No. 21-5426

IN THE

Supreme Court of the United States

STEPHEN C. SHOCKLEY,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR TDCJ-CID,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent objects to the Petitioners' Questions Presented because they assume certain procedural, legal, and factual premises that are demonstrably unfounded, as established more fully below. Respondent, therefore, suggests the following Questions Presented:

1. Since Shockley presented his *Darden* claim for the first time on appeal, did the circuit court properly deny COA because **(1)** Habeas Rule 11(a) requires a district court to first deny COA for his *Darden* claim, **(2)** the *Darden* claim is successive under 28 U.S.C. § 2244(b)(2), depriving the circuit court of jurisdiction to consider the claim, and **(3)** Fifth Circuit precedent provides that the court will not consider an argument raised for the first time on appeal?

2. Did Shockley waive his *Cone v. Bell* argument by not presenting it to the courts below?

3. As necessary to justify granting Shockley's COA under *Slack v. McDaniel*, was the prosecutor's comment referring to an extraneous offense at the end of summation improper and, if so, did it render Shockley's trial fundamentally unfair?

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BRIEF IN OPPOSITION

Respondent, Bobby Lumpkin, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, ("the Director"), respectfully files this brief in opposition to Stephen C. Shockley's petition for writ of certiorari.

OPINIONS BELOW

1. The Fifth Circuit's order denying Shockley's motion for certificate of appealability is unreported but can be found at Pet. Cert. App. A.

2. The district court's judgment and reasoned decision denying Shockley's federal habeas petition is unreported but can be found at Pet. Cert. App. B.

3. The Texas Court of Criminal Appeals' order denying Shockley's state habeas application is unreported but can be found at Pet. Cert. App. C.

4. The intermediate state court's opinion affirming Shockley's judgment of conviction and sentence on direct appeal is unreported but can be found on Westlaw at *Shockley v. State*, No. 05-12-01018-CR, 2014 WL 3756301 (Tex. App.—Dallas July 30, 2014, pet. ref'd); Pet. Cert. D.

STATEMENT OF JURISDICTION

Since Shockley seeks review of the Fifth Circuit's denial of a certificate of appealability (COA), the Court has jurisdiction under 28 U.S.C. § 1254(1); *see Hohn v. United States*, 524 U.S. 236, 253 (1998) ("Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals.").

STATEMENT OF THE CASE

I. Factual Background

Shockley repeatedly sexually assaulted his niece, E.B. beginning when she was about five years old. *Shockley v. State*, No. 05-12-01018-CR, 2014 WL 3756301, at *1–2 (Tex. App.—Dallas 2014, pet. ref'd). Eventually, E.B. told her father which led to a forensic interview when she was eleven years old. *Id*. At trial, Shockley pursued a defense suggesting that E.B. was a troubled child who had fabricated her allegations in response to a broken home life and suggestions from her father and grandmother. *Id*.

Shockley's defense triggered rebuttal testimony from the State in the form of another allegation from a second victim, Kristen, who claimed Shockley sexually abused her. Kristin, who was about thirty years old at the time of trial, testified that Shockley was her foster father from when she was thirteen years to sixteen years old. *Id*. Starting when she was thirteen, Shockley began fondling her genitals as she slept. *Id*. His molestation continued over the years and progressed to oral sex and sexual intercourse by the time Kristen was sixteen. *Id*.

During closing argument, Shockley's counsel argued that E.B. and Kristen were "troubled children" who fabricated their allegations. Resp't App. A (4 RR 75–87). In rebuttal, the prosecution argued that E.B. and Kristen were credible, closing with the following plea: "I ask you to find

the defendant guilty because not only did he hurt Kristen so many years ago he's hurt a second child and justice demands that he be found guilty. Resp't App. A (4 RR 88–95).

II. Procedural History

After the jury convicted and sentenced Shockley to ninety-nine years' confinement for continuous sexual abuse of a child, Shockley proffered mutating legal arguments to support his premise that the State improperly relied on extraneous offense evidence to convict him.

A. Direct appeal

In his state direct appeal and petition for discretionary review, Shockley challenged the admission of Kristen extraneous offense testimony claiming only that the trial court misapplied the Texas Rules of Evidence in allowing Kristen's testimony; however, the appellate court rejected the argument and affirmed his conviction, and the Texas Court of Criminal Appeals (TCCA) refused his PDR. Resp't App. B, C;[1] *Shockley,* 2014 WL 3756301, at *2–5 (demonstrating that the intermediate Texas appellate court addressed only an evidentiary claim).

[1] "Resp't App." refers to the Director's appendices accompanying this brief in opposition.

B. State habeas review

On state habeas review, Shockley claimed, in pertinent part, that the prosecution violated his due process rights by relying on extraneous offense testimony, which resulted in a constructive amendment of the indictment against him by effectively putting him on trial for a second, unindicted crime. Resp't App. D at 10–11 (state habeas application). In reviewing this claim, the state habeas trial court found that "[t]he admissibility of the extraneous offense was raised on direct appeal," and "[c]laims that are raised and addressed on direct appeal cannot be relitigated in habeas corpus." Resp't App. E (state habeas trial court findings of fact and conclusions of law). The TCCA denied Shockley's state habeas application on the findings and recommendations of the trial court and on its own independent review of the record. Resp't App. F (TCCA order denying relief).

C. Federal habeas review

When he filed the federal habeas petition at issue here, Shockley again framed this constitutional challenge as a violation of due process "when the state engaged in constructive amendment of the indictment" by repeatedly citing the extraneous offense. Resp't App. G at 6 (ground one); Resp't App. H at 9–10. In its report and recommendations (R&R)—which the district court adopted—the federal magistrate construed this claim as an alleged violation of his "right to due process when the state constructively amended his indictment

by presenting evidence of an unadjudicated, extraneous offense." Resp't App. I at 2 (magistrate R&R); Resp't App. J at 1–3 (order adopting R&R). Finally, the Director also construed the claim as an indictment challenge and argued that it was not a cognizable habeas claim and was otherwise meritless. Resp't App. K at 9–11.

However, in resolving Shockley's contention that his due process rights were violated because the prosecutor's reference to the extraneous offense evidence constructively amended the indictment, the magistrate determined the claim to be procedurally defaulted because the state habeas court refused to consider it after concluding it had been raised and rejected on direct appeal.[2] Resp't App. G at 7–8. By adopting the R&R, the district court necessarily determined that the claim was procedurally defaulted because it had been raised and rejected on direct appeal. Resp't App. I at 7–8; Resp't App. J.

In requesting COA regarding this claim in the Fifth Circuit, Shockley again reframed his claim, this time as prosecutorial misconduct, alleging improper closing argument for invoking the extraneous offense evidence to support a guilty verdict. Exhibit I at 7–11. Shockley also argued that the district court's invocation of the state procedural bar to preclude merits review

[2] The magistrate also addressed the merits of Shockley's claim in a brief footnote, noting that "Even if this issue was not barred, Petitioner's jury charge did not include an additional crime that was not presented in Petitioner's indictment." Resp't App. G at 8 n.1.

of this claim was incorrect because his arguments on direct appeal and state habeas proceedings were distinctly different arguments. *Id.* at 15–17. The Fifth Circuit denied Shockley's motion for COA without explanation. Resp't App. M.

Shockley then filed this petition for writ of certiorari raising the following Question Presented:

> When the federal district court refuses to hear the due-process component of a state habeas claim because that claim was twice presented to the State and therefore suffers a state-relitigation bar, does the district court's refusal constitute error in light of this Court's holding in *Cone v. Bell*, 556 U.S. 449 (2009)?

Cert. Pet. at 2.

ARGUMENT

I. Certiorari Should Be Denied Because Shockley Fails to Demonstrate that the Fifth Circuit Erred When It Denied COA under 28 U.S.C. § 2253(c)(2).

A. The test for COA

This Court's certiorari jurisdiction extends to review a circuit court's decision to deny an application for COA. *See Hohn*, 524 U.S. at 253. To this end, in seeking COA with respect to the district court's *procedural* determination regarding application of a state procedural bar, Shockley was required to meet *two* separate legal tests, "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Slack v. McDaniel*, 529 U.S. 473, 485 (2000) (citing 28 U.S.C. §

2253(c)). Specifically, Shockley was required to (1) make a substantial showing that jurists of reason would find it debatable whether his petition stated a valid claim of the denial of a constitutional right; *and* (2) show that jurists of reason would find it debatable that the district court was correct in its procedural ruling. *Id*. at 484; *Jimenez v. Quarterman*, 555 U.S. 113, 118 n.3 (2009) (finding that a COA may issue "only when the prisoner shows both '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'") (quoting *Slack*, 529 U.S. at 484).

B. In seeking COA, Shockley fundamentally altered his underlying due process challenge.

In requesting COA from the Fifth Circuit, Shockley challenged the district court's procedural ruling regarding the propriety of the state habeas court's decision to default his due process challenge. Resp't App. L at 7–9. In making this challenge, Shockley recognized that, to obtain COA to review this procedural complaint, he was also required to demonstrate that jurists of reason would find it debatable whether his underlying due process allegation presented a valid claim of the denial of a constitutional right. *Id*.

But Shockley fundamentally changed his underlying due process claim in his COA application. Specifically, in support of his motion for COA in the

Fifth Circuit, he argued for the first time that the prosecutor's reference to the extraneous offense evidence in support of a guilty verdict, during closing argument, was *itself* a freestanding due process violation under *Darden v. Wainwright*, 477 U.S. 168, 181 (1986),[3] irrespective of its effect on the indictment. *See e.g.*, Resp't App. L at 7–11. In other words, Shockley abandoned the due process contention he raised in the district court, i.e., the effect the extraneous offense evidence had on the *indictment*, and replaced it with *Darden* error. *See* Resp't App. K at 9 ("The prosecutor's arguments were therefore improper because they aimed to divert the jury from its sworn duty to decide the case on the evidence and the law and to focus instead on issues broader than the guilt or innocence of the accused under controlling law."); *see also id*. at 7 (showing Shockley's reliance on *Darden*).

C. The Fifth Circuit did not err when it denied COA, whether (or not) the district court's procedural ruling was correct.

In his petition for certiorari, Shockley argues that the lower court improperly denied COA to consider his *Darden* claim. Cert. Pet. at 4–10. But, because he did not present a *Darden* claim to the district court, the district court could never have "denied" COA on the claim. And absent a district court

[3] In *Darden*, the Court identified the test the federal courts must use in federal habeas when reviewing a claim that a state prosecutor's arguments or comments violated the Due Process Clause. *Darden*, 477 U.S. at 181 ("The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

decision denying a *Darden*-claim, Shockley can never establish that the Fifth Circuit misapplied *Slack* when it denied COA on the related *procedural* question for at least three reasons.

1. In pressing a new due process violation in support of COA, Shockley violated Habeas Rule 11(a).

Habeas Rule 11(a) mandates that a district court must grant or deny COA on a given claim when it enters final judgment. Rule 11(a), 28 U.S.C. foll. § 2254. Relatedly, where the district court denies a COA pursuant to that mandatory command, a petitioner "may not appeal the denial but may seek a certificate from the court of appeals" pursuant to Rule 22 of the Federal Rules of Appellate Procedure, which explicitly incorporates the mandatory requirements of 28 U.S.C. § 2253. *See id.* (citing Fed. R. App. P. 22(a)). By attaching a new due process claim to his procedural challenge—in an effort to comply with *Slack*—Shockley bypassed the "district court first rule" in Habeas Rule 11(a). In other words, in failing to raise an available constitutional claim upon which the Fifth Circuit might justify granting COA under *Slack*, Shockley fails to demonstrate error when the lower court denied COA. *See Slack*, 529 U.S. at 485 (explaining that when a court determines whether to grant COA regarding a procedural issue "a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.").

2. The Fifth Circuit was without jurisdiction to grant COA on the procedural question because the corresponding due process claim was "successive" under 28 U.S.C. § 2244(b)(2).

Any claim "presented in a second or successive" application "that was not presented in a prior application *shall be dismissed*" unless the petitioner first seeks and obtains authorization from the appropriate court of appeals to press the new claim in a successive petition. 28 U.S.C. § 2244(b)(2) (emphasis added), (b)(3)(A). A circuit court may grant such authorization only if the movant makes a prima facie demonstration of reliance (1) on a new and retroactive rule of constitutional law; or (2) that the factual basis of the new claim could not have been discovered earlier with due diligence and that the new facts underlying the claim show a high probability of actual innocence. § 2244(b)(2)(A), (B); *see Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). Moreover, the mandatory gatekeeping requirements in § 2244(b) are "jurisdictional in nature." *Blackman v. Davis*, 909 F.3d 772, 777 (5th Cir. 2018) (citing *Panetti v. Quarterman*, 551 U.S. 930, 942 (2007)), *cert. denied*, 139 S. Ct. 1215 (2019); *see Case v. Hatch*, 731 F.3d 1015, 1027 (10th Cir. 2013) ("Section 2244's gate-keeping requirements are jurisdictional in nature, and must be considered prior to the merits of a § 2254 petition.").

Here, Shockley's *Darden* claim was never raised to, or passed upon, by the district court. Hence, the district court's judgment denying Shockley's

habeas petition was final well before the Fifth Circuit considered his request for COA. In this circumstance, the new *Darden* claim, raised for the first time on appeal, was successive because the district court's "[f]inal judgment marks [the] terminal point" for purposes of § 2244(b)(2). *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *but see United States v. Santarelli*, 929 F.3d 95, 105 (3d Cir. 2019) (holding that subsequent habeas petition is not a "second or successive" petition when it is filed during the pendency of an appeal of the district court's denial of the petitioner's initial habeas petition). And necessarily so. "Treating motions filed during appeal as part of the original application . . . would drain most force from the time-and-number limits in § 2244 and § 2255." *Phillips*, 668 F.3d at 435. "Nothing in the language of § 2244 . . . suggests that the time-and-number limits are irrelevant as long as a prisoner keeps his initial request alive through motions, appeals, and petitions." *Id*.

In essence, Shockley asks the Court to hold that a circuit court must grant COA under *Slack* to review a procedural determination with reference to a successive constitutional claim. But before the Court could resolve that question, the Court would first need to resolve whether the *Darden* claim was successive. The Court should decline Shockley's implicit invitation to resolve complex, antecedent legal questions in the guise of correcting a supposed

procedural error by the district court. Indeed, this a poor vehicle to resolve such questions given that he never raised them below.

3. The Fifth Circuit will generally not consider an argument raised for the first time on appeal.

Finally, the Fifth Circuit could have denied COA because the *Darden* claim was first raised in Shockley's COA application. *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003) (finding that the court will generally not consider any issue raised for the first time in a COA); *Brewer v. Quarterman*, 475 F.3d 253, 255 (5th Cir. 2006) (denying COA request because claims were never raised in district court). Hence, to resolve Shockley's Question Presented the Court would first have to find that the Fifth Circuit had no authority to reject COA under *Henderson* and *Brewer*. The Court should deny certiorari.

II. Certiorari Should Be Denied Because Shockley Waived His Claim That the District Court Violated *Cone v. Bell* by Not Raising It Below.

This petition should also be rejected because Shockley seeks this Court's review to address a claim he did not raise in the circuit court below. That is, he argues for the first time in this petition that the district court's procedural bar violated *Cone v. Bell*. *Compare* Cert. Pet. at 2 *with* Exhibit I at 14–16. He therefore waived his *Cone* argument in this Court.

As this Court has explained, "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Sims v. Apfel*, 530 U.S. 103, 109

(2000) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). While the rule in this Court is "prudential only" in cases arising from federal courts, *Yee v. Escondido*, 503 U.S. 519, 533 (1992), "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed," *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

While Shockley argued in circuit court that his claim should not be procedurally barred, the legal basis for his argument in the lower court differed fundamentally from the basis for his argument presented in this Court. In the lower courts, he argued his claims in his direct appeal and state habeas proceedings are distinct and different claims, therefore the "same claim" bar did not apply. Resp't App. L at 14–16. But, as is a reoccurring theme in Shockley's litigation, his argument morphed into a materially different claim in this Court. Now, he plainly argues the "same claim" bar implemented by the district court conflicts with the Supreme Court's holding in *Cone*. *See Cone*, 556 U.S. at 466–67 (holding that a claim is not procedurally defaulted on the basis that it was been twice presented before the state courts). Shockley did not make a similar argument or any citation to *Cone* in his briefing in the courts below.

Still, the Director is cognizant that this Court in *Hormel* stated that a "rigid and undeviating" application of waiver may be inappropriate where, *inter alia*, doing so would not "promote the ends of justice." 312 U.S. at 557.

But, as will be established in Part III, *infra*, Shockley fails his burden to show that his underlying due process claim has any substance. The ends of justice do not require the Court to encourage more frivolous litigation consisting of constantly mutating allegations, when his claim is plainly meritless and the evidence supports the jury's decision that Shockley is guilty of continuously sexually assaulting a little girl that was entrusted to his care.

In sum, since Shockley waived his *Cone* argument by presenting it for the first time in his petition for certiorari, Shockley's petition should be denied.[4]

III. In the Alternative, Even If Shockley Raised *Darden* error in the District Court, He Fails to Establish that the Fifth Circuit Erred When It Denied COA Regarding His Procedural Challenge Because He Failed To Establish that the Prosecutor's Comment "Infect[ed] the Trial With Unfairness."

Even if Shockley had raised a *Darden* claim in the district court, he fails to show that the Fifth Circuit erred in denying COA to review his procedural challenge under *Slack*. Specifically, Shockley fails to show a valid claim of the denial of a constitutional right because he cannot show that the prosecutor's

[4] Even if Shockley's failure to properly frame this claim below is not jurisdictional, such a failing does inform the Court's decision to grant certiorari. *See City of Canton v. Harris*, 489 U.S. 378, 383–84 (1989) ("[T]he decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition."). The State does not waive this defect, rather, the State cites the defect and urges this Court to deny review for this reason. *See id.* at 384 ("Nonjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived.")

statement was both improper and infected his trial to such a degree that it amounted to a denial of due process.

The appropriate standard of review for a claim of prosecutorial misconduct on a writ of habeas corpus is "'the narrow one of due process, and not the broad exercise of supervisory power.'" *Darden*, 477 U.S.at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Accordingly, this Court has instructed federal courts reviewing habeas claims brought by state prisoners and premised upon prosecutorial misconduct in summation to distinguish between "ordinary trial error of a prosecutor and that sort of egregious misconduct ... amount[ing] to a denial of constitutional due process." *Donnelly,* 416 U.S. at 647–48 (citations omitted). *Darden*'s demanding standard requires that a prosecutor's improper closing statement "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181.

In reviewing the threshold question of whether a prosecutor's argument was improper, one must review the proper scope of jury argument. In Texas, the proper scope of proper jury argument extends to four areas: (1) summation of the evidence presented at trial; (2) reasonable deductions and inferences from the evidence; (3) responses to opposing counsel's argument; and (4) appropriate pleas for law enforcement. *Alejandro v. State*, 493 S.W.2d 230, 231–32 (Tex. Crim. App. 1973). And, certainly, a prosecutor may not

permissibly argue that a defendant should be found guilty based on extraneous offenses. *See, e.g., Melton v. State*, 713 S.W.2d 107, 114 (Tex. Crim. App. 1986) (impermissible to argue that a defendant in a theft case should be found guilty because of hundreds of other similar thefts in the region).

In this case, Shockley argued that the prosecutor's request for a guilty verdict at the end of his closing argument constituted *Darden* error. Resp't App. L at 7–14. But the prosecutor's closing request stayed within the realm of proper summation. The statement in question occurred at the end of the rebuttal portion of the prosecutor's closing argument when the prosecutor closed with the following request: "I ask you to find the defendant guilty because not only did he hurt Kristen so many years ago he's hurt a second child and justice demands that he be found guilty." Resp't App. A (4 RR 95). This statement consists of a summation of the evidence at trial and was a concluding response to defense counsel's argument that Kristen was "a troubled child, a drug user, a liar and thief" and therefore not "credible at all." *Id*. (4 RR 86). In addition, the prosecutor did not argue that Shockley should be found guilty based on the extraneous offense. On the contrary, the prosecutor argued that Shockley should be found guilty "because" of the instant offense, "*not only*" the extraneous offense. *Id*. (4 RR 95). Since the prosecutor's statement consisted of proper argument, Shockley's claim should fail before it even reaches the

question of whether the argument was so prejudicial that it deprived Shockley of his right to a fair trial.

But even if the prosecutor's statement was improper under Texas law, it still falls far short of a *Darden* error because it was not so egregious that it could have "infected the trial with unfairness." *Darden*, 477 U.S. at 181. In *Darden*, this Court reviewed a prosecutor's argument that "deserve[d] the condemnation it has received from every court to review it" and included several comments which were "offensive" and "undoubtedly improper." *Id*. at 179–81. But, despite the universal condemnation of the prosecutor's argument in *Darden*, this Court still did not find a due process violation because the argument "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent" and "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Id*. at 182.

Here, too, the prosecutor's statement did not misstate or manipulate the evidence and did not implicate any specific rights of the accused. The statement was isolated, not the "consistent and repeated misrepresentation" worthy of this Court's scrutiny. *See Donnelly,* 416 U.S. at 646. And moreover, the prosecutor's argument was invited by defense counsel's dual attacks on the credibility of both the extraneous offense victim, Kristin, and the victim in the

instant case. *See* Resp't App. A (4 RR 85–86);[5] *see Darden*, 477 U.S. at 182 (acknowledging "invited response" does not excuse improper comments, but factoring it into the overall analysis) (citing *United States v. Young*, 470 U.S. 1 (1985)). At bottom, like in *Darden*, the statement in question in this case did not render Shockley's trial unfair.

In addition, any error committed by the prosecution in this regard was mitigated by curative instructions. *See Darden*, 477 U.S. at 182 (considering curative instructions). The jury was instructed to consider extraneous offense evidence only if they believed it beyond a reasonable doubt and only for the limited purposes contained in Rule 404(b) of the Texas Rules of Evidence. Resp't App. N at 69–70; *see Resendiz v. State*, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003) ("We presume the jury follows the trial court's instructions.") (citing *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998)). Indeed, the prosecutor highlighted the limited nature of the extraneous offense evidence in his initial closing argument before the jury: "You also heard from an extraneous victim. There's some language in here that tells you you're just to

[5] Defense counsel plainly targeted the extraneous offense victim in his closing argument as follows: "And in the end we get Kristen Chandler on the stand who 17 years ago having never formally made any kind of accusation against Mr. Shockley comes forward and accuses him of doing similar acts to her 17 years ago with absolutely nothing to back it up. Except that she was a troubled child, a drug user, a liar and thief by her own admission. I don't find her testimony credible at all . . . There's nothing, nothing to corroborate her story or Elizabeth's story." *Id.*

consider her testimony for intent, opportunity. It's similar to what happened to Elizabeth. You can consider her testimony for that purpose." Resp't App. A (4 RR 70). If these instructions were insufficient, Shockley could have objected or requested additional instructions, but he did not do so.

Because the prosecutor's comment was not improper, not deceptive, did not implicate Shockley's rights, was in response to Shockley's attack on Kristin, and was bookended with curative instructions to the jury, the comment did not render Shockley's trial unfair. Because Shockley's *Darden* claim fails "to show a valid claim of the denial of a constitutional right," the circuit court properly rejected his motion for COA under *Slack*. 529 U.S. at 484.

IV. Shockley Does Not Present "Compelling Reasons" for Granting Certiorari.

Finally, Shockley's petition should be rejected because it fails to satisfy any of the "considerations governing review on certiorari." Sup. Ct. R. 10.

This Court's rules declare that "a petition for writ of certiorari will be granted only for compelling reasons." *Id*. But Shockley identifies no compelling reasons to grant certiorari. There is no circuit split involved in this case, the state courts did not decide any important federal questions, and the circuit court did not decide any important questions of federal law. *See id*. There are no issues of national importance, and no precedent has been set in this case as the district court's opinion was unpublished. At most, Shockley presents a case

of isolated procedural error correction, but such a case does not warrant a diversion of judicial resources which are already in short supply.

CONCLUSION

The circuit court correctly rejected Shockley's motion for COA pursuant to the well-established standards defined in *Slack*; Shockley waived his *Cone* argument by raising it for the first time in this petition;, and, this case implicates no "compelling reasons" to grant certiorari review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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