's the worst he's ever seen in his 30 years. Dr. Farley told us the same thing. Worst case of child abuse ever in our community. Look at this little girl. Look at her. She was defenseless, innocent. Her daughter.

The nature of this crime speaks for itself. She was beaten to death. This is not one time. Deliberate acts, over, and over, on this poor little girl. This is a crime of hatred. A crime of violence. Not just one time. Not an accident. The manner of death of which this little girl died is also tragic. It's also horrific.

There's many of you on this jury that work in the medical field and can understand the suffering that she endured from her little brain swelling. Dr. Farley told you that brain swelling inside her head, went into her spinal cavity, she would have suffered. She would have trouble breathing. She would have seizures and just lay there. She let her lay there and suffer.

A very painful cruel death. That is what is so horrific about this case, that this little girl laid there in that bed when she could have simply called for help, taken her to the doctor, done something to protect this little girl. The manner of death in this case is so horrific because she suffered for so long, this little baby girl. It was simply torture and cruel.

* * *

> And I want you to look at her jail record because this jail record speaks to you about the type of person that she is. And in the short time that she's been in jail she has had physical altercations, verbal altercations, been in possession of contraband, unauthorized communication, inciting a riot, and confrontational towards the staff. What does that tell you about the type of person that she is now? And that's only here in our jail. Imagine what she's going to be like when she gets to Huntsville or wherever she ends up. Look at these records, because they records [sic] speak for themselves.
>
> This defendant is like a dog that bites a human person. Once that dog bites, they will always have—there will always be a probability that it will bite again. Same thing with this defendant. Her record speaks to you: This isn't going to end here. This isn't going to end with Mariah. This is going to continue.

The defense argued during its closing jury arguments that the State did not present "one scintilla of evidence as to future dangerousness."

> [DEFENSE]: The first question has to do with future dangerousness. What have we heard one scintilla of evidence as to future dangerousness of this person?
>
> We had the guy, Mr. Merrillet, or whatever his name was, from Conroe. If you take his own statistics, he never spoke about Melissa specifically. Never once did he talk about her. In fact, he came up here and told you, I'm not going to talk about her. I don't know her life. So he gives statistics.
>
> What are the statistics he gave us about the future dangerousness of criminals in general? He told us there are 12,000 female inmates in the Texas Department of Corrections as of 2007. That's 12,000. How many assaults were there in that population? Seventeen. That is one one-hundredth of a percent.

What else do they bring you here? They bring you the jail records. This is one thing where I agree with the State. Please, look at Melissa's jail records. Look at them. They bring to you that she was in a dorm with eight people and they found tattooing equipment above the lights. None of the girls would admit to having been the owner of it. So that is evidence of future dangerousness? Oh, but she was in a fight. Look at the fight. You all look at them. I saw you all looking at the records. She got in blocked punches in one of the fights. The other one, the girl hit her. Please. There's not a scintilla of evidence of future dangerousness, much less beyond a reasonable doubt.

What else do they bring here of future dangerousness? To answer question number one, she's got a past history, a criminal history. What was that? A DWI. If we poll the people in this courtroom today sitting here, throughout this courtroom there would be a good number of folks who've gotten a DWI. It doesn't mean that they are a future danger.

What didn't they show you? They didn't show you one past act of physical abuse to any children. Not one. They didn't show you one past act where she's ever been charged with a crime involving any physical harm to anyone else.

* * *

Is there a probability of continuing acts of violence? Probably not. We've heard that from the State's main person who they bring down because just from the statistics, there's no probability. We heard it from Dr. Pinkerman who also said there's very little probability that she would ever do anything of violence.

During its final closing jury arguments, the State emphasized [Lucio]'s behavior in the county jail and her abuse of Mariah over a period of time in support of its argument that [Lucio] "has already shown a tendency to be violent ... to be abusive, to be aggressive and to injure innocent people."

> [STATE]: This wasn't an isolated incident where she lost it and she killed this child. She made this child suffer. Every time she injured this child she had to have gotten some pleasure from it because she didn't do it one time. She did it over a period of weeks and probably months.
>
> Is this a person that you want out there in a society of prisoners? She has already shown a tendency to be violent, ladies and gentlemen, to be abusive, to be aggressive and to injure innocent people. She's just as likely to go after the innocent—other innocent individuals, people that may be within the prison system. Because Mr. Merrillet has told you that they don't classify them by capital murder. They can put him [sic] in with a burglar, with somebody who's writing hot checks. She can victimize other individuals.
>
> * * *
>
> Try to marginalize her behavior in jail now. That's what we're being accused of. We've looked at the little things to show a consistent pattern. Even now when she's caught in jail, awaiting trial, whatever rules she can still break, she's still breaking them.
>
> Her own people say, she has a history of that. She's not going to change her stripes. Is she going to do that automatically because you spared her? No. She's never going to changer her stripes.

Lucio v. State, 351 S.W.3d 878, 880–91 (Tex. Crim. App. 2011)(f00tnotes omitted).

The TCCA affirmed Lucio's conviction and sentence, *id*, and the Supreme Court of the United States denied Lucio's petition for a writ of *certiorari*, *Lucio v. Texas*, 132 S.Ct. 2712 (2012). On January 9, 2013, the TCCA denied Lucio's application for a writ of habeas corpus. *Ex Parte Lucio*, No. WR-72702-02, 2013 WL 105179 (Tex. Crim. App. Jan. 9, 2013). Lucio filed this federal

petition on January 9, 2014.

II. The Applicable Legal Standards

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir. 2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)), *abrogated on other grounds by Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012).

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but

unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 406. "In applying this standard, [courts] must decide (1) what was the decision of the state courts with regard to the questions before [them] and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc). The solitary inquiry for a federal court under the "unreasonable application" prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). The State court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997).

B. Summary Judgment Standard in Habeas Corpus Proceedings

In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts of the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (The "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). This principle is limited, however; Rule 56 applies insofar as it is consistent with established habeas practice and procedure. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (citing Rule 11 of the Rules Governing Section 2254 Cases). Therefore, § 2254(e)(1) – which mandates that findings of fact made by a state court are "presumed to be correct" – overrides the ordinary summary judgment rule that all disputed facts must be construed in the light most favorable to the nonmoving party. *See id.* Unless the petitioner can "rebut[ ] the presumption of correctness by clear and convincing evidence" regarding the state court's findings of fact, those findings must be accepted as correct. *See id.* Thus, the Court may not construe the facts in the state petitioner's favor where the prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness in 28 U.S.C. § 2254(e)(1) should not apply. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997).

III. Analysis

Lucio's petition raises 25 claims for relief, including subclaims. These are addressed below.

A. **Use of a State Agent**

Lucio first contends that her Sixth Amendment right to counsel was violated when Beto Juarez, a therapist for Texas Child Protective Services ("CPS"), interviewed her after her initial appearance before a magistrate in this case. Juarez met with Lucio to provide court-ordered mental health counseling in jail. *See* 35 Tr. at 147.

Juarez turned over his reports of the interviews to the prosecutor in the capital murder case. During the course of these interviews, Lucio made statements that were used by the prosecution during the punishment phase of Lucio's capital murder trial.

Lucio complains that Juarez was acting as an agent of the prosecution and that conducting the interviews without counsel present violated her Sixth Amendment rights. Based on these alleged violations, she contends that her statements to Juarez should have been suppressed.

The parties agree that Lucio's Sixth Amendment right to counsel in this case attached by the time of her initial appearance. Respondent argues, however, that Lucio's claim for relief is without merit.

It is beyond dispute that the Sixth Amendment right to counsel is offense-specific. *Texas v. Cobb*, 532 U.S. 162, 168 (2001). In denying Lucio's state habeas corpus application, the state habeas court found that Juarez was not working in conjunction with the prosecution in the capital murder case, and that the purpose of his visits was not investigatory. 4 Supp. CR at 5.[1] The state habeas court therefore found that Juarez was not acting in tandem with law enforcement and his notes did not implicate Lucio's Sixth Amendment rights. *Id.* at 16.

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[1] "Supp. CR" refers to the supplemental clerk's record submitted in connection with Lucio's state habeas corpus proceeding.

Lucio argues that the state habeas court's conclusions were unreasonable. She contends that Juarez' visits were investigatory in nature because it is CPS' responsibility to investigate child abuse. She also analogizes Juarez' evaluation with a pre-trial psychiatric evaluation.

As noted above, the Sixth Amendment right to counsel is offense-specific. Juarez was not there to investigate any criminal offense. The fact that information came out that was potentially damaging to Lucio in her capital murder case is no different than harmful information coming to light in a completely unrelated criminal investigation. If, for example, the police suspected Lucio in a second, unrelated murder, and obtained information harmful to Lucio in this case while investigating that second murder, there can be no question that such information would not have been excludable during the punishment phase on Sixth Amendment grounds. Similarly, there can be no doubt that the many years of CPS records created before Lucio's arrest for capital murder were admissible at the punishment phase. Lucio's attempt to conflate the prosecution of the capital murder case with the child protective work of CPS does not change this.

Juarez was not involved in a criminal investigation. Lucio had no Sixth Amendment right with regard to Juarez' work. Therefore, the admission of her statements to Juarez did not violate her Sixth Amendment rights. At a minimum, the state habeas court's conclusion that Juarez' actions did not implicate Lucio's Sixth Amendment rights was neither an unreasonable determination of the facts, not an unreasonable application of Supreme Court precedent. That conclusion is therefore entitled to deference, and Lucio is not entitled to relief on this claim.

B. Ineffective Assistance of Counsel

In her second, third, fifth, seventh, and ninth claims for relief, Lucio contends that she received ineffective assistance of trial and appellate counsel. Respondent argues that some of these

claims are procedurally defaulted, and that all are without merit.

1. Failure to Move to Suppress Custodial Statements

In her second claim for relief, Lucio contends that trial counsel, Peter C. Gilman, was ineffective by failing to move to suppress statements she made to the police after her arrest. Lucio does not dispute that she received *Miranda* warnings and waived her *Miranda* rights. She argues, however, that she was interrogated for a prolonged period of time without food or water, and was threatened and intimidated by police officers who also took advantage of her physical exhaustion and psychological vulnerabilities. Respondent counters that this claim is procedurally defaulted and without merit.

a. Procedural Default

The procedural default doctrine may bar federal review of a claim. "When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding

the cause and prejudice standard to be "grounded in concerns of comity and federalism").

To be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). If the state law ground is not firmly established and regularly followed, there is no bar to federal review and a federal habeas court may consider the merits of the claim. *Barr v. Columbia*, 378 U.S. 146, 149 (1964). An important consideration in determining whether an "adequate" state law ground exists is the application of the state law ground to identical or similar claims. *Amos v. Scott*, 61 F.3d 333, 340-41 (5th Cir. 1995). The adequacy of a state law ground to preclude federal court review of federal constitutional claims is a federal question. *Howlett v. Rose*, 496 U.S. 356, 366 (1990). If the state court decision rests on federal law, then there is no bar to federal habeas corpus review.

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040–41 (1983); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (applying the presumption in the context of habeas).

Lucio first raised this claim in her state habeas corpus application. The TCCA found the claim defaulted, but did not explain the basis for the finding of default.[2] Instead, the TCCA cited two of its own opinions. In *Ex Parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989), the TCCA held that a claim that could have been raised on direct appeal is procedurally defaulted if raised for the first time in habeas corpus. In *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984), the court held that claims raised and rejected on appeal will not be reconsidered in an application for

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[2] In the alternative, the TCCA found the claim meritless.

habeas corpus. Lucio argues that this citation to two cases renders the finding of default ambiguous.

The TCCA's citations concerned findings that several of Lucio's claims were defaulted. Read in context, it is clear that the default of this claim was based on the *Banks* rule that the claim could have been raised on direct appeal. There is no ambiguity.

This Court finds, however, that the *Banks* procedural bar is not regularly applied with regard to ineffective assistance of counsel claims. The TCCA has repeatedly stated that ineffective assistance claims are generally brought in habeas corpus because they often require factual development outside the trial record. *See, e.g., Tong v. State,* 25 S.W.3d 707, 714 n. 10 (Tex. Crim. App. 2000)("Because a record focused on the conduct of trial counsel is not typically developed at trial, it is often difficult to review an effective assistance of counsel claim on direct appeal. Hence, these claims are usually better raised in a post-conviction application for a writ of habeas corpus.") Because this procedural bar is not regularly applied in this context, it is not a bar to federal habeas corpus review. *Barr*, 378 U.S. at 149; *Amos*, 61 F.3d at 340-41.

b. Ineffective Assistance

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing

professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

Lucio made statements to the police in which she acknowledged a history of physically abusing Mariah, but denied killing her. She now argues that she was subjected to harsh, coercive conditions that exploited her physical exhaustion and psychological vulnerabilities, and rendered her statement involuntary in violation of her Fifth Amendment rights.

The Supreme Court has noted that "all [cases finding a compelled self-incriminatory statement] have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Colorado v. Connelly*, 479 U.S. 157, 164, (1986). Therefore, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984).

In this case, despite Lucio's attempts to portray it otherwise, there was no compulsion. The police questioned her in an office for about four hours after informing her of her rights to remain silent, to have counsel present, and to terminate the interview at any time. *See* State's Exhibit ("SX") 3 at 0:10-1:40. The record shows that, contrary to Lucio's current assertion that she was deprived of food and drink, she was offered water. 32 Tr. at 47; CR at 249[3]. When Lucio asked for a cigarette, she was given one and allowed to go outside to smoke. 32 Tr. at 47. She was not threatened. With the exception of a few brief exchanges in which one officer raised his voice, the

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[3] "Tr." refers to the transcript of Lucio's trial; "CR" refers to the Clerk's Record in Lucio's state habeas corpus proceeding.

tone of the interview was conversational.

The only point at which Lucio even arguably asked to terminate the interview was a statement that"I want to talk to my husband. I don't want to talk to nobody else." CR at 249. When Lucio asked to speak to her husband, the officer asked her if she wanted any water. She replied that she wanted a cigarette. The officer replied: "Ok. Let's finish this. Ok? I'll get you a cigarette. Ok? Let's get this out of the way." There was a brief inaudible portion of the video, after which Lucio stated: "It's gonna be a long . . . It's a long story. Everything's long."*Id.* At that point, the officer left the room. When he returned, he asked Lucio to tell her story, and she did.

> Once [*Miranda*] warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Miranda v. Arizona, 384 U.S. 436, 473–74 (1966) (footnote omitted). However, "[i]f an accused makes a statement [invoking her rights] that is ambiguous or equivocal . . . the police are not required to end the interrogation or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Berghuis v. Thompkins*, 560 U.S. 370, 381, (2010) (internal quotation marks and citations omitted).

Lucio's statement that she wanted to speak to her husband and nobody else was not an

unequivocal invocation of her *Miranda* rights. At that point, she had been speaking to the police for an extended period of time, and she never stated that she wanted to end the interview. She subsequently volunteered that she had a long story to tell. Lucio's statement was, at most, an ambiguous expression that she no longer wanted to talk to the police. She did not expressly state that she wished to remain silent, nor did she invoke her right to counsel. In light of this ambiguity, the police were not required to stop the interview. Because the statement was admissible, trial counsel was not ineffective for failing to seek suppression, nor can Lucio show any *Strickland* prejudice because there is virtually no probability that any such motion would have been successful. At a minimum, the TCCA's conclusion that there was no Fifth Amendment violation, and thus no ineffective assistance of counsel, *see* 4 Supp. CR at 5, was reasonable and is entitled to deference under the AEDPA. Therefore, Lucio is not entitled to relief on this claim.

2. Failure to Investigate

Lucio next argues that counsel failed to investigate, develop, and present evidence supporting her current theory that Mariah's older injuries were caused by a combination of rough treatment by her siblings, insect bites, and Mariah scratching at the insect bites. Specifically, she contends that counsel: (1) failed to obtain the assistance of a competent forensic pathologist; (2) failed to make a timely request for, or adequately utilize, a mitigation specialist and psychologist; (3) and (4) failed to investigate and present evidence and witnesses supporting her explanations for Mariah's injuries; (5) failed to investigate and present evidence that Lucio could not have severely beaten Mariah in the 24 to 48 hours preceding Mariah's death; (6) failed to dispel the idea that Lucio would not explain the cause of Mariah's injuries because she caused them; (7) failed to investigate and present

evidence that Lucio did not know the extent and severity of Mariah's fatal injury; and (8) failed to dispel the idea that Lucio was indifferent toward Mariah. The TCCA found that counsel's alleged failures were the product of reasonable trial strategy.

Counsel's explanation for Mariah's fatal injury was the same as that now advanced by Lucio. In his opening statement, counsel told the jury that Mariah died as a result of injuries sustained when she fell down a flight of stairs and was also injured by other family members. 32 Tr. at 21-22. He argued that Lucio was a battered woman who made a false confession to please the police officers who were questioning her. *Id.*

a.) Evidence Supporting Lucio's Theory of the Case

Gilman elicited testimony from state's witnesses showing that the police never submitted for analysis physical evidence obtained from Lucio, including hair samples, fingernail clippings, saliva swabs, dental records, and Lucio's ring. 33 Tr. at 22-24, 59, 127. He thereby established that there was no physical evidence demonstrating that Lucio caused Mariah's death.

Counsel attempted to call a mitigation specialist and a psychologist to offer a theory that Lucio gave a false confession because she was suffering from battered woman's syndrome and, as a result, would tend to be compliant to any authority figure. 35 Tr. at 126-35, 141-44, 194-96. The trial court, however, excluded this evidence, leaving counsel to present his alternative theories in the face of Lucio's confession. *Id.* at 136. In closing argument, counsel argued that the confession was the result of exhaustion, intimidation, and an effort to cover for her husband and/or children. 36 Tr. at 25-27. He also argued an alternative theory that Lucio was guilty only of injuring Mariah, but not killing her. 36 Tr. at 34.

The TCCA found that counsel pursued a reasonable trial strategy. 4 Supp. CR at 16. Lucio argues that the findings are contradictory, and thus unreasonable. For example, she contends that the TCCA's findings that counsel both conceded that Lucio beat Mariah while working to exclude evidence that she beat her other children is inconsistent and contradictory. *See* Pet. at 57-61. In fact, there is nothing contradictory in conceding what Lucio admitted to in her confession while seeking to exclude additional evidence of other bad acts that would paint Lucio as cruel and sadistic, make the jury less likely to believe that she did not inflict the fatal injuries and, looking ahead to a possible penalty phase, make Lucio appear to be a pathologically violent person.

Lucio now argues that counsel should have called some of Lucio's children and a CPS caseworker to support his alternative theory of Mariah's injuries. Respondent points out, however, that there were risks involved in calling these witnesses. The children had made statements in the past portraying a dysfunctional, sometimes violent, household, and telling conflicting stories about the events leading up to Mariah's death. *See*, *e.g.* 2 CR at 316-28, 352-53. Gilman's decision not to call the children was therefore reasonable, the TCCA's conclusion is also reasonable, and Lucio is not entitled to relief on this claim..

b.) Expert Witness

Lucio argues that counsel was ineffective for failing to retain "a competent forensic pathologist" to testify about the causes of Mariah's injuries. Counsel retained an expert, Dr. Jose Kuri, a neurosurgeon. Dr. Kuri testified that Mariah's fatal injuries could have been caused by a fall down a flight of stairs. 35 Tr. at 34. He also presented evidence through a CPS caseworker that some of Lucio's other children were physically aggressive, supporting the theory that they might

have caused the injuries, 33 Tr. at 182-83; 35 Tr. at 163-64, and that Mariah had thrown tantrums in which she hit her head against the floor or a wall, 33 Tr. at 183; 35 Tr. at 161; Defense Exhibits ("DX") 19-22. Counsel further presented evidence, through Lucio's sister, that Lucio never disciplined her children and that the children were aggressive toward each other. 35 Tr. at 94-95, 100, 113.

Lucio now identifies a forensic pathologist, Dr. Thomas Young, who states that Dr. Kuri's testimony was "egregiously inadequate to confront the arguments provided by the state for child abuse." Lucio also argues that Dr. Kuri's testimony was "largely incoherent and non-responsive to the questions asked." Pet. at 62. The TCCA found that Dr. Kuri's testimony "ably presented" the defense theory that Mariah's fatal injuries were caused by a fall.

The state habeas court found:

> Defense counsel retained and called to testify a qualified medical expert, Dr. Jose Kuri, to rebut the testimony of the State's pathologist regarding the cause of the victim's death. Defense counsel's strategy in this case was to assert that the fatal blunt force trauma to the victim was caused by a fall sustained some 48 hours prior to death. Dr. Kuri's testimony ably presented this theory of the case, challenging the testimony of the State's pathologist as to the age and etiology of the victim's trauma. Dr. Kuri presented testimony helpful to the defense, and defense counsel's decision to retain him was not erroneous.

4 Supp. CR at 5.

Dr. Kuri testified that he had been, as of the time of trial, board certified in neurosurgery for 53 years, and had been licensed to practice medicine in Texas since 1975. 35 Tr. at 4. He was educated at Columbia University and the University of Texas. *Id.* at 9. He possesses certificates of completion from the American Board of Forensic Medicine and the American College of Forensic

Examiners. *Id.* at 10.

Dr. Kuri stated that he is not a pathologist, but was asked to testify only about Mariah's brain injuries. *Id.* at 4-5, 9. In fact, there was no dispute in this case as to the cause of Mariah's death; it was blunt force trauma to her head. *Id.* at 24-25. The only dispute was, and is, as to whether that trauma resulted from a fall, and, if not, whether Lucio inflicted the fatal blow. Dr. Kuri was well qualified to testify concerning Mariah's fatal injury and did, in fact, testify that it could have been caused by falling down the stairs approximately 48 hours before her death. *Id.* at 34-39.

Lucio cites two Texas state cases for the proposition that counsel is ineffective for failing to obtain the assistance of a pathologist, or an expert to help evaluate the strength of the defense or the weaknesses in the State's case. *See* Pet. at 67-68 (citing *Ex Parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005), and *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995)). These cases are of no help to Lucio.

In *Briggs*, the TCCA found ineffective assistance of counsel when defense counsel failed to consult any medical expert in a case arising out of the death of a child in which the case turned on whether the child died of natural causes. 187 S.W.3d at 466-67. Moreover, the record established that Briggs' attorney did not pursue expert medical testimony for economic, rather than strategic, reasons. *Id.* In *Rey*, the TCCA reversed a conviction because the trial court improperly failed to provide funds for the defendant to retain an expert. 897 S.W.2d at 335.

In contrast to *Briggs*, Lucio's counsel did retain an expert. That expert was an experienced, board certified neurosurgeon asked to testify about the possible causes and timing of Mariah's fatal brain injury. In contrast to *Rey*, Lucio had access to an expert witness.

Lucio cites no case holding that an attorney is deficient for relying on the expert opinion of a medical doctor who is board certified in a relevant specialty. Nor does she cite any case holding that a subsequent expert opinion disagreeing with the expert trial witness' opinion is sufficient to establish ineffective assistance of counsel. In light of Dr. Kuri's qualifications and counsel's reasonable reliance on Dr. Kuri's expertise, counsel was not deficient for using Dr. Kuri as the medical expert in this case.

c.) Mitigation Specialist and Psychologist

Lucio next complains that counsel did not retain a mitigation specialist and psychological expert early enough in the process to give them adequate time to perform their work to constitutional standards.

1.) Mitigation Specialist

The record shows that the retained mitigation specialist, Norma Villanueva, first spoke to Lucio on January 22, 2008. Lucio complains that this was too late because the trial was scheduled to begin on February 4, 2008. She acknowledges, however, that the trial was reset for April. This change in schedule was based on counsel's statement to the court that the mitigation specialist needed the additional time. 10 Tr. at 5-6. A subsequent change moved the beginning of jury selection back to May 27, 2008.

At a pretrial hearing on that date, Villanueva stated that she had been working on her mitigation investigation for approximately two and a half months, and needed approximately two more weeks. 13 Tr. at 10-13. The record shows that jury selection did not begin until June 2, 2008, 15 Tr. at 1, and the first defense witness was not called until July 7, 2008, 35 Tr. at 19. Villanueva

did not testify until July 9, 2008. 37 Tr. at 173.

Even if the Court accepts Lucio's contention that counsel was tardy in retaining Villanueva, Lucio fails to demonstrate *Strickland* prejudice. While a January 22 start date may well have been too late to prepare for a trial beginning on February 4, as Lucio's trial was originally scheduled, her trial did not actually begin until June 2. Lucio makes no showing that this time–over four months–was inadequate.

Lucio also argues that a mitigation investigation might be useful in discovering helpful witnesses, and that the allegedly late start handicapped Villanueva, and counsel, in that regard. Again, however, the first defense witness was not called until July 7, 2008, more than five months after Villanueva began her work.

Lucio also argues that the State was dilatory in producing CPS records, handicapping Villanueva's work. Villanueva, however, testified that she reviewed the CPS records. 37 Tr. at 173. Lucio points to nothing supporting her claim that the timing of the production of the records hampered Villanueva's work.

Lucio also argues that, had Villanueva been more fully utilized before trial, she could have helped to develop a psychological profile that would have been helpful in suppressing Lucio's custodial statement as the result of undue psychological pressures. As discussed above, however, a Fifth Amendment violation requires a showing of police misconduct, *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), and there is no evidence supporting Lucio's claim that the police overreached, or that her statement was anything but fully voluntary.

Lucio also complains that Gilman prevented Villanueva from speaking to CPS caseworkers

and Lucio's children and other family members. The state habeas court found that Villanueva was provided with family contact information six weeks before trial, and that Lucio did not show that six weeks was inadequate time for Villanueva to do so. 4 Supp. CR at 7. This conclusion is reasonable. Moreover, Villanueva testified that she did not ask for contact information for CPS caseworkers, 37 Tr. at 223-25, and did not contact the children because all the information she needed was in the CPS files. *Id.* at 231. The state habeas court was reasonable in crediting Villanueva's testimony on these issues.

Lucio fails to demonstrate any *Strickland* prejudice from the timing of Villanueva's hire, or from counsel's utilization of Villanueva. Therefore, she is not entitled to relief on this portion of her claim.

2.) Psychologist

Lucio similarly argues that counsel was late in retaining Dr. Pinkerman, resulting in less than optimal utilization of his expert services. In support of this claim, she cites a statement by Pinkerman that he would have liked to have more meetings with the defense team. She further claims that, had Pinkerman been on board earlier, he could have helped counsel craft a better argument for suppressing Lucio's custodial statement.

Respondent counters that having fewer meetings than the expert might desire does not prove ineffective assistance. Indeed, Lucio does not demonstrate that Pinkerman had inadequate time to perform his work, and the state habeas court's finding to that effect, 4 Supp. CR at 8, is entitled to deference.

As to the confession, as discussed above, Lucio fails to demonstrate any police misconduct,

or any action by the police or any other state agent that rendered her statement anything less than voluntary. Lucio is not entitled to relief on this claim.

d.) CPS Caseworkers, Foster Parents, and Children

Lucio next complains that counsel was ineffective by failing to investigate and call various CPS caseworkers, foster parents for her children, and some of her children to testify that she was not violent and to provide explanations for Mariah's older injuries.

The Fifth Circuit has held that "complaints based upon uncalled witnesses [are] not favored because the presentation of witness testimony is essentially strategy and thus within the trial counsel's domain, and . . . speculations as to what these witnesses would have testified is too uncertain." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (citing *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984)). "In order for the appellant to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial." *Id.*

The state habeas court found that counsel elicited testimony from one CPS caseworker, Joanne Estrada, and from Lucio's sister. They both testified that they had never seen Lucio physically abuse her children. 4 Supp. CR at 9. In light of this testimony, and Lucio's statement to the police admitting that she caused Mariah's injuries, the TCCA found that the additional testimony Lucio now argues counsel should have presented would have been "of limited, if any, value . . . ." *Id.*

Lucio disputes this finding, arguing that the jury may have discounted Estrada's testimony

because she may have feared facing prosecution for returning Mariah to Lucio's custody. Lucio further speculates that the jury might have discounted Lucio's sister's testimony as biased in favor of her sister.

Estrada played no role in returning Mariah to Lucio's custody as she only began work on the case after Mariah's death. 35 Tr. at 159. Therefore, Lucio's speculation about the jury's concerns about Estrada giving self-interested testimony is unfounded.

Lucio fails to demonstrate that any of the other CPS caseworkers would have been available to testify (or why *those* caseworkers, who worked on the case *before* Mariah's death, would not have been seen by the jury as self-interested). The TCCA's conclusion that such witnesses would merely have been cumulative is reasonable.

Mariah's foster mother did testify in the punishment phase, and her testimony was not helpful to Lucio. Alfonsa Castillo, Mariah's foster mother, testified that Mariah sometimes threw tantrums, but that they were becoming less frequent as she got older. She talked about watching Mariah go through withdrawal from the cocaine that was in her system when she was born. 37 Tr. at 94-98. She also testified that Lucio showed little interest in Mariah during supervised visits. *Id.* at 99-100. Lucio fails to demonstrate that guilt-innocence phase testimony by Castillo would have been helpful to her.

Lucio next argues that counsel should have called two of her young sons, Richard and Rene, to testify that Mariah fell down some stairs. She identifies portions of interviews conducted with the boys in support of her claim that they would have testified helpfully.

The state habeas court found that counsel was not ineffective because attempts to suggest that

there was no abuse would have caused Lucio to lose credibility in the eyes of the jury. 4 Supp. CR at 9-10. Respondent now points out numerous inconsistencies in the boys' statements, and between their statements and Lucio's. For example, respondent points out that, while Richard said Mariah fell down some steps, he said it was only two steps, and that he knew this because his mother told him. 2 CR at 327-28. Richard said that he saw bruises on Mariah's eye and arm after the alleged fall, but also denied seeing the bruises. *Id.* at 316, 321, 328. Rene said that he saw Mariah fall down three steps after Lucio told her to wait on the steps, but Lucio said that she went outside to find Mariah when she didn't see her in the house and found her at the bottom of the stairs. Lucio also told the police that none of the children saw Mariah fall down the stairs. *Compare Id.* at 345 and 1 CR at 176. In light of the numerous inconsistencies and contradictions in the boys' statements, the state habeas court's conclusion that counsel made a reasonable decision not to call the boys is, itself, reasonable. It is therefore entitled to deference, and Lucio is not entitled to relief on this claim.

e.) Offering an Alterative Suspect

Lucio next argues that counsel was ineffective by failing to accuse Lucio's 15 year old daughter Alexandra or her husband of murdering Mariah. Lucio argues that Alexandra made statements admitting to striking Mariah. The state habeas court found that the statements were not probative because they did not address the question of who administered the fatal blow. Lucio argues that this is unreasonable because the evidence would show that Alexandra was responsible, at a minimum, for some of Mariah's older injuries. This, in turn, would blunt the State's case accusing Lucio of engaging in long term physical abuse of Mariah.

Lucio acknowledged in state habeas that Gilman was aware of Alexandra's statements, but

decided not to pursue that theory of the case. 1 CR at 84. The record further shows that Lucio told Gilman that Alexandra would deny harming Mariah if called to testify. It thus appears that counsel made a strategic choice not to present evidence that would be recanted or contradicted, and would risk alienating the jury by attempting to deflect blame to a teenager. Moreover, Alexandra's statements against her penal interest that now appear in an affidavit by Lucio's sister and that Lucio argues could have been used for impeachment were made approximately two years after the trial, in May 2010. SH at 366. Thus, any argument Lucio might have that denials on the stand could be impeached with Alexandra's statements against her own penal interest falls flat, because those statements were not made until well after the trial concluded. The state habeas court's conclusion that counsel made a reasonable strategic decision not to offer Alexandra as the murdered was a reasonable conclusion.

Lucio also claims counsel should have pointed to Lucio's husband, Robert Alvarez, as the killer. She points to material in the record showing that Alvarez had been seen yanking another child's arm, and that he had some opportunity to inflict the fatal injury on Mariah. She points to nothing, however, indicating that he actually did so. In light of Lucio's confession, an attempt to shift blame to Alvarez would likely have failed, and would have carried with it the risk of damaging Lucio's credibility and making her seem even less sympathetic to the jury. Counsel was not deficient for not pursuing this theory.

f.) Evidence of Other Causes of Mariah's Injuries

Lucio next argues that Gilman was ineffective by failing to investigate and present witnesses and documentary evidence that she could not have severely beaten Mariah in the 24 to 48 hours prior

to Mariah's death.[4] Lucio notes that there was some evidence supporting a theory that Mariah's older injuries resulted, at least in part, from insect bites and rough play by Mariah's siblings.

In rejecting this claim, the state habeas court found that counsel was not deficient because Lucio originally offered these explanations to the police, but then recanted and admitted responsibility. 4 Supp. CR at 11. Respondent further notes the extent and severity of Mariah's injuries, including bruises on her arms, hands, ears, torso, legs, scalp, and neck, adult size bite marks on her back, hair missing from her scalp, and abrasions on her vagina. 34 Tr. at 15-38. Mariah also had a subdural hemorrhage and bruising on her lungs and right kidney. *Id.* at 27-28. She had blood around her spinal cord. *Id.* Both the emergency room doctor who saw Mariah and the pathologist who performed Mariah's autopsy testified that this was the worst case of child abuse they had ever seen. 32 Tr. at 79; 34 Tr. at 58.

It was reasonable for counsel to not aggressively pursue this theory. He did elicit some testimony that the children were rough with each other but, in light of the extensive and severe nature of Mariah's injuries and Lucio's statement to the police, aggressively arguing that Mariah's injuries were accidental and/or the result of insect bites would have damaged the defense's credibility. It is therefore reasonable to conclude that such argument would have had virtually no chance of changing the verdict. The TCCA's conclusion that counsel was not ineffective for failing to pursue this theory was a reasonable one.

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[4] Lucio breaks out into three separate subclaims the contention that counsel should have presented alternative theories, that counsel should have countered the argument that Lucio could not explain Mariah's old injuries, and that Lucio was unaware of the extent of Mariah's new injuries. The latter two claims involve much the same evidence and are subject to the same analysis. Therefore, these two arguments are both addressed under one heading.

Finally, Lucio argues that counsel failed to dispel the idea that Lucio was aware of Mariah's new injuries. She told the police that Mariah was wearing a jumpsuit when she suffered her fatal injuries and now argues that this covered up her bruises. She also now argues that she was busy unpacking her family into a new apartment, and therefore did not notice the extent of Mariah's injuries. The state habeas court found that Lucio admitted to the police that she caused most of Mariah's injuries, and that counsel therefore could not have credibly denied that she was unaware of what she caused. 4 Supp. CR at 11-12.

Lucio again argues that counsel should have argued that Lucio's confession was false, and the result of police coercion. According to Lucio, he could have argued that she was unaware of the injuries. As discussed above, however, there is no evidence of police coercion.

Counsel attempted to present expert testimony in support of Lucio's argument that she was uniquely vulnerable to giving a false confession because of her psychological state, but the trial court did not allow the evidence. Faced with no opportunity to present this theory, coupled with Lucio's inculpatory confession, counsel made a reasonable strategic decision not to argue a theory that the jury was unlikely to believe, *i.e.* that Lucio was unaware of the extent of Mariah's injuries. Counsel did not render deficient performance in this regard.

g.) Lucio's Attitude Toward Mariah

Mariah's foster mother, Alfonsa Castillo, testified that Lucio and her husband did not pay much attention to Mariah during supervised visits. 37 Tr. at 99-101. Lucio contends that counsel was ineffective for failing to counter the impression that Lucio was indifferent to Mariah, ignored her needs, and preferred her other children. She argues that there was evidence that Castillo did not

stay to observe the visits and her testimony was inaccurate. She argues that Lucio's sister could have testified that Lucio was an attentive parent, and that CPS records reflect a great deal of positive interaction between Lucio and Mariah.

In rejecting this claim, the state habeas court found that CPS investigated Lucio for neglect in 1995, 1996, 1998, 2000, 2001, 2002, 2003, and 2004. 4 Supp. CR at 12. The court thus found that "any attempt to argue that she was a good parent would have been superfluous at best." *Id.*

Lucio argues that there is a big difference between passive neglect and abuse, and that she did not have to prove that she was "a good parent." While Lucio is correct, her argument moves the goal posts. Her claim for relief is that counsel failed to counter testimony that she was an indifferent parent, not an abusive one. CPS records showing numerous instances of child neglect are certainly relevant to this issue. While Lucio is correct that she was not required to prove that she was a good parent, additional evidence that she had a long history of being a neglectful one would not have helped her case. The state habeas court's conclusion that counsel was not ineffective for failing to pursue this line of defense was reasonable.

C. Right to Present a Complete Defense

Lucio next contends that the trial court's ruling that Villanueva could not testify regarding the meaning of Lucio's body language during her interrogation, and on the relevance of Lucio's CPS records to Mariah's cause of death, denied Lucio her constitutional right to present a complete defense. Lucio states that Villanueva would have testified concerning Lucio's patterns of behavior and how that showed in her videotaped interview with police, how her documented patterns influence her decision making and affected how she interacted with the interviewers, and how Lucio

deals with people in positions of authority. 35 Tr. at 142-43.

Lucio also complains about the trial court's ruling barring Dr. Pinkerman from testifying that Lucio is a battered woman and, as such, "takes blame for everything that goes on in the family . . . ." 35 Tr. at 187-88. The trial court ruled that ths testimony was irrelevant to guilt-innocence.

While there is no dispute that a criminal defendant has a right to present a defense, "lawmakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). A defendant's due process rights are violated if the evidentiary rules are arbitrary or "disproportionate to the purposes they are designed to serve." *Id.*

Rules barring evidence that is irrelevant are present in both the Texas and Federal Rules of Evidence. *See, e.g.*, Fed. R. Evid. 401. Some relevant evidence is excludable, for a variety of reasons. *See, e.g.*, Fed. R. Evid. 403. Similarly, courts are authorized to exclude expert or scientific evidence when the proffered expert is not qualified, or when the evidence is unreliable. *See, e.g.*, Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The evidentiary rules invoked by the trial court were neither arbitrary nor disproportionate, but were rooted in longstanding and well accepted principles of evidence law. Lucio's real complaint, then, is not with the rules themselves, but with the trial court's application of those rules to her particular case.

In reviewing evidentiary rulings of a state court, a federal habeas court "do[es] not sit as a super state supreme court to review error under state law." *Skillern v. Estelle*, 720 F.2d 839, 852 (5th Cir. 1983), *cert. denied*, 469 U.S. 873 (1984). A federal court may grant habeas relief "only when the trial judge's error is so extreme that it constitutes a denial of fundamental fairness under the Due

Process clause." *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984).

Lucio's attempt to dress up this state evidence law claim as a constitutional claim is unconvincing. Lucio wished to introduce "battered woman" evidence in support of her argument that her confession was involuntary. However, she makes no showing that the trial court's exclusion of Villanueva's testimony on the basis of Villanueva's lack of expert qualifications was incorrect. Moreover, as discussed above, the videotape of Lucio's police interview makes clear that there was no police misconduct, or any police action that rendered Lucio's statements involuntary.

Dr. Pinkerman's proposed testimony was only tangentially related to the question of Lucio's guilt or innocence, and created a risk of requiring significant time and effort litigating a collateral issue. The jury was able to see the videotape of the interview and form their own judgment as to voluntariness. As discussed above, the evidence that anyone but Lucio inflicted the fatal injuries is tenuous at best. The exclusion of Pinkerman's false confession testimony as irrelevant did not deny Lucio a fair trial, and thus did not violate her right to due process. This claim is without merit.

D. Failure to File Pretrial Motions

Lucio next raises five claims of ineffective assistance of counsel, arguing that counsel should have filed a number of pretrial motions.

1. Motion to Suppress Statements Made to Beto Juarez

Lucio first argues that counsel should have moved to suppress testimony about the existence and substance of Beto Juarez' CPS reports on the grounds that Lucio's statements to Juarez were obtained in violation of her Fifth and Sixth Amendment rights. As discussed above, however, Juarez was not an agent of the prosecution, and was not engaged in a criminal investigation, when he spoke

to Lucio. Therefore, as also explained above, his interviews with Lucio did not implicate her Fifth or Sixth Amendment rights, and any pretrial motion seeking to suppress the statements on those grounds would have been without merit. Counsel's failure to raise a meritless claim did not constitute deficient performance. *See, e.g.*, *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995) ("Counsel cannot be deficient for failing to press a frivolous point"); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections."). In addition, because such claim would have been without merit, it is not reasonably probable that counsel would have obtained any relief.

2. Motion to Suppress Autopsy Evidence

Lucio next claims that counsel should have filed a *Daubert* motion to challenge the scientific validity, and thus admissibility, of the forensic pathologist's opinion that Mariah was abused and her death was a homicide. She contends that the conclusions reached by the pathologist, Dr. Norma Farley, were not scientifically sound.

The state habeas court rejected this claim, finding that Lucio failed to demonstrate that Dr. Farley's testimony was scientifically invalid, subjective, or conclusory. Lucio argues that this was an unreasonable application of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Even if Lucio is correct that the Texas state courts incorrectly applied *Daubert*, she fails to state a claim for relief. *Daubert* announced a standard for the admission of expert and scientific evidence under the Federal Rules of Evidence; it did not articulate a rule of constitutional law. *See Castillo v. Johnson*, 141 F.3d 218, 221 (5th Cir. 1998). While states are free to adopt the *Daubert*

standard, they are not constitutionally required to do so. Texas has, *see, e.g.*, *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720-28 (Tex. 1998), but its adoption of the *Daubert* standard does not create a new constitutional right.

At most, Lucio now argues that the state habeas court improperly applied Texas evidence law in rejecting her claim. However, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether the conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Because the Texas state courts have determined that there was no basis to exclude Dr. Farley's opinion and conclusions under Texas law, there was no basis for a pretrial motion to exclude this evidence, and counsel did not render deficient performance by failing to file such a motion.

3. **Shaken Baby Evidence**

Dr. Alfredo Vargas, the emergency room doctor, and Escalon testified that shaking a baby could cause head trauma. Lucio claims that counsel was ineffective by failing to challenge this testimony as junk science.

Dr. Vargas included shaking a baby in a list of events that could cause internal bruising of the brain. 32 Tr. at 78-79. On cross examination, Dr. Vargas acknowledged that she was unable to determine Mariah's cause of death. *Id.* at 82.

Escalon testified that he suspected Mariah's death was caused by head trauma, and stated that shaking can cause bleeding in the brain. 33 Tr. at 129. Gilman asked Escalon if he had any medical training, and Escalon acknowledged that he did not. *Id.* Escalon went on to explain why he

suspected head trauma, and stated that "the injuries that [Lucio] caused, indirectly could cause damage to the brain by grabbing, shaking her, shaking her, and beating her." *Id.* at 134. Escalon demonstrated on the prosecutor how shaking a baby might cause brain injury. On cross examination, however, Escalon admitted that Lucio never said that she shook Mariah. *id.* at 136. Upon further questioning by Gilman, Escalon acknowledged that "[t]here is no evidence to show that she . . . shook the child." *Id.* at 138.

In denying this claim, the state habeas court found that Gilman was not ineffective because "[s]haken-baby syndrome was at best an ancillary issue at the trial," and noted that "[t]he medical experts in this case agree that the victim was not killed by shaking, but rather blunt force trauma to the head." 4 Supp. CR at 13. The state habeas court's conclusion is reasonable. Whether shaken baby syndrome is scientifically valid or not, counsel elicited testimony from both Vargas and Escalon that they had no evidence that Lucio shook Mariah. Shaken baby syndrome was not put forth as the cause of death. Thus, even if Gilman should have objected on the grounds Lucio now urges, Lucio cannot demonstrate any likelihood that the verdict would have been different had he done so. She therefore, at a minimum, fails to demonstrate any *Strickland* prejudice, and is not entitled to relief on this claim.

4. Reports by Non-Testifying Experts

Appended to the autopsy report prepared by Dr. Farley were reports by Laura M. Labey from NMS Labs, Frank Scribbick from Eye Pathology Laboratory, and an unnamed lab technician from Valley Baptist Medical Center. Gilman objected to the admission of these attachments and to any reference to the attachments in the autopsy report. 34 Tr. at 39, 44-46. The objection was sustained,

the reports and references redacted, and the redacted report received in evidence. 34 Tr. at 45-46. Dr. Farley, however, testified that she sent Mariah's eyes to be examined by an eye pathologist, who saw folds in the retina, indicating significant trauma, and also saw optic nerve hemorrhaging, which Dr. Farley also observed. Dr. Farley also testified that the marks that she identified as bite marks were examined by a forensic odontologist, who stated that they were bite marks, but that she could not link them to a particular person. *Id.* at 33-34.

Lucio argues that Farley's references to these reports violated her Sixth Amendment right to confront witnesses against her. She raised this issue in state habeas, citing *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009). The state habeas court rejected the claim, finding that the report of the eye pathologist was merely cumulative of Dr. Farley's own conclusions, and that the odontologist's conclusions were cumulative of other evidence that the marks were, in fact, bite marks.

Lucio argues that these conclusions are unreasonable. She contends that the evidence was not merely cumulative because the eye pathologist observed and commented on the folds in the retina, as well as the optic nerve hemorrhage, whereas Dr. Farley only commented on the hemorrhage. She argues that the odontologist's conclusion was not merely cumulative because the other evidence that the marks were bite marks was not expert testimony. Lucio contends that the marks were actually scrapes from falling down the stairs.

While Lucio cites both *Crawford* and *Melendez-Diaz, Melendez-Diaz* did not come out until 2009, the year after Lucio's trial. Counsel cannot be deemed ineffective for failing to anticipate any new holding or clarification that had not yet issued. The issue, then, is whether *Crawford* dictated

an objection to the references to non-testifying experts' opinions.

In *Crawford*, the defendant was convicted of assault for stabbing a man he claimed tried to rape his wife. At trial, the prosecution played a tape recorded statement the defendant's wife gave to police describing the stabbing. The defendant had no opportunity to cross-examine his wife. 541 U.S. at 38-40. The Court held that the confrontation clause prohibits the introduction of *testimonial* out-of-court statements, even if they fall within a firmly rooted hearsay exception. *Id.* at 50-51. While the Court did not give a detailed explanation of the kinds of statements constituting "testimonial" statements, the Court did give three broad examples:

> [1] *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably be expected to be used prosecutorially . . .[2] extrajudicial statements. . . contained in testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . [and, 3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52. Texas case law prior to *Melendez-Diaz* held that autopsy reports were not testimonial. *See, e.g., Wood v. State*, 299 S.W.3d 200, 208 (Tex. App. – Austin, 2009)(citing several pre-*Melendez-Diaz* cases).

Respondent points out that Gilman did, in fact, have a running objection to the entire autopsy report, but that the trial judge indicated that the portions now at issue were admissible as hearsay exceptions. *See* 34 Tr. at 42-46. In light of the state of the law at the time of Lucio's trial, Gilman was not ineffective for failing to do more. This claim is without merit.

5. **Evidence of DWI**

Lucio argues that counsel was ineffective by failing to object to the admission during the punishment phase of her prior conviction for driving while intoxicated. As noted above, before her capital murder trial, Lucio pled guilty to a DWI committed in 2006. The plea followed Lucio's arrest and arraignment in this case. The plea was made without the assistance of counsel. Lucio argues that the admission of that conviction into evidence in this case violated her Sixth Amendment right to counsel.

Before trial, Gilman filed a motion *in limine* to keep the DWI out. The trial court never ruled on the motion. 1 CR at 140-41. Gilman later reminded the court of his motion, but the trial court again declined to rule. 32 Tr. at 7-8.

During the defense's punishment phase case, the State asked to reopen its case to admit the DWI. Gilman again objected, but the court granted the request. 37 Tr. at 170. The prosecution stated that it would seek to admit the conviction after the defense rested. *Id.* at 171. Gilman noted that the State would have to prove the conviction through fingerprints or some other proof that Lucio was the person convicted. *Id.* Instead, the State asked Lucio's mitigation specialist whether she was aware of the conviction and that Lucio used an alias. 38 Tr. at 35. The witness stated that she was aware of the DWI, but not the alias. *Id.* Gilman let the DWI come in this way.

In rejecting this claim, the state habeas court found that Gilman made a strategic decision to allow the conviction to come in this way, *i.e.*, "through a friendly witness," because it would have been admissible under TEX. CODE CRIM. PROC. art. 37.071. SH at 15. Lucio now argues that this was unreasonable because the conviction was inadmissible because it was based on a Sixth

Amendment violation.

As discussed above, however, Sixth Amendment rights are offense-specific. While Lucio asserts that her DWI plea was made without the benefit of counsel, she makes no argument for why the DWI conviction was inadmissible in this case other than that it was entered after she was charged with capital murder. Her Sixth Amendment right to counsel in this case, however, did not extend to the DWI case. Lucio thus identifies no basis for excluding the DWI plea. Because the conviction was admissible, the TCCA's conclusion that Gilman made a strategic choice to allow the conviction to come in through limited questioning of a friendly witness, rather than proof of Lucio's use of an alias through fingerprint evidence, was a reasonable conclusion. It is therefore entitled to deference.

E. *Brady*

Lucio contends that she was denied due process when CPS failed to turn over documents containing information useful in Lucio's mitigation case in sufficient time for the defense to use them at trial. Respondent argues that the claim is procedurally defaulted.

The TCCA found the claim defaulted, but did not explain the basis for the finding of default.[5] Instead, the TCCA cited to two of its own opinions. In*Ex Parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989), the TCCA held that a claim that could have been raised on direct appeal is procedurally defaulted if raised for the first time in habeas corpus. In *Ex Parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984), the court held that claims raised and rejected on appeal will not be reconsidered in an application for habeas corpus. Lucio argues that this citation to two cases renders the finding of default ambiguous.

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[5] In the alternative, the TCCA found the claim meritless.

The TCCA's citations concerned findings that several of Lucio's claims were defaulted. Read in context, it is clear that the default of this claim was based on *Banks*; Lucio did not raise a *Brady* claim in her direct appeal, therefore, *Banks* addresses the procedural posture of this claim and *Acosta* does not. There is no ambiguity, and the claim is procedurally barred. That bar precludes this Court from reviewing Lucio's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule, or a showing of a prior determination of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). Lucio makes no showing of cause.

A "miscarriage of justice" means actual innocence, either of the crime for which she was convicted or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, she would not have been legally eligible for a sentence of death. *Id.*

To show actual innocence,

> [T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986). More succinctly, the petitioner must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a

reasonable doubt" in light of the evidence now presented. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Lucio argues throughout her petition that the evidence she contends Gilman either improperly failed to present or improperly failed to exclude, or that was otherwise improperly excluded, would show that she is actually innocent. As discussed in regard to Lucio's substantive claims, however, she fails to demonstrate that evidence was improperly admitted or not presented, or that she was prejudiced by any error that did occur. She therefore fails to demonstrate that it is more likely than not that no reasonable juror would have found her guilty but-for any such error. Therefore, this Court's refusal to review this claim will not result in a fundamental miscarriage of justice. Because this claim is procedurally defaulted, and because Lucio fails to demonstrate either cause for the default or that she is actually innocent, this Court cannot grant relief on this claim.

F. Failure to Preserve Error

In her final claim of ineffective assistance of trial counsel, Lucio contends that Gilman was ineffective for failing to preserve error for appellate review. She identifies seven specific instances of alleged failure to preserve error: 1) failure to transcribe Lucio's recorded statement or the State's failure to provide such a transcript; 2)admission of custodial statement on the grounds that it was involuntary or the result of an illegal arrest; 3) admission into evidence of Lucio's DWI conviction; 4) exclusion of Villanueva's expert testimony on Lucio's ability to give a voluntary statement to the police; 5) exclusion of Dr. Pinkerman's expert testimony as to the voluntariness of Lucio's statement to the police; 6) admission of Beto Juarez' notes; and 7) the timing of the State's production of CPS records.

1. Unexhausted Claims

Lucio acknowledges that she specifically identified only two of these issues in her state habeas corpus application: Admission of the video of her statement to the police, and admission of Juarez' notes. Pet. at 145. She also states that she "incorporated by reference 'any other appellate issues' the CCA might subsequently deem 'waived by the failure to raise proper objection.'" *Id.* at 145-46. Respondent argues that the claims not specifically identified in Lucio's state habeas application are unexhausted.

AEDPA requires that a prisoner exhaust available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(I) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre -AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000); *see* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . .").

Lucio argues that the claims are properly exhausted because the TCCA had not yet issued its

opinion on Lucio's direct appeal at the time she filed her state habeas application, and she therefore did not know which claims that court would find unpreserved. This argument is unconvincing.

Any instance of deficient performance by trial counsel occurred at the time of trial. These claims were ripe immediately following Lucio's conviction and sentencing, and were in no way dependent on the TCCA's decision on Lucio's direct appeal. If Lucio had concerns that some of the claims of error she raised on appeal were not properly preserved for appellate review, then she had an obligation to raise any ineffective assistance of trial counsel claims related to the failure to preserve those points of error in her state habeas application. There was no downside risk to doing so. At most, any such claim would have been rendered moot if the TCCA found that the underlying claim was properly preserved. Therefore, all of these claims other than the claims that counsel failed to preserve error concerning admission of the video of Lucio's statement to the police, and the admission of Juarez' notes are unexhausted and this Court may not consider them. *Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989).

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present her unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. On habeas review, a federal court may not consider a state inmate's claim if the state court based its rejection of that claim on an independent and adequate state ground. *Martin v. Maxey*, 98 F.3d 844, 847 (5th Cir. 1996). A procedural bar for federal habeas review also occurs if the court to which a petitioner must present his claims to satisfy the exhaustion requirement would now find the

unexhausted claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. Tex. Code Crim.Proc.Ann. art. 11.071 § 5(a). The TCCA will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id. The TCCA applies its abuse of the writ doctrine regularly and strictly. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (per curiam).

Petitioner claims that she could not have presented these claims in her state habeas application because the factual or legal basis for the claim was unavailable because the TCCA had not yet decided her direct appeal. As discussed above, however, that argument is specious: the factual and legal bases for the claims existed as of the time counsel failed to preserve error. No subsequent finding that the error was unpreserved was required.

Lucio also contends that she is actually innocent. As discussed above, however, she fails

to demonstrate that, had any erroneously excluded evidence been admitted, or erroneously admitted evidence been excluded, that no rational juror could have found her guilty, or eligible for a death sentence. Therefore, Petitioner's unexhausted claims do not fit within the exceptions to the successive writ statute and would be procedurally defaulted in the Texas courts. *Coleman*, 501 U.S. at 735 n.1. That bar precludes this Court from reviewing Petitioner's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Id.* at 750. As discussed in detail above, however, Lucio demonstrates neither cause nor a fundamental miscarriage of justice. Therefore, this Court cannot grant relief on the unexhausted claims.

2. Exhausted Claims

As discussed in detail above, in connection with Lucio's claims that counsel should have moved to suppress her statement and Juarez' notes, there was no underlying constitutional violation. Lucio fails to demonstrate that her statement was involuntary, or that Juarez' actions violated her Fifth or Sixth Amendment rights. Because the admission of these pieces of evidence was not erroneous, there was no error for counsel to preserve, and he did not render deficient performance.

G. Judicial Comment on the Evidence

Lucio contends that her right to a fair trial by an impartial judge was violated because the trial judge made a facial expression during the testimony of her expert, Dr. Kuri. Following Dr. Kuri's testimony, the following exchange occurred between the trial judge and Gilman:

> THE COURT: Mr. Gilman, you said before proceeding further you wanted to take up some legal matters.
>
> MR. GILMAN: Yes, sir. I don't know if the Court is aware, but

> during the testimony this morning, there were facial remarks of Your Honor during the testimony. And those facial remarks conveyed things, even though maybe you had no intentions of conveying things to the jury, and I just am bringing this to the Court's attention because I would like the Court to try and refrain from making any facial gestures during the time of the testimony. If the Court is pleased or humorous of something that somebody might have said, I wish the Court would take that up after the jury is out.
>
> THE COURT: I made no conscious facial remarks for any specific purpose. But I will try and refrain from reacting in any way, either positively or negatively, as I have in the past. And any time counsel wants to make a standing bill on any of this, you are more than welcome to.
>
> MR. GILMAN: Like I said, I don't know if the Court is aware that the Court is doing it. But I am bringing it to the Court's attention.
>
> THE COURT: I was not.

35 Tr. at 91-92.

The state habeas court denied relief on this claim, finding that Lucio "failed to show that any voluntary or involuntary facial expressions alleged to have been exhibited by the Court constituted a comment on the weight of the evidence." SH at 17. This conclusion is reasonable.

It is beyond dispute that due process guarantees a criminal defendant a fair trial by an impartial judge. *See, e.g., Rose v. Clark*, 478 U.S. 570, 577 (1986). In this case, though, the only evidence that the trial judge made any kind of expression is the exchange quoted above. This exchange does not identify when the alleged expression was made, what it was, whether any juror actually saw it, or why the judge made it. While Lucio states in her point heading on this issue that the judge "laughed" at the witness, nothing in the record supports that conclusion. Lucio presents nothing to rebut the state habeas court's conclusion that the judge did not comment on the evidence,

not does she present any evidence that she was denied a fair trial. This claim is without merit.

H. Ineffective Assistance of Counsel Based on Failure to Provide a Complete Transcript

Lucio next complains that the State deprived her of effective assistance of appellate counsel because her statement to the police was never transcribed. The video of the interview was played for the jury, but the court reporter never transcribed it. The State offered to provide a transcript of the interview, 32 Tr. at 61-62, but apparently never did.

A defendant is constitutionally entitled to effective assistance of appellate counsel when she has a right to appeal under state law. *Evitts v. Lucy*, 469 U.S. 387, 395 (1985). The *Strickland* two-prong standard applies to claims of ineffective assistance of appellate counsel. *Duhamel v. Collins*, 955 F.2d 962, 967 (5th Cir. 1992).

In her state habeas application, Lucio complained that the video recording was inadequate to identify and argue appellate issues, complaining in particular that it was partially inaudible and some of the words spoken in the interview were in Spanish. The state habeas court found that the video was audible, that Lucio had the video, and that she failed to cite any authority holding that the State is obliged to provide a transcript of videotaped statements.

Lucio argues that the state habeas court's finding that the video was audible is an unreasonable finding based on the record. This Court has reviewed the video and found a number of short, isolated segments were, in fact, inaudible. The segments in question are, however, small and isolated, consisting of a word or two here and there. The video is mostly audible, and the state habeas court's conclusion is reasonable. *See also Lucio v. State*, 351 S.W.3d 858, 892 n.13 (Tex. Crim. App. 2011)(finding "that a word here or there might be inaudible").

Citing Texas law, Lucio argues that appellate counsel has a duty to review the record for error. This much seems uncontroversial. Lucio then goes on to argue, however, that the video recordings themselves were inadequate for this purpose. Pet. at 161. This argument is wholly conclusory.

The only case Lucio cites in support of this argument is *Perez v. State*, 824 S.W.2d 565 (Tex. Crim. App. 1992). In *Perez*, the court reporter's notes and tapes were lost, preventing the preparation of a trial record. *Id.* at 566. In sharp contrast, Lucio's counsel had the video of her police interview. Nothing was lost, and the state habeas court correctly found that Lucio had a complete record of the proceedings. She fails to demonstrate that appellate counsel was hindered in his ability to review the record and identify issues for appeal.

I. Actual Innocence

In her tenth ground for relief, Lucio contends that she is entitled to habeas corpus relief because she is actually innocent of capital murder based on her theories that Mariah's fatal injury was either caused by a fall, or caused by someone other than Lucio. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). This is so because "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact." *Id.* Therefore, this claim is not cognizable on federal habeas corpus review.

J. Lesser Included Offense Instruction

In her final claim for relief, Lucio argues that she was denied due process when the trial court

refused her request for a jury instruction on the lesser included offense of injury to a child. Due process requires a jury charge "on a lesser included offense if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit h[er] of the greater," *i.e.*, "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense . . . ." *Beck v. Alabama*, 447 U.S. 625, 635, 637 (1980) (citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)). Under these circumstances, "the failure to give the jury the . . . option of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake*Beck*, 447 U.S. at 637. A lesser included offense charge is required under these circumstances to avoid presenting the jury with a false dichotomy: either convict a defendant who is guilty of a serious non-capital crime (but not a capital crime) on the capital charge, or acquit her so as to avoid convicting her of the more serious offense. *See, e.g.*, *Hopper v. Evans*, 456 U.S. 605, 611 (1982). "[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [Texas] is constitutionally prohibited from withdrawing that option from the jury in a capital case." *Beck*, 447 U.S. at 638.

This claim is procedurally defaulted. Lucio raised this claim on direct appeal, but the TCCA found that the claim was inadequately briefed. *Lucio v. State*, 351 S.W.3d 878, 895-96 (Tex. Crim. App. 2011). The Fifth Circuit recently made clear that a dismissal for inadequate briefing is an independent and adequate state procedural ground.

> A survey of the TCCA's capital sentencing jurisprudence reveals that it regularly rejects claims, both on direct and postconviction review,

> on the basis that these claims are inadequately briefed . . . . [W]e hold now that under the prevailing standards, Texas's rules have been regularly followed by its courts, and applied to the majority of similar claims. . . . Our sister courts of appeal, in addressing analogous provisions from other states, have likewise found them to act as independent and adequate state procedural bars. *See House v. Hatch*, 527 F.3d 1010, 1029–30 (10th Cir. 2008) (holding that New Mexico's requirement of adequate briefing is an independent and adequate procedural bar to federal habeas relief); *Clay v. Hatch*, 485 F.3d 1037, 1040–41 (8th Cir. 2007) (holding that Arkansas's proper abstracting rule is an independent and adequate procedural bar to federal habeas relief).

Roberts v. Thaler, 681 F.3d 597 (5th Cir. 2012). *Roberts* thus makes it clear that the TCCA's dismissal of this claim as inadequately briefed constitutes a procedural default.

Lucio acknowledges that this claim is procedurally defaulted, but argues that this Court can consider it under the fundamental miscarriage of justice exception. As discussed above, however, Lucio fails to satisfy that standard. Therefore, this Court cannot grant relief on this claim.

IV. Certificate of Appealability

Lucio has not requested a certificate of appealability ("COA"), but this court may determine whether she is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does.").

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253© is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000).

The Court has carefully considered each of Lucio's claims and concludes that each of the claims is foreclosed by clear, binding precedent. Lucio thus fails to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court therefore concludes that Lucio is not entitled to a certificate of appealability.

V. Conclusion and Order

For the foregoing reasons, it is ORDERED as follows:

1. Respondent Lorie Davis' motion for summary judgment (Docket Entry No. 18) is GRANTED;

2. Petitioner Melissa Elizabeth Lucio's Petition for a Writ of Habeas Corpus (Docket Entry No. 6) is DENIED and DISMISSED WITH PREJUDICE; and

3. No Certificate of Appealability shall issue.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 28 day of September, 2016.

Hilda G. Tagle
United States District Judge

Appendix F

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-72,702-02

EX PARTE MELISSA ELIZABETH LUCIO

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 07-CR-885-B IN THE 138TH DISTRICT COURT OF CAMERON COUNTY

***Per Curiam*.**

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, TEX. CODE CRIM. PROC.

In July 2008, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Lucio v. State*, 351 S.W.3d 878 (Tex. Crim. App. 2011), *cert. denied*, 132 S.Ct. 2712 (2012).

Applicant presents ten allegations in her application in which she challenges the validity of her conviction and resulting sentence. The trial court did not hold an evidentiary hearing. The trial court adopted the State's proposed findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Additionally, grounds for relief one, two, and six are also procedurally barred. *See Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989); *Ex parte Acosta,* 672 S.W.2d 470 (Tex. Crim. App. 1984). Regarding ground for relief ten, while we note that the trial court's findings and conclusions are valid on the merits, the issue is not cognizable on habeas review. *See Ex parte Alba,* 256 S.W.3d 682 (Tex. Crim. App. 2008). Therefore, based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 9TH DAY OF JANUARY, 2013.

Do Not Publish

Appendix G

Cause No. 2007-CR-885-B

EX PARTE	§	IN THE 138TH JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
MELISSA ELIZABETH LUCIO	§	
	§	CAMERON COUNTY, TEXAS

STATE'S SECOND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas, Respondent herein, and submits to this Court its proposed Findings of Fact and Conclusions of Law, and in support thereof would show:

I.

On May 30, 2012, this Court found that there do not exist in this case any controverted, previously unresolved factual issues material to the legality of Applicant's confinement, and ordered the parties to file proposed findings of fact and conclusions of law for the Court's consideration. On June 11, 2012, the State filed its proposed findings of fact and conclusions of law. On June 19, 2012, this Court adopted the State's findings of fact and conclusions of law. On June 28, 2012, this Court issued an order striking the State's proposed findings of fact and conclusions of law and the Court's own findings of fact and conclusions of law. The Court ordered the parties to file proposed findings of fact and conclusions of law by July 13, 2012.

II.

Accordingly, attached hereto as Exhibit A is the State's second proposed Findings of Fact and Conclusions of Law.

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III.

WHEREFORE, PREMISES CONSIDERED, the State prays that the Court accept and adopt its proposed Findings of Fact and Conclusions of Law, to then be forwarded to the Court of Criminal Appeals.

Respectfully Submitted,

ARMANDO R. VILLALOBOS
Cameron County (District) Attorney

Michael Bloch
State Bar No. 24009906
Assistant County (District) Attorney

BY: _____
Michael Bloch

Post Office Box 2299
Brownsville, Texas 78522-2299
Phone: (956) 544-0849
Fax:(956) 544-0869

Attorneys for the State of Texas

Certificate of Service

I certify that on this 29th day of June, 2012, a true and correct copy of the foregoing document and attached exhibit was forwarded to Margaret Schmucker, counsel for Applicant, at 13706 Research Blvd., Suite 211-F, Austin, TX 78750

_____
Michael Bloch

002

Exhibit A

Cause No. 2007-CR-885-B

EX PARTE	§	IN THE 138TH JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
MELISSA ELIZABETH LUCIO	§	
	§	CAMERON COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAVING CONSIDERED the application for writ of habeas corpus, the State's answer thereto and the Court's file in the above-styled and numbered cause, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Applicant was taken into police custody and interrogated on February 17, 2007. Applicant was properly Mirandized and waived her rights before speaking to police; therefore, Applicant was not entitled to the presence of counsel at her interrogation.

2. Applicant was not brought before the Court for a magistration hearing until after the statement she gave police was obtained. Hence, the earliest time Applicant could have been appointed counsel would have been after Applicant provided her statements to police.

3. Although a 90-day delay ensued between Applicant's initial appearance before a magistrate and the eventual appointment of counsel, Applicant has not shown a causal nexus between the delay in the appointment of counsel and the statements obtained by police.

4. Applicant has not shown prejudice to the instant case as a result of her separate plea of guilty to the misdemeanor offense of Driving While Intoxicated. Applicant has not shown that her plea was a result of an unconstitutional confinement without the assistance of counsel.

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5. Therapist Beto Juarez, a CPS contractor, was not working in tandem with police at the time he interviewed Applicant. He was retained by CPS to offer mental health counseling, not to interrogate her. The police were not able to see the reports made by Juarez, as they were confidential. Juarez was not directed by the police. The purpose of his visits were non-investigatory. Therefore, Juarez was not an agent of the State such that he was required to Mirandize Applicant before speaking to her, or in any other way comply with Art. 38.22 of the Texas Code of Criminal Procedure.

6. Applicant has not shown that defense counsel was ineffective for failing to file a motion to suppress her statement to police. The record shows that at the time the statement was given Applicant received the required statutory warnings, indicated that she understood them, and proceeded to answer the officers' questions. She has failed to demonstrate that had a motion to suppress been filed it would have been granted.

7. During her interview with police, Applicant stated "I want to talk to my husband, I don't want to talk to nobody else." Given the context of the exchange, this was not an unambiguous statement that Applicant wished to invoke her constitutional right to remain silent. When the interviewer intimated that she could not see her husband, but would be allowed a cigarette, Applicant showed no signs of reluctance in continuing with the interview. Because this statement was not an invocation of her right to remain silent, defense counsel did not err in failing to file what would have been a futile motion to suppress based upon that statement.

8. Defense counsel retained and called to testify a qualified medical expert, Dr. Jose Kuri, to rebut the testimony of the State's pathologist regarding the cause of the victim's death. Defense counsel's strategy in this case was to assert that the fatal blunt force trauma to the victim was caused by a fall sustained some 48 hours prior to death. Dr. Kuri's testimony ably presented this theory of the case, challenging the testimony of the State's pathologist as to the age and etiology of the victim's trauma. Dr. Kuri presented testimony helpful to the defense, and defense counsel's decision to retain him was not erroneous.

9. Applicant asserts that defense counsel should have retained an expert sooner than he did, but points to nothing to indicate that the timing of the hire was erroneous, that Applicant suffered any harm or prejudice as a result of the timing of the hire, or that the outcome of the case would have been any different had an expert been hired at an earlier date. Therefore, she has not shown ineffective assistance of counsel as to this point.

10. Defense counsel was not deficient for failing to retain a pathologist in this case. Dr. Kuri testified that the victim's fatal injury was consistent with blunt force trauma from a fall down stairs. He further testified that the symptoms Applicant claimed the victim displayed in the day prior to her death could have been related to a progressive worsening of the victim's condition as a result of the blunt force trauma. Applicant has failed to demonstrate that a pathologist could have given any additional testimony that would have affected the outcome of the trial.

11. Applicant has failed to show that medical testimony challenging the etiology of the numerous contusions and abrasions found on the victim's body would have affected the outcome of the trial. Applicant admitted during her videotaped interview with police that she had abused the victim and caused all, except perhaps two, of the numerous contusions, including bite marks, to the victim's body; that interview was shown to the jury. Defense counsel strategically opted not to attempt to contradict these unambiguous admissions by offering alternative explanations for the contusions at trial. Instead, he conceded that the contusions were caused by Applicant, but denied that she was responsible for the blunt force trauma that actually killed the victim. This was sound trial strategy that did not constitute ineffective assistance of counsel.

12. Applicant has failed to show that defense counsel was deficient for failing to retain a pathologist to explain the "mistake" in Dr. Farley's autopsy report of substituting intuition for a scientifically defensible interpretation of forensic evidence. Dr. Farley clearly explained at trial the bases for her conclusion that the contusions and blunt force trauma were not the result of a fall down stairs, but rather of abuse – she drew this conclusion from the nature and location of the numerous wounds she found on the victim. This finding did not come about by "intuition;" rather, it was based on the forensic evidence she found during the autopsy. Hence, any purported "explanations" about intuition vs. interpretation would have been irrelevant and of no use to Applicant's defense, especially since Applicant admitted to causing all, except perhaps two, of the numerous contusions and abrasions found on the victim.

13. Applicant has failed to show that defense counsel was deficient in failing to afford her mitigation specialist adequate time to complete her investigation. The mitigation specialist had 5 months, 17 days to complete such investigation, and Applicant has failed to demonstrate that the tasks the mitigation expert claims she needed to conduct could not have been completed within that time-frame.

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14. Applicant's mitigation specialist was provided with Applicant's family contact information when jury selection began on May 28, 2008. The mitigation specialist then had 42 days to conduct family interviews in connection with the preparation of a social history. Applicant has produced no evidence to support any assertion that this was an insufficient length of time to gather that information. Applicant has also failed to show how any additional interviews would have yielded a social history that would have affected the outcome of the trial – the mitigation expert interviewed Applicant, and sisters Diane and Sonya in connection with the report and reviewed CPS records relating to Applicant. No ineffective assistance of counsel has been shown.

15. Defense counsel made full use of the mitigation expert. The mitigation expert gathered enough evidence to enable her to testify extensively regarding Applicant's social history, covering such areas as her troubled childhood, sexual abuse perpetrated upon her by her mother's boyfriend, physical abuse at the hands of her siblings, her lack of a history of aggression, her suffering physical and emotional abuse at the hands of her husband and subsequent boyfriend, her cocaine addiction, her history of homelessness, her history of having children at a very young age, and her fitting the profile of an individual suffering from battered woman's syndrome.

16. The mitigation expert also testified as to Applicant's history with CPS, including when her children were taken and returned to her, the evolution of Applicant and her children's home life, aggressive behavior between siblings that allegedly occurred within the household, Applicant's poverty, and the results of various drug tests administered to Applicant by CPS. Defense counsel was not ineffective in eliciting that testimony.

17. The mitigation expert thoroughly covered issues relevant to Applicant's family and personal life, and Applicant has failed to show how defense counsel in any way erred in failing to present, pursue or develop such issues, much less that but for defense counsel's error the outcome of the trial would have been different.

18. Defense counsel was not deficient in failing to point out that her husband was the last person to see the victim alive. That fact, even if true, was irrelevant to defense counsel's strategy, which was to argue that the victim's fatal injury was due to a fall down stairs that occurred some 48 hours prior to death.

19. Defense counsel was not deficient for failing to present a questionable claim by one of Applicant's daughters, Alexandra, that "she was the reason that [the victim] fell down the stairs." This claim, even if true, is not probative evidence that someone other than Applicant caused the death of the victim.

Defense counsel's decision not to attempt to present this evidence was trial strategy because Alexandra and her sister, Celina were giving conflicting stories that were not particularly credible. Furthermore, defense counsel may have justifiable feared that putting those children on the stand would backfire, as they might deny having caused any abuse and point to Applicant as the perpetrator. Again, Applicant admitted during her videotaped statement that she caused all, except perhaps two, of the numerous wounds found on the victim's body. Attempting to bring in children to testify that they had caused the bruising would have simply confused the issues and would not have furthered trial counsel's strategy to argue to the jury that Applicant truthfully told the police she had caused these wounds but not the fatal blunt force trauma that killed the victim.

20. Applicant fails to point to any evidence to support her assertion that mitigation psychiatrist Dr. John Pinkerman did not have adequate time to prepare for trial. Applicant claims Dr. Pinkerman felt he did not have enough meetings with defense counsel, but fails to specify or prove what additional meetings would have yielded, how the number of meetings they had constituted error on the part of defense counsel, or how additional defense team meetings would have affected the outcome of the trial. No deficiency on the part of defense counsel has been shown.

21. Applicant has failed to provide any evidence to substantiate her claim that defense counsel failed to properly utilize Dr. Pinkerman. She makes vague, conclusory claims that defense counsel failed to pursue or develop "mental health issues" and "personality dynamics" and fails to specify what exactly defense counsel did not develop, how defense counsel did not develop it, why defense counsel's failure to develop it was erroneous, or how developing it would have changed the outcome of the trial. Relief should be denied because the Applicant states only conclusion, and not specific facts.

22. Dr. Pinkerman testified extensively during punishment as to Applicant's psychological functioning, including findings that her IQ was in the low average range with verbal comprehension scores that were close to the mentally retarded range, that she was overutilizing repression and denial, that she had major depression with prior substance abuse, that she suffered from Post-Traumatic Stress Disorder (PTSD), that she was the victim of prior physical and sexual abuse both as an adult and as a child, that her PTSD caused her to have some distance from people in position or trust or authority, that there were indications that she suffered from battered woman's syndrome, that her personality features involve hysterical features, characterized by repression, denial, isolation and disassociation of feelings and thoughts, and that there was a low probability that she would reoffend in a prison setting.

Applicant has failed to show how or why additional "development" or "exploration" of this topic was necessary, how the failure to include it constituted error on the part of defense counsel, or how this additional development or exploration of mental health issues would have affected the outcome of the trial. No ineffective assistance of defense counsel has been shown.

23. With regard to Applicant's claim that defense counsel was deficient for failing to elicit testimony from Dr. Pinkerman regarding false confessions, because he only testified after Applicant had been found guilty, any such testimony would have been moot and of no use to the defense.

24. Defense counsel ably and thoroughly utilized the services of Ms. Villanueva and Dr. Pinkerman in developing and presenting mitigation and future dangerousness evidence, and Applicant has failed to show any deficiency therein.

25. Defense counsel was not deficient for failing to introduce alternative theories of the extensive injuries found on the victim's body. Applicant admitted during police questioning that she caused all, except perhaps two, of these injuries, and defense counsel had to operate under that constraint. Hence, his sound trial strategy was to admit the physical abuse, but deny that Applicant inflicted the fatal blow, which she attributed to a fall down stairs.

26. Applicant has failed to show that defense counsel was deficient for failing to call certain CPS workers and foster parents to testify, because she has failed to demonstrate that their testimony would have been beneficial to her, or that it would have affected the outcome of the trial. Moreover, the matters the CPS workers and foster parents would supposedly have testified to were either irrelevant or cumulative of testimony given by other witnesses in the case.

27. Defense counsel elicited testimony from Applicant's sister and CPS worker Joanne Estrada, both of whom testified that they had no knowledge of Applicant's ever being physically abusive to any of her children. This testimony was sufficient in furthering Applicant's allegation that she did not physically discipline her children. This testimony and any other testimony purporting to show that Applicant was not physically abusive toward her children would be of limited, if any, value given that Applicant admitted to police that she had caused the extensive injuries found on the victim. No deficiency on the part of defense counsel has been shown.

28. Defense counsel was not deficient for failing to call two of Applicant's young sons, Richard and Rene, to testify. During their forensic interviews, they both

stated they did not know how the victim died, and that they had seen no visible marks or bruises on the victim. It is undisputed that numerous bruises, abrasions and contusions of varying ages were found on the victim, and that Applicant admitted to police that she had caused nearly all of them. Any attempt to introduce evidence suggesting that no abuse occurred at all would have been of dubious probative value, confuse the issues, and likely cause the defense to lose credibility with the jury, especially since these two witnesses would have been young children.

29. Applicant's son Rene did advise the forensic interviewer that he saw the victim fall down some steps, but the fall he described was not at all consistent with the blunt-force trauma that actually caused the victim's death. Hence, defense counsel was not deficient for opting not to present testimony that would have been of virtually no evidentiary value.

30. Applicant's sons Richard and Rene also made statements to the forensic interviewer that would have been directly detrimental to Applicant's defense. They both stated that violence was a regular occurrence in Applicant's household, and that Applicant was an aggressor. Had the boys testified to this at trial, it would have impeached Applicant's own expert testimony that she had no history of violence. Defense counsel's sound trial strategy was to keep the jury from hearing about Applicant's violent tendencies.

31. Defense counsel was not deficient for opting not to call the victim's older brother, John Alvarez, to testify. Alvarez is a convicted felon who was previously banned from Applicant's household for sexually molesting his siblings. His history would have rendered him a less than credible witness, and defense counsel's decision not to call him certainly did not rise to the level of error.

32. Defense counsel was not deficient for not attempting to place the blame for the murder on Applicant's daughter Alexandra. The evidence submitted by Applicant in support of this claim, an unsworn hearsay "affidavit," which reports further hearsay from three sources, does not rise to the level of credible evidence justifying relief in this case. Furthermore, even if the statements made -- that two of the victim's sisters physically struck the victim at some point -- were true, they are not probative of who administered the final blunt force trauma that caused the victim's death. Such an attempt to blame Alexandra for the victim's injuries also would run contrary to Applicant's admission to police that she was responsible for all but two of the injuries found on the victim.

33. Applicant has failed to demonstrate that defense counsel was deficient for failing to "further investigate" or "present evidence" placing the blame on Alexandra because she does not specify what type of further investigation should have been done or what evidence it would have revealed.

34. Applicant has failed to demonstrate that defense counsel was deficient for failing to "investigate and/or present available evidence" that Applicant's husband, Robert Alvarez, could have caused some of the victim's injuries. Alvarez was one of numerous people who had access to the victim at various times, and his supposed violent nature was supported only by Applicant's self-serving reports to her mitigation experts, and contradicted by CPS records. Moreover, Applicant admitted to police that she had caused the myriad of injuries to the victim and, when asked whether Alvarez had ever "spanked" the victim as she had done, Applicant shook her head in the negative. Defense counsel had no reasonable basis for arguing that Alvarez harmed the victim; hence, his failure to do so was not erroneous.

35. Defense counsel was not deficient for failing to call Robert Alvarez as a witness in an attempt to prove that Applicant was not alone with the victim during the timeframe in which the fatal blunt force trauma occurred. Alvarez's statement to police indicates that he witnessed Applicant physically abuse the victim, and defense counsel certainly did not want that type of testimony before the jury. Furthermore, Alvarez's statement does not prove that Applicant was never alone with the victim; in fact, he states that one day prior to the victim's death he and some of his children left the family apartment at least twice to deliver belongings to a new residence, and while he was gone Applicant was alone in the apartment with the remaining children, including the victim. Given this evidence, defense counsel could not have credibly argued that Applicant was not alone with the victim prior to the murder, and his failure to attempt to do so was not deficient performance.

36. Defense counsel was not deficient for failing to argue that Applicant was able to explain innocuous sources for many of the victim's injuries. During her recorded statement to police, she did first attribute the victim's bruises to mosquito bites, rough play between the children and self-injury. However, later in the interview she admitted to causing all of those injuries. Once the jury heard that confession, any prior explanations were moot, and defense counsel did not err in failing to urge them at trial.

37. Defense counsel was not deficient for failing to argue that Applicant did not know the extent or severity of the victim's injuries. During her videotaped interview with police, she admitted her knowledge of the victim's injuries to the interviewing officers, stating that she did not take her child to the doctor

because "I knew that they would accuse me just like y'all are accusing me now." Later, she admitted having caused all but two of those injuries to the victim. Certainly, then, Applicant knew of the injuries, since she admitted having inflicted them. Defense counsel could not have credibly argued that Applicant was unaware of what she caused.

38. Defense counsel was not deficient for failing to dispel the notion that Applicant was indifferent to the victim's needs. Applicant claims that defense counsel should have presented certain CPS visitation records as evidence that Applicant was a caring parent. However, the totality of evidence in this case, including numerous other records prepared by CPS, show otherwise. Given that Applicant was investigated for neglect and/or abuse in 1995, 1996, 1998, 2000, 2001, 2002, 2003 and 2004, any claim made by defense counsel that Applicant was a good parent would have been superfluous at best.

39. Applicant's complaint about this Court's exclusion of her mitigation experts from the guilt-innocence portion of the trial is nearly identical to issues nine and ten raised on direct appeal. Matters raised on direct appeal should not be re-litigated on habeas unless the judgment is subsequently rendered void or a subsequent change in the law is made retroactive. While additional evidence may warrant relief even when the issue was raised on direct appeal, Applicant has not demonstrated that she is entitled to relief herein because of any additional evidence herein.

40. Moreover, this Court did not abuse its discretion in excluding the testimony of Norma Villanueva and Dr. John Pinkerman from the guilt-innocence portion of the trial. Ms. Villanueva proffered nothing to indicate that she had any sort of specialized experience, knowledge or training in the area of interpreting body language and patterns of behavior during police interviews. Dr. Pinkerman's proffered testimony as to Applicant's psychological functioning, including how there was little support in the "historical record" for the idea that Applicant physically abused her children, that she suffered from battered woman syndrome, and the meaning of her demeanor after the incident and during questioning had no relevance to the question of Applicant's guilt or innocence.

41. Defense counsel did not err in not objecting or otherwise attempting to exclude CPS evidence pertaining to Applicant's history of abuse and neglect of her children. The evidence was permissible because it spoke to the previous relationship between Applicant and the victim. At trial, Applicant marshaled the defensive theory that the victim's death was called by a fall down stairs; this brought Applicant's intent into issue, making the abuse evidence relative and probative under Tex. Code Crim. Proc. 38.36.

42. Defense counsel did not err by failing to object to portions of the testimony of the emergency room physician, Dr. Alfredo Vargas, who was not previously designated as an expert witness. Dr. Vargas did not testify as an expert when describing his views of the victim's injuries. Instead, he testified as a lay witness under Texas Rule of Evidence 701, making observations or inferences rationally based on the perception of Dr. Vargas and helpful to a clear understanding of his testimony or the determination of a fact in issue.

43. Defense counsel did not err in not objecting to portions of the testimony of Ranger Victor Escalon, who was not previously designated as an expert witness. Again, Ranger Escalon's testimony was that of a lay witness under Texas Rule of Evidence 701, making observations and inferences rationally based on his testimony of the determination of a fact in issue.

44. Defense counsel was not deficient for failing to object to comments made by investigating officers during the taping of her oral statement. Their statements regarding the injuries seen on the victim were lay observations pursuant to Texas Rule of Evidence 701. Their statements regarding the injuries, as well as statements advising Applicant that her significant other claimed that Applicant hid those injuries from him, were not hearsay because they were not offered for the truth of the matter asserted. Instead, these statements were made to Applicant to advise her as to how and why she had become a suspect. Moreover, any officer testimony regarding such injuries was harmless because it was cumulative of testimony from both Dr. Vargas and Dr. Farley.

45. Defense counsel was not ineffective for failing to object to questions regarding CPS interviews of Applicant conducted by Dr. Beto Juarez for the reasons set forth in Finding of Fact No. 5 herein.

46. Defense counsel was not deficient for failing to challenge Dr. Farley's expert testimony as "scientifically invalid, subjective and conclusory." Dr. Farley thoroughly explained the basis for her opinions as a long-practicing pathologist, and Applicant has failed to show this Court that such testimony was in any way "scientifically invalid, subjective and conclusory."

47. Defense counsel was not deficient for failing to object to the State's evidence of the victim being shaken as "junk science, sheer speculation and more prejudicial than probative." Shaken-baby syndrome was at best an ancillary issue at the trial. The medical experts in this case agreed that the victim was not killed by shaking, but rather blunt force trauma to the head. Because the "shaking" issue was of so little importance during the trial, Applicant has failed to show that defense counsel erred in not objecting to this testimony,

and there is no reasonable probability that the outcome would have been different had this limited evidence not been introduced.

48. Defense counsel was not deficient for failing to object to Dr. Farley's testimony regarding the results of an eye pathology report. During her testimony, Dr. Farley made mention that she had personally examined the victim's eyes and saw retinal hemorrhaging indicative of blunt force trauma. She then indicated that she had sent the victim's eyes to an eye specialist, who found the same thing. Because Dr. Farley's own personal observation were substantially the same as that of the specialist, the testimony was cumulative and defense counsel's objecting to it would not have changed the outcome of the case.

49. Defense counsel was not deficient for objecting to Dr. Farley's mention that she had spoke to a non-testifying odontologist who advised her that the marks on the baby were teeth marks. Applicant did not suffer any harm as a result of that brief statement, as the record was already replete with testimony and exhibits showing that the marks were bite marks. Hence, the odontologist's statement that the marks were bite marks was simply cumulative of other testimony. Moreover, allowing the odontologist's findings into evidence was likely a strategic move – the odonotologist could say these were bite marks, but had no evidence to show that Applicant was the one who inflicted them.

50. Defense counsel was not deficient for opting not to object to certain questions asked Dr. Kuri by the State. Dr. Kuri was retained by the defense to testify regarding the blunt force trauma that caused the victim's death. In an effort to frame Dr. Kuri's testimony, the State asked him if he could opine as to the other injuries found on the victim's body. Dr. Kuri rightfully said he could not. This was proper questioning on the part of the State, and there was nothing to which defense counsel could have objected.

51. Defense counsel was not deficient for opting not to object to testimony regarding drug paraphernalia found in Applicant's home. The paraphernalia was contextual evidence offered to show the jury the circumstances of the environment within which Applicant had continually abused and eventually murdered the victim. As such, this was not objectionable testimony. Moreover, defense counsel vigorously challenged the State's theory that the materials found were drug paraphernalia both through cross-examination and closing argument. Furthermore, even excluding this evidence would not have affected the outcome of the trial, since the jury was informed that Applicant had failed at least 17 of the 29 drug tests administered by CPS.

52. Defense counsel was not deficient for failing to object to the State's punishment phase question regarding Applicant's previous DWI conviction. This was a strategic decision, as the evidence would likely come in pursuant to art. 37.071 CCP and counsel opted to allow it to be entered through a friendly witness rather than giving the State the opportunity to reopen its case and have the last word with the jury.

53. The State did not violate *Brady v. Maryland* with its disclosure of certain CPS documents, as the State was in a continuous collection and disclosure of these records. Those records that were not produced until shortly before trial were a result of CPS' failure to comply with this Court's order to produce them. The State did not intentionally or knowingly prevent the production of evidence; the inadvertent delay was the result of the voluminous and complex nature of the documents sought, along with the vagaries of inter-agency requests. Applicant has demonstrated no harm by the date of the final disclosure; no statement appears in either the Application itself nor the record that defense counsel felt he was unable to adequately review the material and use it at either guilt/innocence or punishment.

54. With regard to the disclosure of Maggie's house interviews, the State advised defense counsel and the Court that it did not contain *Brady* material and therefore need not be disclosed under Brady. This Court conducted an *in camera* inspection and agreed. Nonetheless, the interviews were eventually turned over to defense counsel. Even if all of the material were *Brady* material, and even if it were disclosed in an untimely fashion, Applicant has not demonstrated prejudice by the delay, and is therefore not entitled to a new trial.

55. The videotaped statement Applicant made to police, States Exhibits 3, 4 and 5, is audible.

56. Defense counsel was not deficient for failing to object to mentions made at trial of the findings of Beto Juarez for the reasons stated in finding of fact 5 herein.

57. Defense counsel objected to this Court's alleged "facial expressions" during the testimony of Dr. Kuri; however, this occurred after Dr. Kuri had left the stand. Therefore, this Court is without the benefit of a timely and specific objection and a proper context in which to place the alleged expressions. Absent such context, Applicant has failed to show that any voluntary or involuntary facial expressions constituted a comment on the weight of certain evidence.

58. With regard to Applicant's claim that her appellate counsel did not have a complete record, the record in this case shows that State's Exhibits 3, 4 and 5 are in evidence and were played to the jury. The fact that no transcription was made does not render the evidence "missing." Applicant has cited to no authority that the State is obliged to provide a transcription of videotaped statements it introduces, and both Applicant's writ and appellate counsel were able to review State's Exhibit's 3, 4 and 5. The Court of Criminal Appeals has already ruled that the record in this case is complete. *See Lucio v. State*, 351 S.W.3d 878 (Tex. Crim. App. 2011).

59. The affidavits of Sonya Chavez and Esperanza Trevino, which attempt to place blame for the murder upon two of Applicant's children, are not credible. Furthermore, even if they were credible, they fail to establish that Applicant is "unquestionably innocent;" that is, the affidavits fail to by themselves support a finding of innocence by a clear and convincing standard.

60. Applicant's claim that she has shown actual innocence by virtue of her own allegation that she was not alone with the victim fails to show such innocence by a clear and convincing standard, especially given the circumstances set forth in Finding of Fact No. 35 herein.

CONCLUSIONS OF LAW

1. No coerced statement of the Applicant was obtained by law enforcement.

2. CPS contract therapist Beto Juarez was not acting in tandem with law enforcement when he counseled Applicant.

3. Applicant has failed to show that her counsel's performance was deficient in any manner.

4. Moreover, in the cases where Applicant alleges deficiency of counsel, she has failed to show that the outcome of the trial would have been different had defense counsel acted in the manner she alleges would have been appropriate in the situation.

5. Applicant has not overcome her burden to show that defense counsel's actions were not sound trial strategy.

6. This Court did not abuse its discretion in excluding the testimony of Norma Villanueva and Dr. John Pinkerman.

7. The State did not violate *Brady v. Maryland* with its disclosure of CPS documents and Maggie's House interviews.

8. Applicant has failed to show that any voluntary or involuntary facial expression alleged to have been exhibited by the Court constituted a comment on the weight of certain evidence.

9. Applicant's trial, appellate and habeas counsel have a complete record of this case.

10. The affidavits of Sonya Chavez and Esperanza Trevino fail to support a finding of innocence by a clear and convincing standard.

11. Applicant's claim that she was never alone with the child is contradicted by the record and hence does not support a finding of innocence by a clear and convincing standard.

12. Applicant is not entitled to habeas relief.

RECOMMENDATIONS

The court, having considered the above, recommends that the requested relief be **DENIED**.

ORDER

IT IS ORDERED THAT the clerk transmit forthwith this Order, together with all relevant instruments on file that relate to Applicant's Application for Writ of Habeas Corpus, to the Clerk of the Texas Court of Criminal Appeals.

SIGNED ON THIS THE 23rd day of July, 2012.

Judge Presiding
138th District Court
Cameron County, Texas

FILED 1:40 O'CLOCK P M
AURORA DE LA GARZA, CLERK

JUL 23 2012

DISTRICT COURT OF CAMERON COUNTY, TEXAS
DEPUTY

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CC:
A.D.A.
Margaret Schmucker
07/23/12 F.C.