No. 18A775

In the Supreme Court of the United States
October Term, 2018

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

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

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

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Execution scheduled for January 30, 2019, at 6 p.m. CDT

QUESTION PRESENTED

Does a court contravene *Johnson v. Williams*, 569 U.S. 289 (2013), evade application of *Trevino v. Thaler*, 569 U.S. 413 (2013), and depart from the accepted and usual course of judicial proceedings, when it holds in one opinion that an ineffective-assistance claim was unexhausted and procedurally defaulted, then holds in a second opinion in the same case that the same claim was decided on the merits, and the only reason for revisiting the claim was this Court's recognition of a narrow path to overcome the procedural default after final judgment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Mitchell Jennings respectfully prays that a writ of certiorari issue to review the January 28, 2019, judgment of the United States Court of Appeals for the Fifth Circuit affirming the denial of Mr. Jennings's Rule 60(b) motion for relief from judgment.

OPINION BELOW

On January 22, 2019, the United States District Court for the Southern District of Texas (Hughes, J.), issued an order denying Mr. Jennings's motion for relief from judgment on timeliness grounds, and granted a certificate of appealability on the procedural question and claim. App. 11-13.[1] On January 28, 2019, the United States Court of Appeals for the Fifth Circuit affirmed the district court's order. App. 1-10.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 28, 2019. This petition is timely filed.

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[1] Citations to App. ___ refer to the appendix submitted with this petition.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(b) provides:

> (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—
>
> (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.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(d) provides:

> (d)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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in 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; or
>
> (2) 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.

STATEMENT OF THE CASE

But for an improbable succession of bad lawyering, Petitioner Robert Jennings's death sentence would have been vacated years ago based on this Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532 U.S. 782, 788 (2001) ("*Penry II*"), like the death sentences of at least 25 other death row inmates in Texas.[2]

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[2] This Court granted *Penry II* relief in the following cases: *Penry v. Johnson*, 532 U.S. 782 (2001); *Smith v. Texas* (*Smith I*), 543 U.S. 37 (2004); *Smith v. Texas* (*Smith II*), 550 U.S. 297 (2007).

The federal courts granted *Penry II* relief in the following cases: *Aldridge v. Thaler,* 2010 WL 1050335 (S.D. Tex. Mar. 17, 2010)(unpublished); *Bigby v. Dretke*, 402 F.3d 551 (5th Cir. March 8, 2005); *Blue v. Cockrell*, 298 F.3d 318 (5th Cir. July 16, 2002); *Chambers v. Quarterman*, No. 03-11248, 2007 WL 4553657 (5th Cir. Dec. 27, 2007) (unpublished); *Garcia v. Quarterman*, 2007 WL 3005213 (5th Cir. Oct. 15, 2007) (unpublished); *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*); *Goynes v. Dretke*, No. 4:02-cv-02665 (S.D. Tex. Nov. 30,2004); *Jones v. Thaler*, 2011 WL 1044469 (S.D. Tex. Mar. 3, 2011) (unpublished); *Williams v. Davis*, 192 F.Supp.3d 732, 768-70 (S.D. Tex. 2016); *Rodriguez v. Quarterman*, No. CIV. SA-05-CA-659-RF, 2006 WL 1900630, at *1 (W.D. Tex. July 11, 2006).

The Texas Criminal Court of Appeals granted *Penry* II relief in the following decisions: *Ex parte Alexander*, No. AP-76,818,

Mr. Jennings was tried while this Court was deciding *Penry I*. This Court granted *certiorari* to hear the challenge to Texas's capital sentencing scheme the previous year, at the end of its 1987 Term,[3] three weeks before Mr. Jennings's offense. The decision

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2012 WL 2133738, at *1 (Tex. Crim. App. June 13, 2012) (unpublished); *Ex parte Briseno*, No. AP-76,132, 2010 WL 2332150, at *1 (Tex. Crim. App. June 9, 2010) (unpublished); *Ex parte Buntion,* No. AP-76,236, 2009 WL 3154909, at *1 (Tex. Crim. App. Sept. 30, 2009) (unpublished); *Ex parte Davis*, No. AP-76,263, 2009 WL 3839065, at *1 (Tex. Crim. App. Nov. 18, 2009); *Ex parte Hood*, 304 S.W.3d 397 (Tex. Crim. App. 2010) (on reconsideration); *Ex Parte Garcia*, No. WR-78,112-01, 2013 WL 2446468, at *1 (Tex. Crim. App. June 5, 2013) (unpublished); *Ex Parte Greer*, No. AP-76,592, 2011 WL 2581922, at *1 (Tex. Crim. App. June 29, 2011) (unpublished); *Ex parte Lewis*, No. AP-76,334, 2010 WL 1696797, at *1 (Tex. Crim. App. Apr. 28, 2010) (unpublished); *Ex Parte Lim,* No. AP-76,593, 2011 WL 2581924, at *1 (Tex. Crim. App. June 29, 2011) (unpublished); *Ex parte Martinez,* 233 S.W.3d 319 (Tex. Crim. App. 2007); *Ex Parte Mason,* No. AP-76,997, 2013 WL 1149829, at *1 (Tex. Crim. App. Mar. 20, 2013) (unpublished); *Ex parte Moreno,* 245 S.W.3d 419 (Tex. Crim. App. 2008); *Ex Parte Rachal,* No. AP-76,720, 2012 WL 333860, at *1 (Tex. Crim. App. Feb. 1, 2012) (unpublished); *Ex parte Robertson,* No. AP-74,720, 2008 WL 748373, at *1 (Tex. Crim. App. Mar. 12, 2008) (unpublished); *Ex parte Smith,* 390 S.W.3d 53 (Tex. Crim. App. 2010); *Ex parte Wheatfall*, 2015 WL 513388 (Tex. Crim. App. Feb. 4, 2015) (unpublished).

[3] *Penry v. Lynaugh*, 487 U.S. 1283 (June 30, 1988) (mem.).

was front-page news throughout Texas.[4] This Court did not issue its opinion until the end of its 1988 Term, on the eve of Mr. Jennings's trial.

But Mr. Jennings's trial counsel were unaware of *Penry I* until the middle of the punishment phase when the District Attorney told counsel about it. SHCR 441[5] (Suppl. Aff. of Trial Counsel Connie Williams). At the same time the District Attorney handed defense counsel a copy of the *Penry I* opinion, he handed him a proposed jury instruction. *Id.* That instruction—which this Court later referred to as a "nullification instruction," *Penry II*, 532 U.S. at 798—told the jurors that if they had identified a mitigating circumstance that warranted a sentence less than death, they had to give a false negative answer to one of the special issues that must be answered in the affirmative for a death sentence to be imposed.

In complete ignorance of the law, Mr. Jennings's trial counsel proposed the District Attorney's nullification instruction as though it were Mr. Jennings's own. SHCR 441. Even when the District Attorney made a closing argument nearly identical to the one this

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[4] *See* Br. for Appellant at 4-5, *Jennings v. Davis*, No. 19-70005 (5th Cir.) (collecting news articles).

[5] "SHCR" refers to the state habeas clerk's record, as transmitted to the Court of Criminal Appeals.

Court condemned in *Penry I*, Petitioner's trial counsel made no objection. Petitioner's trial counsel also represented him on appeal, and did not assert this *Penry* error.

Also at the punishment phase, the defense rested without presenting a shred of evidence about Mr. Jennings background, his qualities, or any other factor bearing on his culpability. In the time before the punishment stage of Mr. Jennings's trial, his trial counsel admitted he did not "fully appreciate the concept of 'mitigation evidence.'" SHCR 40. The defense made almost no attempt to investigate any circumstances that might persuade a juror to deem Mr. Jennings worthy of a sentence less than death. *Id.*

Trial counsel spoke with Mr. Jennings, his mother, and a Harris County jail chaplain whom Mr. Jennings had met with infrequently while detained before trial. SHCR 41. Though trial counsel had hoped to present Mr. Jennings's testimony subject to an order prohibiting cross-examination about the facts of the case, 39 RR 196-200,[6] the prosecution opposed the order, and the court refused to enter it. Mr. Jennings was to be the defense's source of evidence that he was neglected by his mother who was addicted to drugs. 39 RR 197. The jury heard only from the jail chaplain, who testified

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[6] "__ RR __" refers to the "reporter's record"—the transcript of proceedings at trial.

that he had met Mr. Jennings in jail, saw him a few times a week, and believed that he was not "incorrigible." 39 RR 187-89. The chaplain's evidence had only the "most tenuous" connection to mitigation, and merely had an "ameliorating effect" with respect to the second special issue, future dangerousness. *Ex parte Jennings*, No. AP-75-806 & AP-75,807, 2008 WL 5049911, at *8 (Tex. Crim. App. 2008) (finding no *Penry* error).

In Petitioner's application for state habeas relief, filed in 1996, Petitioner's new lawyer asserted that trial counsel was ineffective based on three unreasonable omissions, and one unreasonable act. None of those challenged omissions or actions was the uninformed decision to launder the District Attorney's newly minted nullification instruction.[7]

After the state trial court recommended that the Court of Criminal Appeals deny relief, and the appellate court ordered additional

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[7] The four deficiencies were:
1. failure to discover and present mitigating evidence of Mr. Jennings's mental impairment;
2. failure to present evidence of applicant's disadvantaged background;
3. failure to move to reopen the voir dire examination or to move for a mistrial when *Penry v. Lynaugh* was decided after completion of the voir dire examination but before commencement of the testimony;
4. arguing during summation that he (defense counsel) could not quarrel with the death sentence.

briefing, Petitioner's counsel asserted for the first time—in a footnote—that trial counsel was ineffective for failing to "introduce[] mitigating evidence of his mental impairment and disadvantaged background" *and* failing to "object[] to the nullification instruction" which would have led to a different outcome on review of the *Penry* error. Petitioner's state habeas application also raised a freestanding claim of *Penry* error.

When the Texas Court of Criminal Appeals decided the ineffective-assistance claim Mr. Jennings raised in his state habeas application, it said the following regarding its prejudice analysis:

> The question boils down, therefore, to whether there is a reasonable probability that the applicant's jury would have answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that the applicant would have received a life sentence instead of the death penalty.

Ex parte Jennings, 2008 WL 5049911 at *6 (Tex. Crim. App. Nov. 26, 2008). That is, when deciding Mr. Jennings's ineffective-assistance claim, the state court did not consider how the additional evidence he presented in post-conviction proceedings would have affected the court's assessment of the *Penry* error. Its prejudice analysis assumed there was no instructional error.

When deciding whether there was Eighth Amendment error from the nullification instruction, the state court expressly refused to consider the mitigation evidence that Mr. Jennings's proffered

with his ineffective-assistance claim indicating it viewed the two claims as distinct:

> The applicant's Penry claim is limited to the evidence actually adduced at his trial, and does not include the jury's ability to render a reasoned moral response to mitigating evidence he now claims *should* have been adduced.

Id. at *8 (emphasis in original).[8] The state court also cited state law limiting *Penry* claims to the evidence presented at trial. *Id.* at *8 n.27 (citing *Ex parte Kunkle*, 852 S.W.2d 499, 504 (Tex. Crim. App. 1993) ("[W]e shall not consider mitigating evidence not presented or proffered at trial in determining the merits of' a *Penry* claim.")).

Mr. Jennings was represented in federal habeas proceedings by the same lawyer who represented him in state habeas. In his federal habeas petition, Mr. Jennings combined the two errors of counsel regarding the failure to investigate and present mitigation evidence and the introduction of the nullification instruction, as he had in the footnote of his brief:

> [h]ad counsel introduced mitigating evidence of petitioner's mental impairment and disadvantaged back-

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[8] Although the trial record contained evidence that Petitioner was remorseful and had been addicted to drugs at the time of the crime, state habeas counsel did not bring that evidence to the court's attention, and the court did not identify it on its own.

> ground and thereafter objected to the nullification instruction, an appellate court would have reversed the death sentence.

Petition, Dist. Ct. ECF No. 1, at 33-34 (citing *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); and *Smith v. Texas*, 550 U.S. 297 (2007)).[9]

"The district court did not consider Jennings' *Penry*-based prejudice argument because it found that Jennings failed to exhaust this claim in his state habeas proceeding." *Jennings v. Stephens*, 537 F. App'x 326, 336-37 (5th Cir. Jul. 22, 2013). The district court found "Jennings raised a *Penry* claim in state court but limited it to the evidence he presented at trial." *Jennings v. Thaler*, No. 4:09-cv-219, 2012 WL 1440387, at *7 n.6 (S.D. Tex. Apr. 23, 2012). "That was insufficient to exhaust the [ineffectiveness] claim," *id.*, that "evidence of his low intelligence would have entitled him to state habeas relief after the Supreme Court decided *Penry [II]*." *Id.* at *7.

In 2013, the Fifth Circuit likewise found the ineffective-assistance "claim [was] unexhausted and procedurally defaulted":

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[9] On appeal to the Fifth Circuit, Petitioner's counsel dropped the deficient performance argument, and argued only the *Penry*-based theory of prejudice.

> Although Jennings established the factual basis to support his *Penry*-based prejudice argument, he did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument—he inserted it in a footnote at the end of his brief.
>
> * * *
>
> This argument only vaguely alerted the state habeas court to his *Penry*-based prejudice argument and focused instead on arguing that *Penry II* is not applicable. This passing reference to his *Penry*-based prejudice argument during his state habeas proceedings does not suffice to exhaust his claim. As a result, Jennings is barred from asserting this claim in his federal habeas petition.

Jennings, 537 F. App'x at 336-67. And based on those findings, the court held,

> Because this claim is unexhausted and procedurally defaulted, Jennings cannot now rely on it to establish prejudice resulting from the failure to present background and mental-health mitigating evidence during the penalty phase. See 28 U.S.C. § 2254(b)(1).

Id.

In 2019, relying on the district and circuit courts' findings of default, and this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), Mr. Jennings filed a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b). *See* Dist. Ct. ECF No. 52. The district court denied the motion on timeliness grounds alone but found Rule 60(b) motion proper because the claim was defaulted and colorable.

App. 12, 13. The district court granted a certificate of appealability on timeliness. App. 13.

The Court of Appeals eschewed the timeliness issue and affirmed on the ground that "the prerequisite for applying *Trevino*, which is 'a procedural default' that would otherwise 'bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial' does not exist in this case." App. 10. The court said it had only "discussed procedural default as an alternative ground, but our holding did not depend on that." App. 9.

The court recognized its "holding" that "[state and federal habeas counsel] 'did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument [on state habeas review]—he inserted it in a footnote at the end of his brief.'" App. 9. But the court stated, "[t]hat additional holding does present an issue of counsel ineffectiveness but only on a point that was an independent reason for denying relief." *Id*.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Contravenes *Johnson v. Williams* and Wreaks Havoc on the Exhaustion Doctrine and Rules for Review Under § 2254(d).

The court below treated an ineffective-assistance claim that had not been fairly presented to the state courts as having been adjudicated on the merits by those courts. That conclusion is in

direct contravention of this Court's decision in *Johnson v. Williams*, 568 U.S. 289, 301 (2013), which controls the determination of when a claim is "adjudicated on the merits." The opinion's elision of an unexhausted claim and a claim adjudicated on the merits wreaks havoc on the well-wrought rules developed to channel federal habeas review under § 2254.

A. Mr. Jennings's *Penry*-based ineffectiveness claim was unexhausted and procedurally defaulted.

The 2013 opinion held that Mr. Jennings had failed to present his claim when his state habeas counsel raised it for the first time—in a *footnote*—in a supplemental *brief* before the Texas Court of Criminal Appeals. In his *application* for state habeas relief, Mr. Jennings asserted a claim of ineffectiveness that did not include laundering the District Attorney's nullification instruction as an act of deficient performance, and that did not include as a theory of prejudice that a preserved objection, coupled with extra-record mitigation evidence would have led to a different outcome on review of the *Penry* issue. In the subsequent brief, after the trial court recommended that the application be denied, Mr. Jennings argued the just-mentioned theories. *See* Applicant's Brief at 31 n.25, *Ex parte Jennings*, Nos. AP-75,806 & AP-75,807 (Tex. Crim. App. Feb. 16, 2007).

In drafting Mr. Jennings's federal habeas petition, counsel aggregated his piecemeal improvements from the different state court proceedings and pled both the initial theory from the application, and the footnoted theory from the brief. *See* Petition at 33-34, ECF No. 1. The district court was not fooled by counsel's sleight of hand, and held the theory from the brief could not be considered on the merits because it was unexhausted and procedurally defaulted. In compliance with *Gonzalez v. Crosby*, 545 U.S. 524 (2005), it is that theory—and only that theory—that Mr. Jennings sought to raise through his Rule 60(b) motion. *See* Rule 60(b) Motion at 25-35, ECF No. 52.[10]

There were at least three independently sufficient reasons the district court was correct to hold the *Penry*-based ineffectiveness claim was not fairly presented to the state courts and so unexhausted and procedurally defaulted.

First, it was not presented in the state habeas application. As a matter of Texas law, an initial writ application must be filed in the convicting court for initial applications and "must be complete on its face." *Ex parte Medina*, 361 S.W.3d 633, 637 (Tex. Crim. App.

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[10] The claim that Mr. Jennings raised to the Court of Appeals in 2013 differed in one respect: it omitted a description of the deficient performance prong. *See* Brief for Appellee at 45-46, *Jennings v. Stephens*, 12-70008.

2011); Tex. Code Crim. Proc. art. 11.071, § 4(a) ("An application for a writ of habeas corpus must be filed in the convicting court . . . ."). The presentation of the claim in a footnote in a supplemental brief to the Court of Criminal Appeals was thus insufficient to raise it under state law. *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (raising issue for the first time in a petition to the state's highest court for allocatur was not "fair presentation" of claim where allocatur review under state law was discretionary and reserved for special circumstances).

Second, the presentation of the claim in a footnote on its own did not fairly present the claim. *E.g., Vasquez v. Jones*, 496 F.3d 564, 568 (6th Cir. 2007).

Third, the facts and law regarding the *Penry* error "fundamentally alter[ed]" the ineffective-assistance claim actually adjudicated by the state court such that it was "new" and unexhausted as pleaded in federal court. *See Vazquez v. Hillery*, 474 U.S. 254, 257-58 (1986); *Moore v. Quarterman*, 491 F.3d 213, 220 (5th Cir. 2007) (presentation of "material additional evidentiary support" not presented in state court fundamentally alters claim). The claim alleged a new deficiency—counsel's failure with respect to the nullification instruction—and alleged a different "*Penry*-based preju-

dice argument," 537 F. App'x at 336-37—founded on the near-certainty that the case would be reversed on appeal if a reasonable trial counsel had presented *any* mitigating evidence. Counsel correctly saw that the *Penry*-based prejudice argument substantially improved Mr. Jennings's claim, but realized it too late under Texas habeas pleading law and any notion of the state court having a fair opportunity to pass on the claim.

Finally, Mr. Jennings's claim was properly treated as procedurally defaulted because he had "failed to exhaust state remedies and the court to which [he] would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). Under Texas law, the new claim founded on the *Penry* deficiency and prejudice theory had to be brought in a habeas application that was complete on its face, and any successive petition with the complete claim was barred as an abuse of the writ. *See* Tex. Code Crim. Proc. art. 11.071, § 5.

B. The conclusion that the unexhausted claim was adjudicated conflicts with *Johnson v. Williams*.

Where a state court does not mention a federal claim, there is a rebuttable presumption that the claim was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d). *Johnson v. Wil-*

liams, 568 U.S. 289, 301 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.").

In *Williams*, this Court refused to assume that a state court had overlooked a federal claim merely because the state court didn't mention it in its opinion denying relief because there are several situations in which state courts notice a federal issue, but refuse to mention it. For example, "a state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim." 568 U.S. at 299.

In rejecting the State of California's argument for an irrebutable presumption, this Court described circumstances in which it would not be appropriate for the presumption to hold. At least two of those examples fit this case. First, "if … in at least some circumstances the state standard is less protective" of the petitioner's rights than the federal standard, the argument for a presumption "goes too far." *Id.* at 301. When the state court considered Mr. Jennings's ineffective-assistance claim, its prejudice analysis assumed no *Penry* error. *Ex parte Jennings*, Nos. AP-

75,806 & AP-75,807, 2008 WL 5049911 at *7 (Tex. Crim. App. Nov. 26, 2008) (emphasis in original). And when deciding whether the *Penry* error was harmless, refused to consider the "mitigating evidence [Jennings] now claims *should* have been adduced" at trial. *Id.* at *8.

The second example given in *Williams* was "if the state standard is quite different from the federal standard, and the defendant's papers made no effort to develop the basis for the federal claim." *Williams*, 568 U.S. at 301. Here, the two standards are different—the prejudice standard applied by the state court to the ineffectiveness claim assumed no *Penry* error, and the harmlessness analysis of the *Penry* claim considered no extra-record evidence. And, the federal court specifically found Mr. Jennings failed to develop the basis for the federal claim. *Jennings v. Thaler*, 2012 WL 1440387 at *7.

"In such circumstances, the presumption that the federal claim was adjudicated on the merits may be rebutted—either by the habeas petitioner (for the purpose of showing that the claim should be considered by the federal court de novo) or by the State (for the purpose of showing that the federal claim should be regarded as procedurally defaulted)." *Williams*, 568 U.S. at 301-302.

Finally, in *Williams*, this Court gave another example: "when a defendant does so little to raise his claim that he fails to 'fairly present' it in 'each appropriate state court,' *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), the *Richter* presumption is fully rebutted." 568 U.S. at 302 n.3. Here, the district court acting *sua sponte* reached the procedural default inquiry on Petitioner's claim not properly raised in state court. *Jennings*, 2012 WL 1440387 at *7. The Fifth Circuit agreed. *Jennings*, 537 F. App'x at 336-37.

The decisions of the district court and Fifth Circuit in 2012 and 2013, respectively, were correct, consisted with this Court's longstanding cases on exhaustion and procedural default, and with *Williams*.

When the Fifth Circuit revisited Mr. Jennings's ineffectiveness claim in 2019, it ran afoul of *Williams*. The court held that Mr. Jennings's ineffectiveness claim based on *Penry* was adjudicated on the merits and subject to review under § 2254(d). App. 8; App. 10. At the same time, the Fifth Circuit reiterated its prior "holding [that] [federal habeas counsel] 'did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument [on state habeas review]—he inserted it in a footnote at the end of his brief.'" App. 9.

Under the circumstances here, these statements cannot both be true under *Williams*: a claim cannot be both unexhausted and adjudicated on the merits. More specifically, when a state court was not fairly presented with a claim, the presentation of the claim was improper under state law, the state court did not mention it, and the state court's reasons for denying relief expressly excluded the theory articulated in the claim,[11] the claim cannot have been adjudicated on the merits. While it is possible in the abstract that a "state court [could] reject[] an argument on the merits even if a petitioner did not raise it—a court might sua sponte raise and reject a claim, for example," *Golb v. Attorney Gen. of the State of New York*, 870 F.3d 89, 97–98 (2d Cir. 2017), *cert. denied sub nom. Golb v. Schneiderman*, 138 S. Ct. 988 (2018), as a matter of Texas law, it would have been near-impossible, s*ee Medina*, 361 S.W.3d at 637; Tex. Code Crim. Proc. art. 11.071, § 4(a), and it simply did not happen here.

The distinction *Williams* draws between raised (and presumptively adjudicated) claims and unraised (and presumptively unadjudicated) claims marks an especially important fault-line in federal habeas corpus law. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170,

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[11] *See Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

186 n.10 (2011) (". . . we do not decide where to draw the line between new claims and claims adjudicated on the merits. . . "); *cf. Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J., statement respecting denial of certiorari) ("A claim without any evidence to support it might as well be no claim at all. In such circumstances, where state habeas counsel deficiently neglects to bring forward 'any admissible evidence' to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim."). If this Court were to draw that line in a place consistent with its precedent, the Fifth Circuit's decision to reject Mr. Jennings's Rule 60(b) motion was wrong, and his *Penry*-based ineffectiveness claim should be remanded to the district court.

C. The decision to treat the unexhausted claim as adjudicated offends other ground rules of federal habeas review.

The Fifth Circuit's unwarranted assumption that § 2254(d) applies to the unexhausted claim also turns *Cullen v. Pinholster*, 563 U.S. 170 (2011), on its head. *Pinholster* limits the body of evidence that a federal habeas court may consider in determining whether § 2254(d)(1) has been satisfied to the evidence presented to the state court record. *See* 563 U.S. at 181. Even though *Pinholster*

dictates that the § 2254(d)(1) analysis is entirely backward-looking, the opinion below suggests courts consider unexhausted evidence and legal theories as part of the § 2254(d) review. App. at 9.

The decision is also in substantial tension with this Court's decision in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). There, this Court stated that federal habeas courts conduct "a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Id.* at 1192. "[A] federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* By contrast, the court below would ignore the Court of Criminal Appeals's reasoned decision, which featured no discussion on the substance of the footnote, and substitute a hypothetical adjudication on the merits.[12]

The obverse problem with treating the claim as "adjudicated" is the decision's retraction of its procedural default holding. And here, too, the decision causes more intractable problems. By purporting to reach the merits of a claim it had found defaulted, the

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[12] The longstanding Fifth Circuit rule of *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002) (en banc), is inconsistent with *Wilson*. The Fifth Circuit recently granted review *en banc* and ordered the parties to address whether *Neal* survives *Wilson*. *Langley v. Prince*, 890 F.3d 504 (5th Cir. 2018), *vacated on reh'g*, argument heard *en banc* (5th Cir. Jan. 23, 2019).

opinion under-protects federalism interests expressed through the procedural default doctrine, which ordinarily imposes an absolute bar to review of defaulted claims unless certain exceptions are met. *Coleman*, 501 U.S. at 750. But it also has the effect of vastly over-protecting the same federalism interests in contravention of the rules set down by *Coleman*: Mr. Jennings alleged that he could overcome the procedural default with a showing of cause under *Martinez* and *Trevino*, but the decision to find the claim adjudicated on the merits circumvented those decisions' exception to *Coleman*.

These legion problems with the decision originate in the failure to treat the unexhausted claim as properly unadjudicated, as *Williams* would require. This Court should grant the writ of *certiorari*, reverse the Fifth Circuit's decision, and remand for further proceedings consistent with *Trevino*.

II. The Fifth Circuit's Decision Undermines the Legitimacy, Reliability, and Stability of Judicial Processes

The decision below depends on an extraordinary and erroneous juridical maneuver to sidestep consideration of Mr. Jennings's "potentially credible" issues in Rule 60(b) motion. App. 7. This was a mistake. Where a court makes a mistake—especially a serious

mistake in a case involving an irrevocable punishment— "the public legitimacy of our justice system" depends upon the availability of a method for "error correction." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018).

This Court has not infrequently had to correct the Fifth Circuit's outlier interpretations of federal habeas law. Last Term, in *Ayestas v. Davis*, a unanimous Court "conclude[d] that the Fifth Circuit's interpretation of [18 U.S.C.] § 3599(f)"—the provision for funding federal habeas counsel's investigation—"is not a permissible reading of the statute." 138 S. Ct. 1080, 1095 (2018). The Term before last, the Court rebuked the Fifth Circuit for not following the "established rule" of *Miller-El v. Cockrell*, 537 U.S. 322 (2003), in assessing certificates of appealability. *Buck v. Davis*, 137 S. Ct. 759, 774 (2017).[13] And this Court faulted the Fifth Circuit for burying the most compelling evidence in Mr. Buck's claim in its improper merits review—that his trial counsel's chosen expert had asked the jury to consider his race in assessing his "future dangerousness." *Buck*, 137 S. Ct. at 778 (noting that the Fifth Circuit

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[13] *Miller-El* fits the pattern, too: this Court had to hear the case twice because, on remand from this Court, a majority the Fifth Circuit panel adopted the dissenting opinion from this Court. Linda Greenhouse, *Supreme Court Rules for Texas on Death Row*, N.Y. Times, June 14, 2005, https://www.nytimes.com/2005/06/14/politics/supreme-court-rules-for-texan-on-death-row.html.

"failed even to mention the racial evidence in concluding that Buck's claim was 'at least unremarkable as far as [ineffective assistance] claims go.'").

Rosales-Mireles was itself a case firmly correcting the Fifth Circuit's erroneous test for unobjected-to error that "'seriously affects the fairness, integrity or public reputation of judicial proceedings." 138 S. Ct. at 1905 (quoting with alterations *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)). This Court found the "Fifth Circuit's articulation of [the test] out of step with the practice of other Circuits." *Id.* at 1906.

Mr. Jennings's case similarly presents a peculiar application of federal habeas law that demands close review and this Court's rare exercise of error-correcting powers.

The extremity of the Fifth Circuit's decision may be measured not only in the substance of the decision, discussed *supra* Part I, but in the procedural deviance from the norms of judicial precedent. The general rule for courts of appeals is once an issue is decided "that should be the end of the matter." *United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). Often termed "the law-of-the-case," this doctrine "expresses the practice of courts generally to refuse to reopen what has been decided." *Messenger v. Anderson,* 225 U.S. 436, 444 (1912)

(Holmes, J.); *accord Musacchio v. United States*, 136 S. Ct. 709, 716 (2016); *see generally* Bryan Garner et al., *The Law of Judicial Precedent* Part D (2016). The prudential doctrine serves the "finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (internal quotation marks and citation omitted). The Fifth Circuit's decision to revisit its procedural default holding unbidden, and without an excuse for doing so, departs from the sound practice of courts.

And it is not just the procedural irregularity that should cause this Court to examine the decision below carefully. What is more concerning is that the procedural irregularity—rightly or wrongly—gives the appearance that the court has bent over backwards to avoid application of a decision from this Court that afforded a procedural right to a death-sentenced petitioner.

In this regard, the case is similar to *Smith v. Texas* (*Smith II*), 550 U.S. 297 (2007). In LaRoyce Smith's case, this Court reviewed a decision of the Texas Court of Criminal Appeals on direct review of a death sentence, found *Penry* error, and remanded for further proceedings consistent with that conclusion. *Smith v. Texas* (*Smith I*), 543 U.S. 37 (2004). On remand, the Texas court found LaRoyce Smith had not preserved the *Penry* error in the first place. *See*

Smith II, 597 U.S. at 300 (noting that, on remand, the TCCA "held, for the first time, that Smith's pretrial objections did not preserve the claim of constitutional error he asserts."). This Court took up the case again and held, *inter alia*, the Texas court was wrong to have imposed the procedural bar on remand. *Id.* at 313 (holding application of procedural rule was "based on a misinterpretation of federal law"). The common theme in this case and *Smith* is a lower court revising its prior holding on the procedural posture of a claim after a decision of this Court breathed new life into the merits under the procedural posture it previously held.

What Petitioner has not yet received—and now can only receive by way of this Court's exceptional intervention—is the opportunity to have some review of his Rule 60(b) motion and his claim for relief. Petitioner stands apart from dozens of capital defendants in Texas whose death sentences were vacated due to *Penry* error. Mr. Jennings's trial counsel is responsible for this lamentable fact. Rule 60(b) is a concededly narrow path for any petitioner to get review of a defaulted claim after final judgment. *See Buck*, 137 S. Ct. at 777-78. But as yet, Petitioner has not received even been afforded the opportunity to present the merits of his Rule 60(b) motion.

The "public legitimacy" of criminal justice in Texas is what is at stake.

> Legitimacy may be measured by the quality of decision making or the quality of treatment of defendants. More specifically, procedures are legitimate when they are neutral, accurate, consistent, trustworthy, and fair—when they provide opportunities for error correction and for interested parties to be heard. Legal authorities are legitimate when they act impartially, honestly, transparently, respectfully, ethically, and equitably. The criminal justice system that optimally expresses these values is not only morally defensible but also quite probably stable and effective.

Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215–216 (2012), *cited in Rosales-Mireles*, 138 S. Ct. at 1908).

The Fifth Circuit's placement of Mr. Jennings's claim in the quantum state of being both unexhausted and adjudicated depending on whether it is viewed initially or through Rule 60(b) so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's extraordinary powers.

CONCLUSION

FOR THESE REASONS, this Court should grant the petition and reverse the decision of the court below.

Respectfully submitted.

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