No. 21-8279

In the Supreme Court of the United States

RANDY GAY,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition for Writ of Certiorari To the Supreme Court of Arkansas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court may review a state court's procedural dismissal of a post-conviction claim previously raised on direct appeal.

2. Whether trial counsel rendered ineffective assistance of counsel by not querying prospective jurors on their likely reactions to specific hypothetical mitigators, when the record does not show whether counsel declined to ask the questions or the trial court prohibited counsel from asking them.

3. Whether trial counsel's failure to move to strike two generally sympathetic jurors because they said they did not view voluntary intoxication as mitigating was ineffective assistance of counsel, when they and their fellow jurors unanimously found the defendant was not intoxicated at the time of the crime.

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STATEMENT

On May 10, 2011, at 5:00 p.m., the Petitioner, Randy Gay, arrived in his pickup truck at a logging business in Garland County, Arkansas, where he was paid to watch the equipment overnight. Pet. App. G, 5. With him was Connie Snow. *Id.* At that time, Gay had already committed two murders—the second-degree murder of his then-father-in-law, Jim Kelly, in 1978, and the second-degree murder of his father, Glen Gay, in 1991. Pet. App. G, 6. Snow would be his third victim.

In the presence of several men who worked at the logging business, Gay ordered Snow out of his truck. Pet. App. G, 6. When she did not comply, he went back to the truck, took out a bolt-action shotgun, and pointed it at her, ordering her to exit the truck. *Id.* Snow stepped out and said, "What are you gonna do, shoot me?" *Id.* Gay did just that, shooting her in her face. *Id.* Snow died from the shot. *Id.* He then proceeded to ask the men at the logging business for help lowering the tailgate on his truck and for plastic to cover the body. *Id.* Out of fear for their own lives, they complied. *Id.* They then called the police. Four days later, Snow's body was found a mile from the shooting in a creek bed, partially eaten by animals. *Id.*

Gay was charged and convicted of capital murder. Pet. App. G, 6. Despite unanimously finding seven mitigating factors, Pet. App. G, 10, the jury unanimously concluded the aggravating circumstances in the case, particularly Gay's two prior murders, outweighed those mitigators and sentenced him to death in 2015. Pet. App. G, 6.

Gay appealed to the Arkansas Supreme Court. He did not challenge the sufficiency of the evidence against him. Pet. App. A, 4. As relevant here, he argued that

the trial court unconstitutionally limited voir dire by barring his counsel from asking how prospective jurors would react to specific mitigating circumstances. Though no such ruling was transcribed, he pointed to a colloquy between defense counsel and a prospective juror in which counsel said, "We're not allowed to give you examples and say if this is proven, would you do this." Pet. App. A, 6 (cross-talk omitted). This showed, he claimed, that the trial court prohibited counsel from querying jurors about hypothetical examples. The Arkansas Supreme Court did not decide whether Gay had a right to pose such questions, but instead held the record didn't support his claim and that, in any event, Gay had forfeited the claim by failing to contemporaneously object to any limitation on voir dire or proffer proposed hypothetical questions. *Id.* That court also rejected the balance of Gay's arguments for reversal and affirmed the conviction and sentence. Pet. App. A, 11.

Gay declined to petition for certiorari to review this decision. Instead, in 2017, he filed a petition for postconviction relief in state trial court. Pet. App. C, 1. His first claim renewed his argument on direct appeal that the trial court had improperly limited voir dire, abridging his right to a fair and impartial jury. Pet. App. C, 2. The balance of his petition made more traditional arguments for collateral relief, including an ineffective-assistance claim that alternatively alleged trial counsel was permitted but failed to ask mitigator-specific questions in voir dire. Pet. App. C, 3.

The trial court denied Gay's petition. It reasoned that Gay's impartial-jury claim was not cognizable in postconviction proceedings because the claim could have been

raised on direct appeal. Pet. App. D, 1. It held that Gay's counsel's voir dire questioning fell within the range of reasonable strategy, and that Gay had failed to show any prejudice from the seating of any juror. *Id.* On appeal, the Arkansas Supreme Court remanded for further findings on one ineffective-assistance claim, not at issue here, regarding counsel's investigation of the circumstances surrounding Gay's prior convictions. Pet. App. E, 2. The trial court made those findings and again denied relief. Pet. App. F, 8. Gay appealed to the Arkansas Supreme Court again.

On appeal, the Arkansas Supreme Court held that Gay's impartial-jury claim could not be raised in postconviction proceedings. It explained that under its well-settled rules on the scope of postconviction review, an issue that was or could have been raised on direct appeal cannot be raised in postconviction proceedings unless it presents a question of "fundamental" or "structural" error. Pet. App. G, 7. Gay's impartial-jury claim, it concluded was not "an issue involving fundamental error." *Id.* Indeed, it noted that the court had previously rejected the claim. Pet. App. G, 8.

Turning to Gay's alternative claim that trial counsel voluntarily declined to query prospective jurors on specific mitigators, and that counsel's failure to constituted ineffective assistance, the Arkansas Supreme Court held that defense counsel's strategy at voir dire was reasonable. Citing counsel's testimony in the postconviction hearing below, it noted that trial counsel "scoured the jury questionnaires" for jurors who "border[ed] on being excluded because they could not consider the death penalty," and attempted to seat as many of them as he could. Pet. App. G, 9. After identifying

those jurors based on their questionnaire responses, Gay's counsel's voir dire questioning was designed to avoid strikes from the prosecution; in fact, he tried to get the jurors he wanted "to say that they could consider the death penalty." *Id.* Though the court allowed different counsel might have chosen a different tactic, it held Gay's counsel's approach fell well "within the realm of counsel's professional judgment," *id.*, and was "a matter of trial strategy," Pet. App. G, 10. Rejecting Gay's other claims, it affirmed the denial of postconviction relief. Pet. App. G, 17. It denied Gay's petition for rehearing and petition to stay the mandate. Pet. App. J, K.

REASONS FOR DENYING THE PETITION

I. The first question presented does not merit review.

Gay's first question presented is really two: whether "a capital defendant's . . . Fourteenth Amendment[] right[] to a fair and impartial jury . . . [is] violated by the preclusion of . . . case-specific mitigation questions during *voir dire*," and whether "a capital defendant's Sixth . . . Amendment[] right[] . . . to the effective assistance of counsel [is] violated by . . . trial counsel's failure to ask, case-specific mitigation questions during *voir dire*." Pet. i. The second of those questions is not presented by the facts of this case. The first is not even within this Court's jurisdiction. The Arkansas Supreme Court did not reach the merits, in the decision below, of Gay's impartial-jury claim, but instead held that such claims are noncognizable in state postconviction review. That holding is an independent and adequate state-law ground for the judgment below that bars this Court's review.

A. This Court cannot entertain Gay's impartial-jury question.

Gay presented the impartial-jury claim he raises now on direct appeal. Pet. App. A., 6-7. When the Arkansas Supreme Court rejected that claim, *id.*, he declined to seek this Court's review. Instead, he raised the claim again, alongside new ineffective-assistance claims, in state postconviction proceedings. Pet. App C., 1-2.

The state trial court rejected that claim on procedural grounds. That court explained that, unlike his ineffective-assistance claims, it "could have been reviewed on direct appeal," and was therefore procedurally barred in postconviction proceedings. Pet. App. D, 1. On appeal, the Arkansas Supreme Court agreed. Pet. App. G, 7. It explained that under its settled rules governing postconviction proceedings, an issue that "could have been . . . argued on appeal" may not be raised in postconviction unless it's an error "so fundamental as to render the judgment of conviction void and subject to collateral attack." *Id.* (quoting *Reams v. State*, 560 S.W.3d 441, 452 (Ark. 2018)). Gay's impartial-jury claim, it held, was not "an issue involving fundamental error," *id.*, and thus could not be raised postconviction.

That procedural ground for decision deprives this Court of jurisdiction over Gay's impartial-jury claim. "This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). This Court has held that a rule much like the one applied below—namely, a rule that "a defendant procedurally defaults a claim raised for the first time on state collateral review if he could have raised it earlier on direct

appeal"—is an independent and adequate state-law ground for decision. *Johnson v. Lee*, 578 U.S. 605, 606 (2016) (per curiam). And it has indicated that procedural bars against litigating "claims which were or could have been raised . . . on direct appeal" in postconviction proceedings—precisely the rule applied below—are "well-established and ubiquitous" and constitute independent and adequate state-law grounds. *Id.* at 609.

It makes no difference that Arkansas excepts fundamental errors from that rule. That exception does not ask whether an error actually occurred, but whether the "alleged . . . violation," *Reams*, 560 S.W.3d at 452, ultimately meritorious or not, states a "claim [that] is structural in nature," *id.* at 454. So the application of that exception below did not make the Arkansas Supreme Court's decision turn on the merits of Gay's claim. Rather, that court merely held that whether or not the trial court impermissibly limited voir dire, Gay's claim that it did so did not fall within the narrow category of structural errors.[1] Having declined to seek this Court's review of his impartial-jury claim on direct review and instead re-raised it in a collateral proceeding where it was procedurally barred under state law, Gay cannot obtain this Court's review now.[2]

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[1] There may arguably be jurisdiction in this Court over the limited question of whether Gay's impartial-jury claim *is structural*, inasmuch as the Arkansas Supreme Court's test for what is structural draws on federal precedents. But Gay has not presented that question.

[2] Further, there is no split on a right to ask mitigator-specific questions. At most, Gay shows that one court has held there is a constitutional right to ask whether jurors would automatically sentence to death if they found a particular aggravator. Pet. 8 (citing *People v. Cash*, 50 P.3d 332 (Cal. 2002)). And this Court recently denied a cert petition claiming, like this one, that the Arkansas Supreme Court's view of the alleged right to ask case-specific questions in voir dire diverges from that of other courts. *Reid v. Arkansas*, 141 S. Ct. 551 (2020).

B. The ineffective-assistance claim raised in Gay's first question presented does not merit review.

In addition to asking this Court to grant review on whether the trial court impermissibly barred his counsel from asking mitigator-specific questions in voir dire, Gay alternatively asks this Court to grant review on whether his counsel rendered ineffective assistance by failing to ask mitigator-specific questions in voir dire. Gay acknowledges that "the record does not make clear" whether the trial court prohibited counsel from asking those questions, or "whether trial counsel simply failed to ask" them. Pet. 11. That concession makes clear that Gay's ineffective-assistance claim, which rests on an admittedly unproven and unprovable hypothesis, does not merit further review.

To begin with, Gay's ineffective-assistance claim does not merit review because it is impossible for Gay to prevail on it. The premise of the claim is that Gay's counsel failed of his own accord to ask mitigator-specific questions in voir dire. But as Gay admits, the record is unclear on whether that's the case, Pet. 11, and there is some suggestion in the record that in fact the trial court precluded those questions, as Gay's impartial-jury claim alternatively assumes. *See* Pet. App. A, 6 (quoting trial counsel's remark to venire member that "We're not allowed to give you examples" of mitigation scenarios). Gay cannot receive relief on his ineffective-assistance claim if he can't even prove that the omission of counsel he says constitutes deficient performance actually happened.

Gay's only response to this obvious defect is to suggest this Court could hold that *either* the trial court erred, *or* his counsel performed deficiently. Pet. 7 ("If the trial

court precluded such questions, it denied Gay a fair and impartial jury. If trial counsel failed to ask the questions, Gay was denied the effective assistance of counsel."). The problem with that solution is that this Court lacks jurisdiction to render the first alternative holding, because the Arkansas Supreme Court rejected Gay's claim that the trial court erred on adequate and independent state-law grounds. Since the second alternative holding, absent the first, assumes a premise that Gay admits may well not be true, this Court could not render it either.

But even if Gay could show that the absence of mitigator-specific questions was his counsel's choice, Gay's ineffective-assistance claim would not merit review. Gay asserts that the Fourteenth Amendment entitles capital defendants to ask prospective jurors how they would react to specific mitigators, Pet. 9, and suggests there is a split of authority on that question, Pet. 8.[3] He then assumes that so long as there is a constitutional right to ask mitigator-specific questions, it is ineffective assistance to fail to ask, and that any split on the right to ask implicates the ineffective-assistance question as well. Pet. 10-11. But that does not follow. For example, defendants have a constitutional right to confront and cross-examine the witnesses against them. Yet that does not mean it is ineffective assistance of counsel to decline to cross-examine a witness, no matter how immaterial his testimony or hopeless the task.

If anything just the opposite follows. Procedural rights, like the right to ask mitigator-specific questions that Gay claims exists, afford defendants and their counsel a *range* of trial strategies and tactics. They do not mandate, as a condition of effective

[3] In fact, there is no split on a right to ask mitigator-specific questions. *See* n.2, *supra*.

assistance, that counsel pursue any one of those strategies. The choice of strategy, within the wide range of reasonableness, rests with counsel, and there is nothing unreasonable about declining to ask a question that many courts, on Gay's telling, Pet. 8, say trial courts are not even required to permit—especially where declining to ask that question, as Gay's counsel explained, avoided exposing friendly jurors to strikes. Gay's ineffective-assistance claim does not merit further review.

II. Gay's second question presented does not merit review.

Gay's second question presented raises a different ineffective-assistance claim. Under that question, he claims he was deprived of the effective assistance of counsel when his counsel declined to challenge the seating of two jurors who said, in response to questions from the prosecution, that they did not view voluntary intoxication as mitigating. This factbound claim is meritless and does not merit further review.

Gay does not claim there is any split of authority among lower courts—or conflict between the decision below and a decision of this Court—on whether it is ineffective assistance of counsel to decline to strike jurors who say they do not view a particular mitigator as mitigating. He simply claims that on the particular facts of this case, he was denied effective assistance of counsel. Pet. 11-12. Such factbound questions rarely merit this Court's review, even in capital cases, and on the merits, the facts of the case entirely belie Gay's claim of ineffective assistance.

Gay claims he was denied effective assistance of counsel when his counsel declined to move to strike two jurors who said they did not view voluntary intoxication as mitigating. For that to be true, he would have to show a reasonable probability of a different outcome at sentencing had they not been seated. But there is not even a

possibility, however remote, of a different outcome here, because the jury unanimously found Gay was not intoxicated at the time of the murder. TR 622, 625. Jurors' views on a mitigator that none found logically could not bear on Gay's sentence. Moreover, defense counsel had good reason for declining to strike the two jurors. Both indicated hesitancy about imposing the death penalty, with one even describing himself as "moderately opposed" to it. TR 3613-14. The Arkansas Supreme Court correctly concluded that defense counsel's strategy in voir dire was reasonable. Pet. App. G, 9-10. Further review of this frivolous claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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